THE

Calcutta Weekly Notes

REPORTS OF IMPORTANT DECISIONS

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON

Appeal from India.

VOL. XXVIII.

NOVEMBER TO OCTOBER.

1923-1924.

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AT THE

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CALCUTTA.

JUDGES OF THE HIGH COURT.

Chief Justice:

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Puisne Judges:

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TABLE OF CIVIL CASES.

(Vol. XXVIII.)

PRIVY COUNCIL.

FULL BENCH.

APPEAL FROM ORIGINAL CIVIL.

ORIGINAL CIVIL.

CIVIL APPELLATE JURISDICTION.

CIVIL REVISIONAL JURISDICTION.

REFERENCE UNDER INCOME TAX ACT

TESTAMENTARY AND INTESTATE.

CASES REFERRED TO.

S

INDEX OF CIVIL CASES.

Vol. XXVIII.

TABLE OF CRIMINAL CASES

(Vol XXVIII.)

FULL BENCH.

CRIMINAL APPELLATE

CRIMINAL REVISIONAL.

CRIMINAL REFERENCE.

CASES REFERRED TO.

INDEX OF CRIMINAL CASES.

Vol. XXVIII.

Page

CRIMINAL PROCEDURE CODE—contd.

————————, **secs. 54, 60 and 61—Magistrate giving bail and ordering person arrested by police under sec. 54 to appear in another Court after 10 days, legality and propriety of.** A commission agent in Calcutta of a limited company in Ahmedabad was charged in a Magistrate's Court in Ahmedabad with having committed the offence of criminal breach of trust in respect of sale proceeds of certain bales of goods, and was arrested in Calcutta on the 5th March 1924 by a C. I. D. Officer of Poona under the provisions of sec. 54, Criminal Procedure Code. On the 6th March the C. I. D. Inspector produced him before the Chief Presidency Magistrate, Calcutta, asking that he might be forwarded to the Magistrate in Ahmedabad. The Chief Presidency Magistrate granted the accused bail and directed him to appear in Ahmedabad Court on the 16th March: **Held**—That the Chief Presidency Magistrate was not right in acting as he did upon the mere statement of the investigating Police Officer but should have required him to produce a warrant from Ahmedabad, releasing the prisoner in the meantime on bail to appear when called on before himself. Though under sec. 54 of the Criminal Procedure Code a Police Officer may arrest without warrant in the case of a cognizable offence under sec. 60 he is bound without unnecessary delay to take or send the person arrested before the Magistrate and under sec. 61 this must be done within 24 hours. The precautions laid down in these sections seem to be designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however incomplete the information may be. DWARKADAS HARIDAS v. MR. AMBALAL GANPATRAM ... 850

————————, **secs. 61 and 167, procedure when investigation cannot be completed in twenty four hours.** The law laid down by secs. 61, 167, 169 and 190 (1) (b) of the Criminal Procedure Code is that at the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before a Magistrate allowed under secs. 61 and 167, an accused must either be released by the Police under sec. 169, security for his appearance if and when required being taken, or the Magistrate, empowered in that behalf, must either take cognizance if he has before him a Police report (which ordinarily would be a report in the form laid down in sec. 173) which he thinks made out a prima facie case or he must release him. BHOLANATH DAS v. EMPEROR ... 490

————————, **secs. 107 and 110, initiation of proceedings under, on insufficient materials, propriety of—High Court's interference in the preliminary stage, desirability of.** Where on a memorial by the tenants against the zamindar containing certain allegations which were not substantiated on enquiry, the District Magistrate drew up proceedings under secs. 107 and 110 (d) of the Code of Criminal Procedure against the zamindar: **Held**—That reading the memorial and the report of the enquiry together it was impossible to hold that they furnished any material sufficient to justify proceedings either under sec. 107 or under sec. 110, Cr. P. C. The proceedings themselves showed that it was on this report and petition and no other material that they were based. Although the High Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections of the Criminal Procedure Code, when the materials on which such orders are based are clearly insufficient to support those orders, the High Court should interfere and quash the orders and proceedings. NAFAR CHANDRA PAL CHOWDHURY v. THE KING-EMPEROR ... 23

————————, **sec. 144, Collector, if may pass order as District Magistrate forbidding interference with cutting of a bundh ordered by Civil Court to be maintained—Indian Penal Code (Act XLV of 1860), sec. 147, resistance to cutting of the bundh, if an offence under, when there is no order in express terms to cut the bundh—Civil Court injunction, how far may be interfered with by Magistrate.** A compromise decree provided inter alia that if the **bundhing** of the eastern bank of a certain river was not completed within a specified time, the permanent injunction, which the decree granted for the maintenance of the **bundh** on the western bank, would be cancelled and the Plaintiffs would raise no objection to the cutting of the western **bundh** and **bundhing** the eastern bank. After the expiry of the specified time one of the Defendants applied to the Collector for permission to remove the western **bundh** and the Collector, in his capacity as District Magistrate, issued an order under sec. 144, Cr. P. C., stating that the conditions had arisen which authorised the Defendants without opposition to cut the western **bundh** and forbidding the public to interfere when the western **bundh** was cut. At the cutting of the **bundh** a riot ensued and some of the villagers who tried to prevent the cutting of the **bundh** were convicted under sec. 147, I. P. C.: **Held**—That the order of the District Magistrate was not in terms an order directing the **bundh** to be cut. If it was in effect so, the District Magistrate had no right to usurp the functions of the Civil Court to construe the consent decree of the Civil Court and to say that the circumstances had arisen which justified the dissolving of the injunction of the Civil Court and the cutting of the western **bundh**. The Civil Court injunction was still subsisting and could only be dissolved by the Court which granted it. There being, however, no order in express terms to cut the **bundh**, no one was entitled to cut the **bundh** in view of the Civil Court's

THE

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LAW NOTES

AND

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The English Law Courts.

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INDEX OF NOTES—CIVIL CASES.

(Calcutta High Court and Privy Council.)

INDEX OF NOTES—CRIMINAL CASES.

TABLE OF CRIMINAL CASES—NOTES.

CRIMINAL REVISIONAL.

REPORTS.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD ATKINSON.
LORD SUMNER.
LORD PARMOOR.
LORD CARSON.
MR. AMEER ALI.
1922,
Heard, 31, October, 2 and 6, November.
Judgment, 20, December.

M. SUBRAMONIAN and anr., Appellants,
v.
M. L. R. M. LUTCHMAN and ors., Respondents.

Registration Act (XVI of 1908), secs. 17, 49 — Equitable mortgage—Deposit of title deeds, accompanied by delivery of signed memorandum, not registered—Memorandum, if admissible—Mortgage, if may be proved aliunde—*Evidence Act (I of 1872), sec. 91.*

When depositing title deeds of certain properties to secure an advance of money by way of equitable mortgage, the debtor signed and delivered to the creditor an unregistered memorandum which constituted the bargain between the parties and was not merely the record of an already completed transaction:

Held—*That the mortgage was void under secs. 17 and 49 of the Registration Act inasmuch as it was effected by an instrument in writing which was not registered, and oral evidence was not admissible to prove the mortgage otherwise than by the memorandum by reason of sec. 91 of the Evidence Act.*

This was an appeal from a judgment and two decrees of the Chief Court of Lower Burma, dated the 24th January 1916, reversing a decree of the said Court in its original jurisdiction, dated the 25th August 1914.

The Plaintiff who is represented in the appeal by the Appellants, his executors, filed the suit against the Respondents, to enforce a mortgage, dated the 26th August 1910.

The Respondents were the members of two firms of Chettys which had gone into dissolution, the Receiver appointed in the dissolution proceedings and Seedat, a creditor of the Chettys, who had deposited with them by way of mortgage his title deeds to certain properties.

On the 15th July 1908, Seedat's title deeds were deposited with the Plaintiff as security for a debt due to him by the Chettys accompanied by a memorandum which was not stamped nor registered. On the 5th April 1910, the Receiver was appointed in the dissolution suit of the Chetty firms and on the 26th August 1910, the latter obtained a legal mortgage from Seedat over, amongst other properties, the properties included in the original equitable mortgage.

The mortgage of the 26th August 1910 was deposited with the Plaintiff as security for the debt due to him by the Chettys and a memorandum signed by the Receiver accompanied such mortgage.

The suit was brought by the Plaintiff to enforce payment of the debt due to him by sale of the properties mortgaged on the 26th August 1910. The trial Judge (Young, J.), decreed the suit and ordered the sale of the mortgaged properties. Against this decree cross-appeals were preferred and the suit was dismissed.

From the resulting decrees the present appeal was brought.

Messrs. A. Powell, K. C., Kenelm Preedy and *B. Dubé* for the Appel-

lants.—The Plaintiff can in any event recover on the original sub-mortgage of the 15th July 1906 whether or not the 1900 mortgage is invalid.

Equity never allows a merger where the effect is to injure an innocent party.

The Plaintiff had all the time the right to call for a legal mortgage. *Carter* v. *Wake* (4).

It is settled law that the Court will not infer an intention in a mortgagee to abandon his old right; on the contrary the Court will infer an intention to retain that right if there is evidence to support such inference. *Locking* v. *Parker* (5), *Kehoe* v. *Hall* (6), *Arumugam Pillai* v. *Periasami* (7) and *Gopaldass* v. *Ranchud Sheochand* (8).

They also referred to Fisher on Mortgages, 6th Edn., secs. 1559, 1560.

The Receiver did, on the facts, give additional security by the deposit of 1910, and the evidence shows that he was authorised to do so apart from the order appointing him.

Messrs. Dunne, K. C. and *Kenworthy Brown* for the Respondent No. 10.—The cases cited on behalf of the Appellants are not applicable because in the present set of circumstances there was no privity between the original mortgagor and the sub-mortgagee.

As to registration, where you have an equitable mortgage and deposit accompanied by a document shewing the terms agreed upon, that is the only evidence of the transaction and must be registered.

Secs. 17 and 49, Indian Registration Act.

Sec. 91, Indian Evidence Act.

Sec. 59, Transfer of Property Act, 1882. *Dwarka Nath* v. *Sarat Kumari* (9) and *Kedarnath Dutt* v. *Shamlall Khettry* (1).

In the latter case the document was not executed until some time after the agreement.

[LORD SUMNER.—It is largely a question of evidence as to whether the document was part of the agreement or merely a record of an already completed transaction. The trial Court find the latter.]

The point is not touched on by the High Court and the Board must decide whether that finding is correct.

The decisions in *Dwarka Nath* v. *Sarat Kumari* (9) and *Kedarnath Dutt* v. *Shamlall Khettry* (1) have been followed in *Esthur Isac* v. *Martu Mall* (10) and *Bhoirab Chandra* v. *Anath Nath* (11).

In the present case the document was an essential part of the agreement and its registration was compulsory. Moreover the memorandum required to be stamped under the provisions of the Indian Stamp Act, II of 1899, amended by Act XV of 1904, sec. 8, Sch. I, No. 6.

An equitable mortgage is a disposition of property, per Lord Cairns in *Credland* v. *Potter* (12), and no evidence other than the document is admissible to determine the nature of the transaction. *Shaw* v. *Foster* (3).

Mr. Powell in reply.—The charge was created by the deposit and not by the document.

If the document creates the charge, it must be registered; but if the deposit creates the charge no question of registra-

(4) 4 Ch. Div. 606 (1877).
(5) 8 Ch. App. 30, 39 (1872).
(6) [1843] 5 Ir. Eq. 597
(7) I. L. R. 19 Mad. 260 (1896).
(8) L. R. 11 I. A. 126 (1884).

(1) 11 B. L. R. O. C. J. 405 (1873).
(3) L. R. 5 H. L. 321, 341 (1872).
(9) 7 B. L. R. O. C. J. 55 (1871).
(10) 25 C. L. J. 160 (1916).
(11) 31 C. L. J. 376 (1920).
(12) L. R. [1874] 10 Ch. 8.

tion arises and you can, if you like, throw over the document: This is really the ground of the decision in *Kedarnath Dutt* v. *Shamlall Khettry* (1).

Their LORDSHIPS' JUDGMENT was delivered by

LORD CARSON.—On the 15th July 1908, the firms of Chettys owed to the original Plaintiff, Mallady Sathalingum, whose executors the present Appellants are, a considerable sum of money, and as security for the same deposited with him by way of equitable mortgage title deeds relating to certain properties of the Defendant Seedat and which had been deposited with the said firm by the said Seedat. On the occasion of such deposit a memorandum was signed and delivered to the said Plaintiff in the following terms :—

"From M.L.R.M.A. Soliappa Chetty
and A L.A.S.R M. Chetty,
Rangoon.

"To Mallady Sathalingum,
Rangoon.

Dated Rangoon, the 15th July 1908.

"DEAR SIR,

"We hand you herewith title deeds relating to fifth class Lot. Nos. 78, 79 and 80, Block E, each measuring 25 by 50 with building thereon belonging to Saleman Ahmed Seedat, also his promissory note for rupees sixty-three thousand (Rs. 63,000) due us, this please hold as security against advances made to us; we also hand you second mortgage executed in our favour by C. Ranga Sawny Moodaliar on 1st class Lot No. 6 in Block Fl. On this we had advanced Rs. 32,000. Please also hold this as further security against advances made to us. We promise not to deal with same till your amount due you is fully paid and satisfied

"Witness:—

"(Signed) C. E. SOLOMAN

"Yours faithfully,

"(Signed) M.L.R.M.A. SOLIAPPA CHETTY.
"A.L.A.S.R.M. ALAGAPPA CHETTY."

(1) 11 B. L. R. (O. C. J.) 405 (1873).

This document was not registered, and the effect of such non-registration will have to be considered later. On the 17th December 1909, the said Plaintiff sent to the said firms of Chetty and the Respondent Seedat notices demanding repayment of the moneys due and interest. In the year 1910 a suit was brought for the dissolution of the said Chetty firms, and on the 5th April 1910, Ramanathan Chetty was appointed Receiver by an order of the Court in the suit in the following terms :—

"It is ordered that M. A. R. A. R. Ramanathan Chetty be and he is hereby appointed receiver on a monthly remuneration of Rs. 300 (three hundred only) to take charge of the property of the Chetty firms of M. L. R. M. A. and A. L. A. S. R. M. pending the decision of the suit for dissolution of partnership, with power to collect outstandings and do all things necessary for the realisation and preservation of the assets of the said firm."

The Receiver so appointed and the members of the Chetty firms being anxious to realise the debt due to them by Seedat, wrote to the Plaintiff for the promissory note and the title deeds deposited with the Plaintiff on the 15th July 1908, in order to enable them to carry on proceedings against Seedat, and the Plaintiff handed them over on condition that he received payment from the fruits of the decree. No suit, however, was brought, but Seedat gave the Chetty firms a legal mortgage, dated the 26th August 1910, over the properties included in the original equitable mortgage and also other properties which were not so included. The Plaintiff agreed to this compromise upon condition that the mortgage of the 26th August 1910 was deposited with the Plaintiff and also the title deeds relating to the properties included in it as collateral security for the monies owing by the Chetty firms to the Plaintiff. This deposit was carried

M. SUBRAMONIAN v. M. L. R. M. LUTCHMAN.

out, and on this occasion a memorandum setting forth such deposit was signed by the Receiver, and is dated the 4th September 1910. The present action was brought by the Plaintiff as equitable mortgagee to enforce payment of the debt due to him by sale of the properties mortgaged by the said mortgage of the 26th August 1910.

At the trial of the action before Mr. Justice Young, it was contended that the original sub-mortgage of 1908 was void inasmuch as it was effected by an instrument in writing which was admittedly not registered and that it was inadmissible in evidence on the same ground.

The learned Judge, however, held that it was admissible as being a record of an already completed transaction.

It was also contended that the old equitable mortgage had been surrendered and that the Plaintiff was suing on a new mortgage which was *ultra vires* the Receiver, who had not obtained the leave of the Court.

The learned Judge held, however, that so far as the new legal mortgage so deposited related to the property included in the former equitable mortgage "there was not an iota of difference between the return of the title deeds and the return of them accompanied by the deposit of the legal mortgage," and he accordingly gave a decree for the usual accounts and for sale in default of payment of the properties included in the original memorandum of deposit. There was an appeal by the Plaintiff to the Chief Court of Lower Burma from this judgment so far as it disallowed his claim to an equitable sub-mortgage on the new and additional properties included in the mortgage of the 26th August 1910; and there was also an appeal from this judgment by the first Defendant in so far as it allowed the claim of the Plaintiff to an equitable sub-mortgage of the properties originally pledged.

The Appellate Court on the 24th January 1916, set aside the decree of the original Court and dismissed the Plaintiffs' claim, holding that by the events which had happened the original mortgage by deposit was extinguished and no deposit of deeds by the Receiver of the Chetty firms was authorised by the order appointing him.

The Chief Judge, Sir Charles Fox, who gave the judgment of the Court, stated that it was unnecessary to deal with the vexed question as to whether the memorandum of the 15th July 1908, required registration. From this judgment and the decrees made under it the present appeal has been brought.

It was not seriously contended before their Lordships that the Receiver had any authority under the order of the 5th April 1910, to mortgage property of the firms, and on this point their Lordships are in agreement with the decree of the Appellate Court. The Plaintiffs' chief effort before this Board was directed to supporting the order of Mr. Justice Young, basing their claim upon the original sub-mortgage of the 15th July 1908. The Respondents' Counsel, on the other hand, raised the objections which had also been made at the trial of the action (1) that the original sub-mortgage was void inasmuch as it was effected by an instrument in writing which was admittedly not registered and relied upon secs. 17 and 49 of the Registration Act, 1908; and (2) that oral evidence was not admissible, as the memorandum of the 15th July 1908 constituted the contract between the parties (sec. 91, Law of Evidence, Act I of 1872). The Appellants, however, contended that though the terms of the deposit were embodied in a written document that document was a

M. SUBRAMONIAN v. M. L.R. M. LUTCHMAN.

mere memorandum of and did not constitute the contract and therefore did not require to be registered, and that on the same ground oral evidence was admissible to prove and explain the deposit.

As already stated, the trial Judge acceded to this argument.

This Board, however, cannot agree with the view taken by the trial Judge. The law upon the subject admits of no doubt. In the case of *Kedarnath Dutt* v. *Shamlall Khettry* (1), Couch, C. J., says :—

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within sec. 17 of the Registration Act."

This Board in *Pranjivandas Mehta* v. *Chan Ma Phee* (2), laid down the law as follows :—

"The law upon this subject is beyond any doubt: (1) Where titles are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of security.

"In the words of Lord Cairns in the leading case of *Shaw* v. *Foster* (3) 'although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed.'"

Applying the principles thus laid down to the present case, what this Board has to determine is, did the document of the 15th July 1908 constitute the bargain between the parties, or was it merely the record of an already completed transaction?

The only evidence upon this subject in their Lordships' opinion is conclusive that the memorandum of the 15th July 1908 constituted the bargain between the parties. The Plaintiffs' agent swore: "The arrangement to deposit their title deeds was made in the presence of the eldest son of E. Solomon," and when we turn to S. Solomon's evidence, he says, "The document was drafted and typed in my office after they had come to an agreement. The document was drawn up at the time they came together"; and upon cross-examination he says :—

"The agreement was signed and handed over in my presence. Unless the title deeds had been handed over he would not have accepted Ex. I (the memorandum of 15th July 1908). The transaction was completed in my office at the same time."

Turning to the document itself, one is led to the same conclusion. "We hand you *herewith* title deeds, etc. . . . This please hold as security, etc. . . . Please also *hold this* as further security." Their Lordships have no doubt therefore that the memorandum in question was the bargain between the parties, and that with-

(1) 20 B. L. R. (O. C. J.) 405 (1873).

(2) L. R. 43 I. A. 122: s. c. I. L. R. 43 Cal 895; 20 C. W. N. 925 (1916).

(3) L. R. 5 H. L. 321, 341 (1872).

out its production in evidence the Plaintiff could establish no claim, and as it was unregistered it ought to have been rejected.

It has already been stated that the Receiver was not under the order appointing him authorised to create any mortgages of the partnership property, and therefore the claim of the Plaintiff fails both in respect of the original equitable deposit and the subsequent deposit in August 1910.

For these reasons their Lordships will humbly advise His Majesty that the appeal of the Plaintiff should be dismissed with costs.

Solicitors: *Messrs. Stoneham & Sons* for the Appellants.

Solicitors: *Messrs. Sanderson, Lee, Eddis* and *Tennant* for the Respondent No. 10.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 1912 OF 1920.

PAGE, J. 1923, 16, July. } CHANDMULL KANGORIA *v.* DEBI CHAND and ors.

Costs—Presidency Small Cause Courts Act (XV of 1882), sec 22—Plaintiff suing for trespass in High Court claims as damages a sum beyond the jurisdiction of Presidency Small Cause Court, but obtains a decree for a sum within such jurisdiction, whether sec 22 applies.

Where the Plaintiff brought a suit in the High Court claiming Rs. 5,300 as damages for trespass to his land and obtained a decree for Rs. 10, and it was contended by the Defendant that the Court had no jurisdiction to award him any costs by reason of the provisions of sec. 22 of the Presidency Small Cause Courts Act, 1882:

Held—*That a suit is cognizable by the Presidency Small Cause Court, if, in respect both of its character and of the amount or value of its subject-matter, it is within its jurisdiction, and that, in the present suit, the damages being at large and the Plaintiff having claimed as damages a sum beyond the jurisdiction of the Presidency Small Cause Court, the provisions of sec. 22 of the Presidency Small Cause Courts Act did not apply and the Court was entitled to award the Plaintiff costs on Scale No. II.*

MADHO DAS *v.* RAMJI PATAK (2), LAKSHMAN *v.* BABAJI (4), MAHABIR SINGH *v.* BEHARI LAL (3), HAMIDUNESSA BIBI *v.* GOPAL CHANDRA MALAKAR (5) *and* RAJ KRISHNA DEY *v.* BEPIN BEHARI DEY (6) *and several other cases referred to.*

Semble:—*A Plaintiff is not at liberty to determine the tribunal by which his suit is to be tried by placing a fictitious value on his claim.*

The facts of the case will appear from the judgment.

Messrs. S. N. Banerjee and *S. Ghose* for the Appellant.

Messrs. N. N. Sircar and *S. M. Bose* for the Defendants.

The JUDGMENT OF THE COURT was as follows:—

PAGE, J.—This application involves the determination of an important question of practice.

It is an application by the Defendant, which, by consent of the parties, has been treated as an application under Or. 47 to review an order awarding the Plaintiff costs.

The Plaintiff brought a suit in the High Court claiming damages for trespass to his land by reason of the unauthorised deposit

(2) I. L. R. 16 All. 286 (1894).
(3) I. L. R. 13 All. 320 (1891).
(4) I. L. R. 8 Bom. 31 (1883).
(5) I. L. R. 24 Cal. 661: s. c., 1 C. W. N. 576 (1897).
(6) I. L. R. 40 Cal. 245: s. c. 17 C. W. N. 591 (1912).

CHANDMULL KANGORIA v. DEBI CHAND.

thereon of building material by the Defendant. The Plaintiff in his plaint claimed Rs. 5,300 as damages and obtained a decree for Rs. 10, and costs were awarded to him on the High Court Scale No. II.

The Defendant now applies for a review of the above order relating to costs on the ground that the suit was cognisable by the Court of Small Causes of Calcutta, and, inasmuch as the Plaintiff obtained a decree for damages for trespass of an amount less than Rs. 300, the Court had no jurisdiction to award him any costs by reason of the provisions of sec. 22 of the Presidency Small Cause Courts Act of 1882. The Plaintiff applied under this section for a certificate that the suit was one fit to be brought in the High Court, but this was refused.

I have, therefore, to decide whether the suit was cognisable by the Small Cause Court or not. A suit, in my opinion, is cognisable by the Small Cause Court if in respect both of its character and of the amount or value of its subject-matter it is within the jurisdiction of the Court. This suit in respect of the character of the relief claimed, was clearly one which the Small Cause Court was entitled to entertain. [See *Peary Mohun Ghosal* v. *Hurrish Chunder Gangooly* (1).]

Was it also within the ambit of the jurisdiction of the Small Cause Court by reason of the amount or value of its subject-matter? That depends upon whether the amount or value is that actually recoverable or ascertained at the trial, or that claimed by the Plaintiff and set out in the plaint.

The law and practice in British India, contained, partly in legislative enactments, and partly in a long and continuous stream of judicial decisions, are, in my opinion, in favour of the latter view.

(1) I. L. R. 11 Cal. 261 (1885).

Learned Counsel for the Defendant urged that if this view is to prevail, the effect will be that if the Plaintiff elects to value his claim at Rs. 1,200 the suit will come within sec. 22, while if he inflates his claim to Rs. 12,000 the section will not be applicable. In favour of his contention he has cited an unreported judgment of my brother Buckland, in suit No. 1657 of 1922. With great respect to the learned Judge I find myself unable to agree in the opinion which he expressed in that case as to the construction of sec. 22. If the test of the amount or value of the subject-matter of the suit be that for which the Defendant contends, one result would appear to be that in a suit, for example, in respect of negligence or of trespass, in which the damages are at large, and it is impossible *a priori* to estimate, even approximately, the amount of the damages which ultimately will be awarded, a Plaintiff, however *bonâ fide* may be his estimate of the damage he has suffered, would be unable to bring his suit in the High Court without running the risk of losing his costs even if he were to be successful. In my opinion, the object of the legislature was to prevent congestion in the High Court, and to provide, where the Plaintiff values his claim at a sum which brings his suit within the jurisdiction both of the High Court and of the Small Cause Court, and yet elects to institute proceedings in the High Court, that he should do so at his peril. It is not to be supposed that the legislature intended *ex post facto* to penalise a Plaintiff because he had failed to guess correctly which was the proper Court in which to launch his suit. If the construction urged upon me by the Defendant were the correct one, it would result in a mere gamble and add a new terror to litigation.

CHANDMULL KANGORIA *v.* DEBI CHAND.

Chief Justice Edge makes some pertinent observations on this subject in *Madho Das* v. *Ramji Patak* (2). There the learned Chief Justice says :—

"Now it has been held by this Court in *Mahabir Singh* v. *Behari Lal* (3) that "for the purpose of determining the proper Appellate Court in a civil suit, what is to be looked to is the value of the original suit, that is to say, 'the amount or value of the subject-matter of the suit'; such 'amount or value of the subject-matter of the suit' must be taken to be the value assigned by the Plaintiff in his plaint and not the value as found by the Court, unless it appears that, either purposely or through gross negligence, the true value of the suit has been altogether mis-represented in the plaint." As a matter of fact in this case the value assigned by the Plaintiff in his plaint was Rs. 1,500. That valuation made the suit one which was triable in the Court of the Subordinate Judge, and that valuation also made the appeal from the decree of the Subordinate Judge lie to the Court of the District Judge. The law contemplates that, in many cases, it may be impossible for a Plaintiff, at the inception of his suit to state correctly the value of the relief which he seeks, as for example, in cases to which sec. 11 of the Court Fees Act, 1870 (Act No. VII of 1870) applies. This was particularly a case in which, until all the evidence had been taken, it was impossible for the Plaintiff to put anything more than a hypothetical value on the relief claimed *qua* the balance in the hands of Babu Madho Das. In our opinion it would be impossible to hold that the jurisdiction of an Appellate Court should depend upon the amount of the decree of the Appellate Court. Take, for example, this case. The lower Appellate Court here being satisfied that the Plaintiff under his second relief was entitled to a decree for over Rs. 7,000, gave him that decree. If the lower Appellate Court had no jurisdiction to give that decree, what would have been the result? According to the argument for the Defendant-Appellant the lower Appellate Court could have done nothing except return the memorandum of appeal for presentation in the High Court. It could not, according to that contention logically worked out, have given the Plaintiff in his appeal a decree for any sum whatever, even a sum less than Rs. 5,000, as if that contention was correct, its jurisdiction was determined by the finding that the Plaintiff was entitled in appeal to a sum exceeding Rs. 5,000. If that contention were correct, and the lower Appellate Court returned the memorandum of appeal, and it was presented in this Court as a first appeal, it is conceivable that this Court might have come to the conclusion that the Plaintiff was entitled, we shall say, to Rs. 2,000 only. Now if the Defendant's contention were correct, in that event what could this Court do except again return the memorandum of appeal to be presented in the Court having jurisdiction, *i.e.*, that of the District Judge? That is an illustration which we think goes to show that it is the Plaintiff's valuation in his plaint which controls the jurisdiction, not only of the first Court, but of the Appellate Court, and not the amount which may be found and decreed by the first Court or by the Appellate Court."

It has repeatedly been held by the High Courts in India that the test of the 'amount or value of the subject-matter of a suit is to be determined by the amount set forth in the plaint. [See *Lakshman*

(2) I. L. R. 16 All. 286 (1894).
(3) I. L. R. 13 All. 320 (1891).

CHANDMULL KANTORIA *v.* DEBI CHAND.

v. *Babaji* (4), *Mahabir Singh* v. *Behari Lal* (3), *Hamidunessa Bibi* v. *Gopal Chandra Malakar* (5) and *Raj Krishna Dey* v. *Bepin Behari Dey* (6).] And a perusal of the material statutes leads me to the same conclusion. By the Suits Valuation Act of 1887, sec. 8, "the value as determinable for the computation of court-fees and the value for the purpose of jurisdiction shall be the same."

By the Court Fees Act of 1870, sec. 4, court-fees are payable as indicated by the Schedule to that Act. By the Bengal Fees Amendment Act of 1922, sec. 5, court-fees are payable according to the amount or value appearing in the plaint. [See also on this subject Court Fees Act of 1870, secs. 5 and 7, sub-secs. (*1*) and (*4*), and sec. 17 of the Presidency Small Cause Courts Act, sec. 18, Exp. I, and also secs. 20 and 21 and 39, (*1*), (*2*) and (*4*). See also Civil Procedure Code, Or. 7, r. 1 (*i*), r. 2 and r. 11 (*b*)].

In cl. 12 of the Letters Patent, 1865, it is provided that the High Court shall not have such Original Jurisdiction in a case falling within the jurisdiction of the Small Cause Court of Calcutta in which the debt, or damage, or value of the property sued for does not exceed Rs. 100. It has to be observed that the words are "sued for" and not "recoverable."

In my opinion, on a true construction of sec. 22 of the Presidency Small Cause Courts Act, where a Plaintiff institutes a suit of a character cognisable by the Small Cause Court in the High Court, and estimates the value or amount of his claim in the plaint at a sum which is within the ambit of the jurisdiction of the Small Cause Court, sec. 22 is applicable to the suit, and the Plaintiff must be taken to have deliberately accepted the risk to which the provisions of the section expose him. On the other hand, the Plaintiff's estimate of the value or amount of his suit may be so high that the suit is not cognisable by the Small Cause Court, but it is erroneous for that reason to suppose that the Plaintiff is entitled, by a designed exaggeration of the claim, to oust the jurisdiction of the Small Cause Court. The Plaintiff by placing a fictitious value on his claim is not at liberty to determine the tribunal by which his suit is to be tried. [See cases cited supra, also *Dayaram* v. *Gordhandas* (7) and *Ashiq Ali* v. *Imtiaz Begam* (8)].

Ample safe-guards are provided to meet such a contingency. Where the relief obtained in the plaint is incorrectly valued, the Court may reject the plaint, or return the plaint to be presented to the proper Court under Or. 7, rr. 10 and 11. The Court of first instance, in a proper case where it deems such a preliminary investigation to be desirable, will itself determine the amount and value of the subject-matter of the suit, if objection is taken in the Court of first instance at or before the hearing at which issues are first framed and recorded. [See Suits Valuation Act, sec. 11 and *Koti Pujari* v. *Manjaya* (9)].

Moreover, the High Court under sec. 35 of the Civil Procedure Code possesses an unfettered discretion of deciding all questions of costs in such a suit. It might, for example, under such circumstances, deprive the Plaintiff wholly of costs, or only award him such costs as he

(3) I. L. R. 13 All. 320 (1891).
(4) I. L. R. 8 Bom. 31 (1883).
(5) I. L. R. 24 Cal. 661; s. c. 1 C. W. N. (1897).
(6) I. L. R. 40 Cal. 245; s. c. 17 C. W. N. 591 (1912).
(7) I. L. R. 31 Bom. 73 (1906).
(8) I. L. R. 39 All. 723 (1917).
(9) I. L. R. 21 Mad. 271 (1897).

CHANDMULL KANGORIA *v.* DEBI CHAND.

would have recovered if he had brought his suit in the Small Cause Court.

Courts of Justice, in construing a statute, must endeavour to discover the meaning to be given to it by a consideration of its terms. Little or no assistance is to be obtained by referring to other statutes in which the words used are not the same.

The provisions of the English County Court Acts from 1867 to 1919 do not contain the safe-guards which are to be found in the Indian practice. Moreover, the provisions of these Acts differ materially from those contained in the statute relevant to the issues raised on this application, and the decisions thereunder proceed upon different considerations, and I do not, therefore, propose to refer to them.

In my opinion, questions of practice in India are to be determined in accordance with the principles laid down in the Courts in India.

Bearing in mind the evidence adduced at the hearing of this suit, and having regard to all the circumstances, I am not disposed to vary the decree which has been passed.

I hold that this application has been misconceived, and I dismiss it with costs.

Messrs. Pugh & Co., Solicitors for the Appellant.

Mr. P. N. Sen, Solicitor for the Defendant.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1979 OF 1920.

SANDERSON, C. J.
RICHARDSON, J.
1923,
Heard, 25 and 26, June.
Judgment, 26, June.

DAKSHINA RANJAN GHOSE, Defendant, Appellant,
v.
OMAR CHAND OSWAL, Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908); sec. 80, notice, if necessary for suit against public servant in respect of an act done malâ fide *but purporting to be done in his official capacity—Notice, if necessary for recovery of bribe extorted by public servant.*

A Police Sub-Inspector extorted money from a person by placing him under wrongful arrest and then released him. The latter thereupon brought a suit for recovery of the sum extorted and for damages for the wrongful arrest, but no notice had been served under the provisions of sec. 80, C. P. C.:

Held, *per* SANDERSON, C. J.—*That the arrest was an act purporting to be done by the Sub-Inspector as a public officer in his official capacity, and consequently he was entitled to notice under sec. 80, Civil Procedure Code, although in the discharge of his duty he acted* malâ fide.

That no notice having been given, the claim for compensation or damages for wrongful arrest must fail.

JOGENDRA NATH ROY BAHADUR *v.* J. C. PRICE (4) *and* KOTI REDDI *v.* SUBBIAH (5) *followed.*

PEARY MOHAN DAS *v.* D. WESTON (1) *and* RAGHUBANS *v.* PHOOLKUMARI (3) *dissented from.*

(1) 16 C. W. N. 145 (1911).
(3) I. L. R. 32 Cal. 1130 (1905).
(4) I. L. R. 24 Cal. 584 (1897).
(5) I. L. R. 41 Mad. 792 (F. B.) (1918).

SHAHUNSHAH BEGUM v. FERGUSSON (2) *distinguished.*

That no notice was required in regard to the claim for the recovery of the amount extorted by the Sub-Inspector, for nobody could suppose that while he was demanding and obtaining the money he was purporting to act in his official capacity. Therefore the Plaintiff was entitled to a decree for that amount though he gave no notice of the suit under sec. 80, C. P. C.

Per RICHARDSON, J.—*In the present case even though the Defendant knew he was arresting the wrong person and was in that sense acting* malâ fide, *he was purporting to act as a Police Officer, that is as a public officer within the meaning of sec. 80, C. P. C., and was therefore entitled to notice of this suit, so far as it was a suit for damages for wrongful arrest.*

JOGENDRA NATH ROY BAHADUR v. J. C. PRICE (4) *and* KOTI v. SUBBIAH (5) *followed.*

SASANKA SEKHAR BANERJEE v. SUDHANSU MOHAN GANGULY (6) *distinguished.*

This was an appeal preferred on the 2nd August 1920 against the decree of the Subordinate Judge of Zillah Mymensingh (Babu Bamandas Mukherjee), dated the 21st June 1920, affirming the decree of the Munsif, 1st Additional Court at Jamalpur (Babu Basanta Behari Mukherjee), dated the 26th May 1919.

The facts are briefly as follows :—One Omar Chand Oswal embezzled a sum of money from the shop of a Marwari merchant and absconded. After several futile enquiries by the Police in Calcutta and in Bikanir, an enquiry slip was sent to the Superintendent of Police at Mymensingh and he sent it to the Sub-Inspector of Police at Islampur, with the note "to enquire and report." The papers attached to the slip described the absconder. The Sub-Inspector, purporting to take action under sec. 54, Cr. P. Code, went to the shop of one Omar Chand Oswal, a trader in Dharmakura Bazar, in the District of Mymensingh, and in spite of the protests of the latter and of other respectable inhabitants of that place, arrested Omar Chand and took him in the custody of a constable to the Thana though he knew that Omar Chand was not the absconder. At the Thana the Sub-Inspector demanded a sum of Rs. 100 as a condition for his release and after some bargaining took Rs. 75 and then released Omar Chand on bail. Thereupon Omar Chand brought the present suit against the Sub-Inspector for recovery of the sum of Rs. 75 which the Defendant had extorted from him and further claimed Rs. 50 as damages for the wrongful arrest. The lower Courts decreed the suit and the Sub-Inspector preferred the present second appeal to the High Court.

Babus Mohendra Nath Roy and *Ramendra Mohan Majumdar* for the Appellant.

Babus Brojolal Chuckerbutty and *Birendra Kumar De* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is a second appeal by the Defendant from the judgment of the learned second Subordinate Judge of Mymensingh.

The suit was brought by one Omar Chand Oswal, who was a trader of the Dharmakura Bazar against the Sub-Inspector of Police of the Islampur Thana, to recover the sum of Rs. 75 which, it was alleged, the Defendant had extorted from the Plaintiff by placing the Plaintiff

(2) I. L. R. 7 Cal. 499 (1881).
(4) I. L. R. 24 Cal. 584 (1897).
(5) I. L. R. 41 Mad. 792 (F. B.) (1918),
(6) 24 C. W. N. 891 (1920).

under a wrongful arrest and taking him to the Thana and detaining him there for more than an hour.

There was a further claim for Rs. 50 which was claimed as damages for the alleged wrongful arrest.

The two points which the learned Vakeel, who appeared for the Appellant, has taken are, first that the Defendant was a public officer and in executing the arrest of the Plaintiff he was purporting to act in his official capacity and, that consequently by reason of the provisions of sec. 80 of the Code of Civil Procedure the Plaintiff could not institute this suit until the expiration of two months next after notice in writing to the Defendant; that no such notice was given and that consequently the suit would not lie. The other point was that the payment of the sum of Rs. 75 was the result of a bargain between the Plaintiff on the one hand and the Defendant on the other, and that the Plaintiff was in *pari delicto* with the Defendant and consequently the Plaintiff was not entitled to recover in this suit.

The learned Vakeel after further consideration admitted that he could not press the second point, having regard to the findings of fact of the learned Subordinate Judge, which were to the effect that the Plaintiff purchased his release by payment to the Defendant of the sum of Rs. 75 under coercion, or putting it in other words, that the Rs. 75 was extorted from the Plaintiff by placing him under a wrongful arrest, taking him to the Thana and detaining him there. There is, therefore, one point only to be considered in this appeal, and that is the question whether the Defendant was entitled to notice under sec. 80 of the Civil Procedure Code before the suit was instituted.

For the consideration of this point it is necessary to state a few facts: It appears that a person, who gave the name of Omar Chand Oswal, was alleged to have embezzled a sum of Rs. 275 from the shop of one Dwarka Das Agarwalla of Sonari and then absconded. Endeavours were being made by the Police to find the absconder. Apparently, an enquiry had been made at Bikanir with no result. An enquiry was then made in Calcutta with no result. Then an enquiry slip was sent to the Superintendent of Police at Mymensingh and he sent it to the Sub-Inspector of Islampur, who is the Defendant in this case, with the note "to enquire and report." Apparently, attached to this slip there was the report of the Bikanir Police, and the papers, which were with the Defendant, described the absconder. It was the Defendant's case that having regard to the information contained in those papers and in the enquiry slip, he took action under sec. 54 of the Code of Criminal Procedure and arrested the Plaintiff. It appears that he went to the shop of the Plaintiff on the morning of the 22nd of March 1918 accompanied by some Chowkidars and Constables, that inspite of the protest of the Plaintiff and some other persons, who are described by the learned Judge as respectable inhabitants of that place, the Plaintiff was taken in the custody of a Constable to the Thana, that at the Thana the Defendant demanded a sum of Rs. 100 as a condition for the release of the Plaintiff, that after some bargaining with the Plaintiff and some others, who had accompanied the Plaintiff to the Thana, it was agreed that the Defendant should receive Rs. 75, and one of those, who had accompanied the Plaintiff, went to his place of business, obtained the money which was paid to the Defendant, and then the Plaintiff was released on bail.

Now, the learned Subordinate Judge

DAKSHINA RANJAN GHOSE v. OMAR CHAND OSWAL.

has found that the Defendant ought to have known that the Plaintiff was not the absconder. He said: "The Defendant had this document in his hand and a look at the man would satisfy him that the Plaintiff was not the absconder." Further on he said: "The Plaintiff had his firm at Dharmakura in the name of Amarchand Askuram for about 25 years and is a man of established reputation in the locality. His shop is only 15 minutes' walk from the Police Station of the Defendant." I need not dwell upon this at any greater detail because the finding is that the conduct of the Defendant was marked with *malâ fides* from the beginning to the end and that he arrested the Plaintiff having good reason to believe him to be innocent and refused to grant him bail at the shop; and, under these circumstances the learned Subordinate Judge made a decree for the recovery of Rs. 75 and a further decree for Rs. 50 as damages for the wrongful arrest.

The learned Vakil, who appeared for the Appellant, has admitted that the point upon which he relies, namely, the omission of notice under sec. 80, does not apply to the claim for Rs. 75, because when the Defendant demanded and obtained the Rs. 75 under coercion no body could suppose that he was purporting to act in his official capacity in so demanding and obtaining the Rs. 75: and consequently, the decree which the lower Appellate Court has made in favour of the Plaintiff for the Rs. 75 must remain undisturbed.

But the learned Vakil pressed the point with regard to the claim for Rs. 50 compensation or damages for the wrongful arrest.

The learned Subordinate Judge held that the Defendant was not entitled to notice under sec. 80, because, he said: "Sec. 80 of the Civil Procedure Code is meant for the protection of Government Officers acting in good faith in lawful discharge of their duties: but it does not apply to cases of *malâ fide* acts perpetrated by Government Officers taking advantage of their position and abusing the salutary provisions of law as engine of torture as has been done in the present case. The law is clear on the point. The ruling reported in *Peary Mohan Das* v. *D. Weston* (1) does not entitle the Defendant to any notice in the present case. So this point also is decided against the Appellant."

Speaking for myself, with great respect to the learned Subordinate Judge, I am of opinion that that decision is wrong. The words of the section are plain. In this case the material words are these: "No suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to him. . . ." On the facts of this case there is no doubt that the Defendant was a public officer, and on the facts which I have already stated, in my opinion, there is equally no doubt that the act, namely, the arrest of the Plaintiff, was an act purporting to be done by the Defendant in his official capacity: and consequently, in my judgment, the Defendant was entitled to notice. The decision of the learned Subordinate Judge implies the importation of words into the section which cannot be found there. He would read the section as if it were "in respect of any act purporting to be done by such public officer *bonâ fide* in his official capacity." In my judgment it is not legitimate to construe the section by importing into the section words which do not appear in the section. For the pur-

(1) 16 C. W. N. 148 (1911).

DAKSHINA RANJAN GHOSE v. OMAR CHAND OSWAL.

pose of my judgment it really would not be necessary for me to say anything further.

It is desirable, however, in my judgment, to refer to the case which was mentioned by the learned Subordinate Judge. That was a decision of Mr. Justice Fletcher, in the case of *Peary Mohan Das* v. *D. Weston* (1). The passage which is relied upon by the learned Subordinate Judge is to be found at p. 214, which runs as follows: "The third issue is whether the Defendants' were entitled to notice of this suit under sec. 80 of the Code of Civil Procedure. In my opinion they were not. A public officer sued in respect of an act done in bad faith is not entitled to notice under sec. 80. The decisions in this Court of *Shahunshah Begum* v. *Fergusson* (2) and *Raghubans* v. *Phoolkumari* (3) establish this proposition without doubt."

With great respect to the learned Judge, I do not agree with him. The case of *Raghubans* v. *Phoolkumari* (3), in my judgment, is no authority for the proposition which the learned Judge ennunciated. In the case of *Shahunshah Begum* v. *Fergusson* (2), the judgment was delivered by Mr. Justice Cunningham and it contains some statements which go to support the opinion of Mr. Justice Fletcher, but in my judgment they were *obiter dicta* and were not nécessary for the decision of that case.

The opinions of Mr. Justice Fletcher and that of Mr. Justice Cunningham are, in my judgment, inconsistent with the decision of this Court in the case of *Jogendra Nath Roy Bahadur* v. *J. C. Price* (4), to which Mr. Justice Macpherson and Mr. Justice Ameer Ali were parties. In that case the lower Court had not arrived at any findings of fact, because the learned Subordinate Judge dismissed the suit on the ground that the Defendant was entitled as a public officer to two months' notice under sec. 424 of the Civil Procedure Code of 1882, previous to the institution of the suit, the acts complained of having been done by the Defendant in his official capacity. It is material to notice that the allegation in the plaint was that the Defendant illegally and maliciously caused the Plaintiff to be arrested: and, in the judgment it is stated that "the Plaintiff charges that this act was illegal and malicious." The learned Judges in giving judgment said this: "The learned pleader for the Appellant contends that as the act is said to have been done maliciously, sec. 424 does not apply, and that that section only applies to acts done inadvertently, and as authority he cites the case of *Shahunshah Begum* v. *Fergusson* (2). There certainly are some remarks of Mr. Justice Cunningham which would lend support to this contention, but that was a case of a very different description from this, and we think the remarks made must be taken in connection with the facts of that particular case, and not as of general application." . . . . "This is a case of a wholly different character, and we are not aware of any instance, certainly no such case has been cited to us, in which it has been held that the section does not apply to the case of a public officer charged with a tortious act done by him in his official capacity. The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise." I agree with the decision in that case, and with great respect to Mr. Justice Fletcher, I

(1) 16 C. W. N. 145 (1911).
(2) I. L. R. 7 Cal. 499 (1881).
(3) I. L. R. 32 Cal. 1130 (1905).
(4) I. L. R. 24 Cal. 584 (1897).

(2) I. L. R. 7 Cal. 499 (1881).

DAKSHINA RANJAN GHOSE v. OMAR CHAND OSWAL.

do not agree with the decision in *Shahunshah Begum* v. *Fergusson* (2). It seems to me that the decision of this Court in *Jogendra Nath Roy Bahadur* v. *J. C. Price* (4) is in accordance with the plain words of the section: and, I am glad to find that that decision has been arrived at; because my own opinion is that if the Courts would be satisfied to give effect to the natural meaning of the language used in the sections of the Codes, a great deal of time would be saved.

The matter does not end there, because the learned Vakeel drew our attention to a Full Bench case in the Madras High Court, *Koti Reddi* v. *Subbiah* (5), the head-note of which is, "a public officer is entitled to notice of suit under sec. 80 of the Civil Procedure Code, even if in the discharge of his duty he has acted *malâ fide*." The decision confirms the view which I have taken of the words in sec. 80; and, the result is, as I have already said, that I am unable to agree with the decision of the learned Subordinate Judge by which he held that it was not necessary for the Plaintiff to give the notice prescribed by sec. 80, before bringing a suit against the Defendant, because it was proved that, although the Defendant purported to act in his official capacity as a public officer, he had acted *malâ fide*.

In view of the conclusion at which I have arrived as to the proper interpretation of sec. 80, the only question on this point is whether the arrest of the Plaintiff was an act purporting to be done by the Defendant as a public officer in his official capacity. On the facts of the case I have no doubt that the arrest was an act purporting to be done by the Defendant as a public officer in his official capacity; and, consequently the suit, so far as the claim for the Rs. 50 is concerned, could not be instituted until the expiration of two months next after notice in writing was given. Inasmuch as no notice was given, in my judgment, the claim of the Plaintiff for the sum of Rs. 50 as compensation or damages for wrongful arrest must fail and the appeal in respect of that claim must be allowed and the suit in respect thereof should be dismissed.

Inasmuch as the appeal has succeeded as to a part of the Plaintiff's claim and failed as regards the other part, we make no order as regards the costs of this appeal. We do not interfere with the order as to the costs of the lower Courts, which will stand.

RICHARDSON, J.—I agree. In the present case even though the Defendant knew that he was arresting the wrong person and was in that sense acting *malâ fide*, he was, in my opinion, purporting to act as a Police Officer, that is, as a public officer, within the meaning of sec. 80 of the Civil Procedure Code. That being so, the Defendant was entitled to notice of this suit, so far as it is a suit for damages for wrongful arrest or false imprisonment.

Our attention has been called to no decision binding on us with which this conclusion is in conflict. Not only so. But the view that the words of sec. 80 should receive their natural meaning is supported by the decision of this Court in *Jogendra Nath Roy Bahadur* v. *J. C. Price* (4), which is binding upon us, and which has been approved by a Full Bench of the Madras High Court in *Koti Reddi* v. *Subbiah* (5).

The case of *Sasanka Sekhar Banerjee* v. *Sudhansu Mohan Ganguly* (6) to which

(2) I. L. R. 7 Cal. 499 (1881).
(4) I. L. R. 24 Cal. 594 (1897).
(5) I. L. R. 41 Mad. 792 (F. B.) (1918).

(4) I. L. R. 24 Cal. 594 (1897).
(5) I. L. R. 41 Mad. 792 (F. B.) (1918).
(6) 24 C. W. N. 891 (1920).

reference was made on behalf of the Respondent turns upon sec. 363 of the Bengal Municipal Act, 1884, the terms of which differ materially from those of sec. 80 of the Code.

With these observations I agree with the order which my Lord has made.

J. N. R. *Appeal allowed in part.*

[CIVIL APPELLATE JURISDICTION.]

MIS. APP. No. 95 OF 1923.

RANKIN, J.
B. B. GHOSE, J.
1923,
Heard, 10 and 11, July.
Judgment, 17, July.

SADEK ALI, Defendant, Appellant,
v.
SAMED ALI, Plaintiff, Respondent.

Provincial Small Cause Court, power of, to attach immoveable property before judgment and to investigate claim thereto—Provincial Small Cause Courts Act (IX of 1887), sec. 17—Civil Procedure Code (Act V of 1908), secs. 7, 37, Ors. 38 and 50.

A Provincial Court of Small Causes has no power to attach immoveable property before judgment under Or. 38 of the Civil Procedure Code, and an order of such a Court adjudicating a claim to property so attached is ultra vires.

This was an appeal preferred on the 1st March 1923, against the order of District Judge of 24-Parganas (A. J. Chotzner, Esq.), dated the 2nd February 1923, reversing an order of the Munsif at Alipur (Babu Prafulla Ch. Dutta), dated the 28th July 1922.

The facts of the case will appear from the judgment.

Babus Santosh Kumar Basu and *Pravat Ch. Dutta* for the Appellant.

Babu Sitaram Banerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

RANKIN, J.—This is an appeal by the Defendant in an ejectment suit. The Defendant's defence was a denial of the Plaintiff's title. The Plaintiff claimed title as purchaser at an execution sale against one Majammil Mea under a Small Cause Court decree for money obtained under the Provincial Small Cause Courts Act. It appears that in the Small Cause Court at Sealdah he obtained an attachment of the land now in suit before judgment, that there was an investigation of claim held under Or. 21, r. 63, Civil Procedure Code, that the claimant succeeded and that the Plaintiff then brought a suit to establish the right of his judgment-debtor, but that suit was withdrawn. Later, the decree was transferred to the ordinary civil Court; the property was attached and sold to him ignoring the previous claim case.

The Munsif held that the Small Cause Court had power to attach immoveables before judgment and to decide the claim case. Accordingly he dismissed the Plaintiff's suit holding that the Plaintiff had no title. The learned District Judge held that the Small Cause Court had no such power and that the proceedings which purported to have been taken under Or. 21, r. 63, C. P. C., were *ultra vires*. Accordingly, he remitted the suit for retrial to the first Court on the other issues. The only point made by the learned Vakil for the Defendant-Appellant is that, under the Code of 1908, a Provincial Small Cause Court has power to attach immoveable property before judgment and to decide a claim case thereon. This matter has been elaborately argued before us. It is quite clear that the proper method is first to examine this matter on the face of the Code and of the Provincial Small Cause Courts Act (IX of 1887). So far as the latter Act is concerned, it is only necessary to note that by the second

SADEK ALI *v.* SAMED ALI.

schedule great care has been taken to exclude from the cognizance of the Small Cause Court all suits in respect of immoveable property whether for possession or declaration or partition or otherwise howsoever, with small exceptions as regards certain classes of rent suits. In effect, rights to, or interests in, immoveable property are elaborately excluded; but as questions of this character may arise incidentally in suits, for example, for money, a facultative provision is made by sec. 23 enabling the Small Cause Courts to send the matter to the ordinary Civil Court but not obliging it to do so. Sec. 17 of this Act deals with procedure. It is the only section applying anything in the Code to Small Cause Courts. The provisions in the Code itself are directed entirely to excluding certain powers of the Court from application to Small Cause Courts. The provisions of the Code of 1882 specified in its second schedule "so far as those chapters and sections are applicable" were made to obtain in the Small Cause Court by virtue of sec. 17. They include Chaps. XIX and XXXIV—"Execution" and "Arrest and Attachment before judgment." In each case the words "except as regards immoveable property" are inserted as a qualification in the second schedule itself. In form sec. 17 is entirely inapposite now. Since 1908 it must be taken by virtue of sec. 158 of the Code to refer to sec. 7 and Or. 50 of the Code of 1908. By sec. 7 of the present Code so much of the body of the Code as relates to certain things is declared not to extend to Small Cause Courts, namely, suits excepted from their cognizance, execution of decrees in such suits and the execution of decrees against immoveable property. Also certain sections are made inapplicable, including secs. 94 and 95 so far as they relate to injunctions and interlocutory orders. This provision is badly drafted. Sec. 94 appears to refer entirely to interlocutory orders and even to call them so, but the parts of this section intended to be excluded are apparently cls. (*c*) and (*e*). Cl. (*b*) is not excluded by the words of sec. 7 [*Kumud Behary Pal* v. *Hari Charan Sardar* (1)] and it can certainly take effect as regards moveables. The actual words of the clause, however, are "order the attachment of any property." Still sec. 94 only confers powers of any sort "if it is so prescribed" which means that unless the power is given by the orders in the first schedule, it is not in existence. It is fairly clear that we must therefore go to the schedule which by Or. 50 declares that certain provisions of the schedule shall not extend to Provincial Small Cause Courts. This repeats the matters mentioned in the first half of sec. 7 and adds two new matters. It then mentions certain rules and orders specifically and declares them also to be inapplicable to Small Cause Courts. It may be noticed that whereas by secs. 7 and 94 a Provincial Small Cause Court cannot grant a temporary injunction, Or. 39, r. 1 is not expressly mentioned in Or. 50. Or. 50 is not, it would appear, drafted either on the principle of repeating every exclusion made by sec. 7 or of not repeating any such exclusion. Further in Or. 16, r. 10 the power of compelling the attendance of a witness by attachment of his property is qualified by the proviso "'that no Court of Small Causes shall make an order for the attachment of immoveable property." In these circumstances, the question seems to turn on the exact implication of the exclusion from the Small Cause Court powers of "the execution of decrees against immoveable property" in sec. 7 and Or. 50.

(1) I. L. R. 46 Cal. 717 (1918)

SADEK ALI v. SAMED ALI.

There can be no doubt that in Or. 38 attachment before judgment is contrasted with and distinguished from "attachment of property in execution of a decree." Nor can it be doubted that there is an important difference between these two things [see *Basiram* v. *Kattyayani* (2)] though it may be doubted whether the difference is really fundamental since attachment in execution is a step taken to crystallise the creditors' rights and prevent loss of the property prior to sale: attachment before judgment is also for the purposes of preservation so far as the Plaintiff is concerned.

Two views have been taken. The District Judge has adopted the view stated in Woodroffe on the Civil Procedure Code. That is, in effect, the principle applied in Madras to the Code of 1859 under Act XI of 1865 that "a Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it" [*Marthamma* v. *Kittu Sheregara* (3)].

The other view was adopted in *Kanchedi* v. *Kanchedi* (4) by the Judicial Commissioner at Nagpur. He regarded the express exception in Or. 16, r. 10 as in favour of this construction and he did not think that r. 7 of Or. 38 was against it. He pointed out that the exclusion of this power was express and clear in the Code of 1882 and that it is not repeated in the present Code.

Or. 38, r. 7 lays down: "The attachment shall be made in the manner provided for the attachment of property in execution of a decree." R. 8 applies in like manner to the provisions as to the method of investigation of claims.

This not only refers *inter alia* to Or. 21, r. 54 but also to the provisions for investigation of claims (rr. 58 to 62) and further to r. 63 which makes the order in a claim case conclusive subject only to a suit. If there is power to attach before judgment, then whether it be limited to moveables or not, r. 63 must be intended to apply [*Srimanth Raju* v. *Matiapalli* (5)]. However the matter be regarded, r. 63 is not in reality a mere question of "manner."

Again by sec. 36 of the Code "the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders." It cannot be contended that "the execution of decrees against immoveable property" is not meant to cover the execution of orders for the purposes of sec. 7 or Or. 50, yet they are only excluded by implication.

The argument from previous Codes is apt to exceed the limits laid down in *Bank of England* v. *Vagliano* (6), but no doubt in so far as a revised Code takes the form of an amendment as regards a particular provision something may legitimately be gathered by a comparison. Compare, for instance, sec. 73 of the present Code and sec. 295 of 1882. But the whole manner and scheme of declaring the powers of Small Cause Courts were recast in 1908, though sec. 17 of Act IX of 1887 lives on. Sec. 5 of the Code of 1882 declares everything expressly mentioned in the second schedule to extend to Small Cause Courts to the extent provided. Sec. 7 and Or. 50 of the present Code mention certain things as not to extend. Formerly every chapter was specifically dealt with, *i.e.*, inserted with or without qualification or omitted. Thus "Chap. XXXIV of Arrest, Attachment before judgment," except as regards "immoveable property."

(2) I. L. R. 38 Cal. 448 (1911).
(3) 6 Mad. H. C. R. 90 (1871).
(4) 43 Ind. Cas. 123 (1917).
(5) I. L. R. 41 Mad. 849 (1918).
(6) [1891] A. C. 107.

SADEK ALI *v.* SAMED ALI.

The Code of 1877 as amended in 1879 was exactly the same. The position which arose under Act XLII of 1860 (which first created the Provincial Small Cause Court) and the amending Act XI of 1865 was that these had to be read with the Code of 1859 which knew nothing of Small Cause Courts. Sec. 2? of the Act of 1860 provided that "except as hereinbefore provided" the Code of 1859 should be applicable "in so far as the same may be applicable and necessary." Sec. 47 of the Act of 1865 was equally general "so far as the same are or may be applicable." In this respect I think the comment of the learned Vakil for the Appellant upon the Madras decision [*Marthamma* v. *Kittu Sheregara* (3)] has force. In 1871 there was a wide general direction left to be applied by common sense. From 1877 to 1908 there was clear and specific provision. The Code of 1908 did not revert to wide or general direction.

It is by no means absurd to suppose that the Code of 1908 may have meant, subject to the right of High Courts to amend the Rules . . . . . to extend the power of attachment before judgment to immoveable property in the case of Provincial Small Cause Courts, while refusing to such Courts the right to attach such property in execution of decrees. As the language of sec. 17 of the Provincial Small Cause Courts Act (IX of 1887) is now inapposite, I am inclined to think that the onus is on the person denying the existence of the power to show that it is excluded by the Code. I agree that the principle of *Marthamma* v. *Kittu Sheregara* (3) is not so forceful as it was under the old Acts. On the other hand, I think the difference between attachment before and after judgment is not so great as has been sometimes thought and I do not think the comparison ... with the clear language ... 1882 affords ground for a safe ... to the effect that the power was not me... to be excluded.

It is very difficult to think that a Court which so far as is possible is prohibited from entertaining questions of rights in immoveables and which may not levy thereon, nor attach such property to compel a witness to appear, should have been given without plain language the extreme right of attachment before judgment and of adjudicating on all claims which such an attachment may produce. That the debt must be small in all cases makes the difficulty greater. It is quite true that on the language of r. 51 of Or. 21 the attachment is made an order: but the peon or the officer who affixes on the premises the order of the Court and proclaims it by beat of drum could hardly deny that he was executing an order upon immoveable property any more than the Sheriff when seizing moveables could deny that he was executing an order. If sec. 7 (*a*) (*iii*) is read with sec. 36 as meaning to exclude "the execution of decrees or orders against immoveable property"—as I think it must—then, apart from Or. 50, I think that the power to attach immoveables before judgment is sufficiently, if not too clearly, negatived. [Cf. Or. 38, r. 11.]

In the end, therefore, the appeal fails and must be dismissed with costs, hearing-fee, two gold mohurs.

GHOSE, J.—I agree.

N. G.

(3) 6 Mad. H. C. R. 90 (1871).

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 1295 OF 1921.

RANKIN, J.
B. B. GHOSE, J.
1923,
Heard, 17 and 18, July.
Judgment, 19, July.

BANKA BEHARI DAS, Plaintiff, Appellant,
v.
GURU DAS DHAR, Defendant, Respondent.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 91, 92 (3), 93—Refund of purchase-money, suit for, by the auction-purchaser, the judgment-debtor having no saleable interest, if maintainable—Fraud, ground of suit, averment of, in the pleadings.

Under the Code of 1908, no suit lies by an auction-purchaser to obtain a refund of the purchase-money on the ground that the judgment-debtor had no saleable interest.

JURANU MAHAMAD v. JATHI MAHAMAD (4) *followed.*

RAM SARUP v. DALPAT RAI (1), BALVANT RAGHUNATH v. BALA (2) *and* TIRUMALAISAMI NAIDU v. SUBRAMANIAN CHETTIAR (3) *referred to.*

This was an appeal preferred on the 16th May 1921 against a decree of Mr. J. A. Ross, District Judge of Zillah Murshidabad, dated the 26th April 1921, reversing a decree of the Munsif at Jangipur (Babu Manindra Prosad Singha), dated the 29th November 1919.

This appeal arose out of a suit by an auction-purchaser at a rent sale for refund of purchase-money with compensation on the allegation that the judgment-debtor had no saleable interest in the property purchased by the Plaintiff and on certain allegations of fraud which are discussed in their Lordships' judgment.

(1) I. L. R. 43 All. 60 (1920).
(2) I. L. R. 46 Bom. 833 (1922).
(3) I. L. R. 40 Mad. 1009 (1916).
(4) 22 C. W. N. 760 (1917).

The lower Appellate Court held on the authority of *Ram Sarup* v. *Dalpat Rai* (1), that no such suit was maintainable and dismissed the suit.

Babu Samatul Chander Dutt (with *Babu Durga Charan Mitter*) for the Appellant.—The sale is to be set aside and the purchase-money refunded, as the decree was a money decree and not a rent decree and the judgment-debtor had no saleable interest.

The following cases are in point:—*Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (5) and *Prosanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (6).

There are, however, some conflicting cases, *Ram Sarup* v. *Dalpat Rai* (1), *Juranu Mahamad* v. *Jathi Mahamad* (4), *Balvant Raghunath* v. *Bala* (2), *Purvathi Ammul* v. *Govinda Sami Pilai* (9), *Tirumalaisami Naidu* v. *Subramanian Chettiar* (3) and *Makar Ali* v. *Sarfuddin* (10).

In this case fraud and misrepresentation are alleged and proved, suit lies to have the sale set aside. *Brij Mohun Thakur* v. *Rai Umanath Chowdhury* (11), *Makhanchore Sarkar* v. *Nishind Gorain* (12), *Abinash Chunder* v. *Bhuban Chunder* (13), *Sheogobinda* v. *Dhanukdhari* (14) and *Balvant Raghunath* v. *Bala* (2).

Dr. Jadunath Kanjilal (with *Babu Peari Mohan Chatterjee*) for the Respondent.—In addition to the cases cited by the learned Vakil for the Appellant two other cases may be cited for the Respon-

(1) I. L. R. 43 All. 60 (1920).
(2) I. L. R. 46 Bom. 833 (1922).
(3) I. L. R. 40 Mad. 1009 (1916).
(4) 22 C. W. N. 760 (1917).
(5) I. L. R. 35 Bom. 29 (1910).
(6) 36 C. L. J. 205 (1917).
(9) I. L. R. 39 Mad. 803 (1915).
(10) I. L. R. 50 Cal. 115: s. c. 36 C. L. J. 132 (1922).
(11) I. L. R. 20 Cal. 8 (P. C.) (1892).
(12) 10 C. L. J. 492 (1909).
(13) 25 C. W. N. 756 (1921).
(14) 19 C. W. N. 1291 (1918).

BANKA BEHARI DAS v. GURU DAS DHAR.

dent. *Mohideen Ibrahim* v. *Md. Mura Levai* (15) and *Mannu Lal* v. *Bhugwan Das* (16).

Mere averment of fraud or misrepresentation in the plaint is not sufficient, particulars of fraud must be set forth.

Or. 6, r. 4, Civil Procedure Code.

Ganga Narain Gupta v. *Tiluckram Chowdhury* (8), *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (17) and *Jyoti Prokash Nandy* v. *Jhow Mull Johurry* (18).

In the present case only two facts are alleged in the plaint, but they do not amount to fraud or misrepresentation, first, that the landlord sued only one of several co-sharer tenants and hence the decree was a money decree and not a rent decree. The judgment-debtor was not in possession and he had no interest in the property. But in the plaint it was alleged that he was in joint possession with his co-sharers. At an auction-sale there is no warranty on the part of the decree-holder as to the interest or extent of interest. of the judgment-debtors. The doctrine of *caveat emptor* applies. There is no fraud. The sale cannot be set aside even under the Code (Or. 21, r. 92) if the judgment-debtor had any the slightest interest. *Ram Coomar Dey* v. *Shoshee Bhushan Ghose* (19), *Sonaram Dass* v. *Mohiram Dass* (20), *Ram Narain* v. *Dwarka Nath Khettry* (21) and *Sant Lal* v. *Ramji Dago* (22).

The second fact alleged is that in the rent suit the *jama* was wrongly and fraudulently stated as Rs. 38 and not Rs. 22. This does not constitute fraud. The decree-holder obtained the decree on a *jama* of Rs. 38. The auction-purchaser might have enquired. He has got no *locus standi* to impeach the decree. Facts found cannot be impeached in second appeal, but whether the facts found constitute fraud is a question of law.

Ishan Chandra Das Sarkar v. *Bishu Sirdar* (23).

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—The Plaintiff, who was the auction-purchaser at a sale in execution of a decree for rent, sued both the decree-holder and the judgment-debtor for refund of the purchase-money and also for compensation on certain allegations made in the plaint. The suit was decreed in the primary Court against both the Defendants. On appeal by the decree-holder Defendant, the learned Judge dismissed the suit holding that it was not maintainable. The Plaintiff appeals to this Court and two questions have been raised on his behalf : (1) Whether a suit for refund of purchase-money is maintainable by the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the land, and (2) whether the suit is maintainable on the ground of fraud of the Defendants.

With regard to the first question, the learned Vakil for the Appellant has placed before us all the cases decided by the different High Courts with reference to sales held after the Code of Civil Procedue of 1908 came into operation. He admits that the general view is that such suits are not maintainable. It is only necessary to refer to the latest cases, which

(8) L. R. 15 I. A. 119: s. c. I. L. R. 15 Cal. 533 at p. 537 (1888).
(15) 23 Mad. L. J. 487 (1912).
(16) I. L. R. 39 All. 114 (1916).
(17) 19 C. W. N. 729 (P. C.) (1915).
(18) I. L. R. 36 Cal. 134 at p. 139 (1908).
(19) I. L. R. 9 Cal. 626 (1883).
(20) I. L. R. 28 Cal. 235 (1900).
(21) I. L. R. 27 Cal. 264 (1899).
(22) I. L. R. 9 All. 167 (1886).

(23) I. L. R. 24 Cal. 825 (1897).

BANKA BEHARI DAS *v.* GURU DAS DHAR.

are *Ram Sarup* v. *Dalpat Rai* (1), *Balvant Raghunath* v. *Bala* (2), *Tirumalaisami Naidu* v. *Subramanian Chettiar* (3) and *Juranu Mahamad* v. *Jathi Mahamad* (4). He, however, relies on two cases in support of his contention that such a suit is maintainable, namely, the cases of *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (5) and *Prosanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (6). The case of *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (5) was under the Civil Procedure Code of 1882 as pointed out by the learned Chief Justice in *Balvant Raghunath's* case (2). The only case then in which a discordant note was struck is that *Prosanna Kumar Bhattacharjea* v. *Ibrahim Mirza* (6). That case, however, was based on the decision in *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (5), which is no authority on the question where the sale was held under the Code of 1908. We must, therefore, follow the later case in our Court, *Juranu Mahamad* v. *Jathi Mahamad* (4), which is in agreement with the decision of all the other High Courts, and hold that such a suit is not maintainable.

The learned Vakil for the Appellant further contends that there is a difference between the present case and the others, as in the present case the sale was a sale in execution of a rent decree and there is a warranty of title in the case of such a sale. The authority cited in support of this proposition is the decision in *Abdul Sobhan Seikh* v. *Nekbar Mandal* (7). That case, however, does not lay down any such rule, as it decides merely a question of estoppel by representation. That there is no such distinction as regards warranty will be apparent from the fact that the proclamation of sale which has to be published is in the same terms in both classes of cases. The difference in the rights acquired by purchasers in execution of decrees does not affect the question as regards warranty of title.

Before parting with this question, I must observe that the Plaintiff does not state that the judgment-debtor had no saleable interest, the allegation being to the effect that the Plaintiff purchased only the right, title and interest of the judgment-debtor and not the holding free from all encumbrances as in a rent sale. On that allegation, the question discussed does not arise and the Plaintiff's suit is not maintainable on any ground whatsoever.

With regard to the second point the matter of fraud was not investigated by the learned Judge on appeal and the Appellant asks us for a remand of the case for retrial on that ground. The learned Vakil for the Respondent contends that, assuming that such a suit on the ground of fraud is maintainable, there is no such averment of fraud in the plaint by which the Plaintiff was induced to purchase the property and that there is nothing to be enquired into; although the words "fraud" and "collusion" have been used several times in the plaint, if those words are struck out, the facts alleged do not disclose any fraud which would entitle the Plaintiff to maintain this action nor was any issue raised on that question. Reference has been made in this connection to the case of *Ganga Narain Gupta* v. *Tiluckram Chowdhury* (8), where Lord Watson quoted the well-known dictum of

(1) I. L. R. 43 All. 60 (1920).
(2) I. L. R. 46 Bom. 833 (1922).
(3) I. L R. 40 Mad. 1009 (1916).
(4) 22 C. W. N. 760 (1917).
(5) I. L. R. 35 Bom. 29 (1910).
(6) 36 C. L. J. 205 (1917).
(7) 17 C. L. J. 652 (1912).
(8) L. R. 15 I. A. 119; s. c. I. L. R. 15 Cal. 533 at p. 537 (1888).

BANKA BEHARI DAS *v.* GURU DAS DHAR.

Lord Selborne on that question. The Appellant urges that, although no issue was raised, the trial Court decided the question of fraud and the Defendants cannot be said to have been prejudiced or taken by surprise. The trial Court, however, seems to have decided two points on the facts alleged in the plaint. First, that in the rent suit the Defendant No. 2 who was a grandson of the recorded tenant did not represent the entire body of tenants deriving title from the recorded tenant and, secondly, that the enhanced rate of rent claimed by the landlord in his suit was not *bonâ fide* as the Defendant No. 2 had no authority to agree to an enhancement on behalf of all the tenants and this enhancement was made by the landlord in collusion with the Defendant No. 2. These findings can hardly be said to be findings of fraud which would entitle the auction-purchaser to have the sale set aside. I have examined the plaint and there is no allegation in it beyond those which have been found by the Munsif. It seems to me clear that these findings were not considered to be findings on any question of fraud by the parties in the lower Appellate Court as it does not appear that the lower Appellate Court was asked to come to any finding on the question of fraud. This ground also, therefore, fails.

The appeal must, therefore, be dismissed with costs.

RANKIN, J.—I agree.

H. D. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 565 AND 566 OF 1923.

NEWBOULD, J.
C. C. GHOSE, J.
1923,
18, July.

NAFAR CHANDRA PAL CHOWDHURY, Petitioner,
v.
THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 107 and 110, initiation of proceedings under, on insufficient materials, propriety of—High Court's interference in the preliminary stage, desirability of.

Where on a memorial by the tenants against the zamindar containing certain allegations which were not substantiated on enquiry, the District Magistrate drew up proceedings under secs. 107 and 110 (d) *of the Code of Criminal Procedure against the zamindar:*

Held—*That reading the memorial and the report of the enquiry together it was impossible to hold that they furnished any material sufficient to justify proceedings either under sec. 107 or under sec. 110, Cr. P. C. The proceedings themselves showed that it was on this report and petition and no other material that they were based.*

Although the High Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections of the Criminal Procedure Code, when the materials on which such orders are based are clearly insufficient to support those orders, the High Court should interfere and quash the orders and proceedings.

These were two Rules granted against the order of H. G. Bloomfield, Esq., I. C. S., District Magistrate of Nadia, drawing up proceedings under secs. 110 (*d*) and 107, Cr. P. C., dated the 11th May 1923.

The facts of the case were briefly as follows :—

The Petitioner Nafar Chandra Pal Chowdhury, is one of the principal zamindars in the District of Nadia. In February 1923 some of his tenants, of mouza Mahajanpur, submitted a memorial to His Excellency the Governor of Bengal alleging that (1) the zamindar habitually realised settlement costs from the tenants, (2) that on the refusal of the tenants to pay the same, the zamindar's men impounded

NAFAR CHANDRA PAL CHOWDHURY *v.* THE KING-EMPEROR.

their cattle and harassed them by false litigation, (3) that the zamindar's *gomostha* did not grant rent receipts at the time of payment but granted receipts after deducting 4 to 6 as. per rupee as *parbani, mathut*, etc., (4) that the zamindar's men forcibly took away vegetables from the gardens of tenants and also took away molasses from those who tapped trees, (5) that the zamindar took *ghee*, milk, etc., on making inadequate payments, and (6) that the zamindar upheld the actions of his men who destroyed the crops of tenants by grazing cattle thereon. This memorial was sent to H. G. Bloomfield, Esq., I.C.S., District Magistrate of Nadia, who in turn sent it to the Sub-Divisional Magistrate of Meherpur for report after enquiry. The Sub-Divisional Magistrate reported in detail after examining a large number of witnesses and found that allegations Nos. 1, 2, 5 and 6 were not established but found that allegation No. 3 was true and was established against the zamindar's *gomostha* and allegation No. 4 was established against zamindar's menials but there was no forcible taking away of vegetables in recent times. Upon receipt of the said report of the Sub-Divisional Officer, dated the 1st May 1923, the District Magistrate drew up proceedings against the Petitioner under secs. 107 and 110, cl. (*d*) of the Code of Criminal Procedure asking the Petitioner to show cause both under secs. 107 and 110, cl. (*d*), Cr. P. C. Thereupon the Petitioner moved the High Court to quash the proceedings mainly on the ground that the initiation of the proceedings was bad in law inasmuch as there were no materials upon which the same could be legally founded.

Babu Manmatha Nath Mukerjee (with him *Babus Amarendra Nath Bose* and *Radhikaranjan Guha*) for the Petitioner.—There were not sufficient materials to initiate the proceedings against the Petitioner. The High Court under similar circumstances quashed the proceedings. The liberty of the citizens should not be interfered with lightly, *In re: Jai Prakash Lal* (1), *Queen-Empress* v. *Abdul Kadir* (2) and *Rajendra Narain Singh* v. *Emperor* (3) and the unreported decision of N. Chatterjea, J. and Cuming, J., in *Ainuddin* v. *Emperor* (4).

Mr. Orr, Deputy Legal Remembrancer for the Crown submitted that their Lordships ought not to interfere at the initial stage in proceedings under the preventive sections of the Code.

The JUDGMENT OF THE COURT was as follows :—

These Rules are directed against two orders of the District Magistrate of Nadia drawing up proceedings under secs. 107 and 110 of the Code of Criminal Procedure against the Petitioner Nafar Chandra Pal Chowdhury. The Petitioner is a wealthy zamindar aged 74 years and in his early days he was more than once commended for his public spirit and liberality. In February last some tenants of village Mahajanpur in his zamindary who have become refractory submitted a memorial to His Excellency the Governor of Bengal. This memorial was sent down to the Collector of Nadia for disposal. The Collector sent it to the Sub-Divisional Officer of Meherpur for report after local enquiry. The Sub-Divisional Officer reported in detail after examining a large number of witnesses. The substance of his report is that out of six definite allega-

(1) I. L. R. 6 All. 26 (F. B.) (1883).
(2) I. L. R. 9 All. 452 (1887).
(3) 17 C. W. N 238: s. c. 16 C. L. J. 467 (1912).
(4) Cr. Rev No 565 of 1920: decided on the 16th July 1920. Unreported.

tions made in the petition four were not established. The remaining two he believed to be true as against the zamindar's servants but held that the zamindar's responsibility for these acts had not been established. On receipt of this report the learned District Magistrate of Nadia drew up the proceedings which in these Rules we are asked to quash.

These proceedings are based on the petition and the report. Reading the two together it is impossible to hold that they furnish any material sufficient to justify proceedings either under sec. 107 or under sec. 110, Cr. P. C. The proceedings themselves show that it was on this report and petition and no other material that they are based. The explanation submitted by the Magistrate shows clearly that he has come to the conclusion that the Petitioner is guilty of all the accusations against him and that he is clearly prejudiced against him. But the explanation does not disclose what grounds the Magistrate has for coming to this conclusion. This Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections of the Code of Criminal Procedure, but when in a case like this the materials on which the orders are based are clearly insufficient to support those orders we feel bound to interfere.

We accordingly make these Rules absolute and quash the orders of the District Magistrate calling on the Petitioner to show cause both under secs. 107 and 110, Cr. P. C.

Rule made absolute;

J. N. R. *Proceedings quashed.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER. LORD PHILLIMORE. SIR JOHN EDGE. SIR LAWRENCE JENKINS. LORD SALVESEN. 1922, Heard, 28 and 30, November. Judgment, 30, November.	CHALIKANI VENKATARAYANIM GARU and ors., Appellants, v. SREE RAJAH VATSAVAYA VENKATA SUBADRAYAMMA JAGAPATI BAHADUR GARU and ors, Respondents.

Mortgage—Collateral advantages to mortgagee, stipulated for in mortgage deed—Valid and invalid stipulations—Tender—Release of debtor from obligation to tender, what act amounts to—Costs.

A mortgage with possession provided for the repayment of the mortgage money according to certain instalments and contained inter alia *the following stipulations: (1) certain charges to be incurred by the mortgagee when in possession were fixed at Rs. 4,000 per annum, (2) a lease was to be given for two years of the mortgaged property by the mortgagee to the mortgagor, at the expiry of which the mortgagor was to deliver possession to the mortgagee, failing which the mortgaged property was to stand sold to the mortgagee for the entire amount due, and (3) that the mortgagor should not sell any portion of the estate to anybody except the mortgagee. The Appellants having purchased the equity of redemption on 16th January 1894, on 10th February 1894 tendered to the mortgagee an instalment of Rs. 15,000 which had fallen due on 1st February 1894; but the two years' lease meanwhile having expired and possession not having thereupon been delivered as stipulated to the mortgagee, the latter refused to accept the instalment fearing that such acceptance might pre-*

judice his rights. On 17th January 1899, the Appellants wrote to the mortgagee to be informed of the amount due to him on the mortgage, which the letter stated they were prepared to pay in full. The mortgagee in reply stated that owing to breaches of the conditions of the mortgage, the estate had vested in the mortgagee, so that there was no need for the intended payment, but the letter concluded with a statement of the amount due on the mortgage. The Appellants thereafter made no further tender and did not pay any money into Court:

Held—*That the agreement fixing the annual allowance at Rs. 4,000 for payment of charges was not open to objection as a collateral advantage which the mortgagee was not entitled to exact.*

That there was no justification for the refusal of the tender of Rs. 15,000 made on 10th February 1894, the delay of nine days being immaterial.

That the view expressed in the mortgagee's reply to the Appellants' letter of 17th January 1899 that the whole of the estate had vested in him was erroneous being based upon invalid provisions in the deed, but it did not follow that the reply meant that if in fact tender had been made of the whole of the amount due the mortgagee would not have accepted it. The reply therefore did not constitute such a clear release to the mortgagor of his obligation to tender the money as is required to justify the latter in not having presented it for receipt.

HUNTER *v.* DANIEL (1) *approved.*

This was an appeal from a decree of the High Court at Madras, dated the 21st November 1917, varying a decree of the Subordinate Judge of Vizagapatam, dated the 25th December 1915.

(1) 4 Hare Rep 420 (1845).

The suit was instituted by the mortgagee against the Appellants and others to enforce a mortgage executed by the predecessors-in-title of the present Appellants, who are assignees of the equity of redemption.

The mortgage was executed in March 1891 in favour of the Raja of Tuni to secure repayment of Rs. 1,80,000.

Seven annual instalments of Rs. 10,000 were agreed upon for repayment of the mortgage debt from February 1892-1898, the balance of the principal and the whole of the interest to be payable in February 1899.

The mortgagee granted to the mortgagor a *mustajari* lease for two years and the mortgage provided that :—

"If during our said *mustajari* period of two years, the amount of any instalment is not paid but remains due to any extent, we shall deliver the estate and other landed property to you without any objection so that you may, at the end of the said period of two years, take possession of the estate immediately and manage the same by leasing it out, either on *ryotwari* or *mustajari* system."

The material provisions of the mortgage and the facts leading up to the suit are summarised in the judgment of the Board. The mortgagor failed to pay the second instalment due in February 1893 and retained possession at the end of his lease, whereupon the mortgagee obtained a decree and entered into possession in July 1894.

The main questions for consideration in the appeal were (1) whether the first Respondent was entitled to interest on the mortgage amount subsequent to the 1st February 1899, the date fixed for payment of the mortgage amount, (2) whether the first Respondent was entitled to interest on the instalment of Rs. 10,000 due

in February 1894, subsequent to the 10th February 1894, the date on which the amount was tendered and refused, and (3) whether the first Respondent was entitled to debit Rs. 4,000 for establishment charges every year or only the actual amounts spent for the purpose.

The Subordinate Judge held that interest was payable subsequent to February 1899, that the tender of Rs. 10,000 for the instalment of February 1894 was made on the 10th instead of the 1st and that the mortgagee was entitled to refuse it, but in his view the Plaintiff was entitled to debit only the actual amounts spent in establishment charges.

The High Court (Abdur Rahim and Oldfield, JJ.) held that the mere expression of willingness on the part of a debtor to pay a debt cannot amount to a tender in law so as to bring the case within sec. 84 of the Transfer of Property Act.

Both Courts in India held that the offer to redeem was not *bonâ fide* as the mortgagors or their assignees were not in a position to pay the sum due.

Messrs. Upjohn, K. C., Narasimham and *C. V. Rao* for the Appellants.—There was an undoubted offer in 1899 by the Appellants to redeem and this was refused by the mortgagee. It then became unnecessary for the mortgagor either to tender or deposit in Court and sec. 84 of the Transfer of Property Act is inapplicable.

By his action the mortgagee waived his right to a tender of the money and it is outside the scope of the enquiry to find whether the mortgagor was or was not actually in a position to pay the mortgage debt.

The provision as to Rs. 4,000 establishment charges was a clog on the equity of redemption.

Sec. 60, Transfer of Property Act.

Kreglinger v. *New Patagonia Co.* (2).

Messrs. DeGruyther, K. C. and *Kenworthy Brown* for the Respondents.—There was never any genuine offer to pay off the mortgage-debt. The mortgagor was neither able nor willing to pay it off and so the High Court have found.

These conditions cannot be waived. The Appellants' contention really amounts to this that the writing of a letter such as the mortgagor wrote places him in a better position than if he had actually tendered and paid the money into Court.

Mr. Upjohn, K. C. in reply referred to *Cort* v. *Ambergate Railway Co.* (3).

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Three questions are raised upon this appeal. They all arise out of the rights created under a mortgage deed which was executed on the 2nd March 1891, in favour of the first Plaintiff in the suit by the first Defendant. The Appellants are assignees of the equity of redemption of that mortgage, and claim that in the accounts taken to determine the true amount due under the deed three mistakes have been made adverse to their interests. The mortgage deed itself is in a peculiar form. It is a mortgage with possession to secure the repayment of Rs. 180,000 with interest at the rate of R. 1 per cent. per month; the principal of the debt is to be repaid by sums of Rs. 10,000 payable year after year, beginning on the 1st February 1892, down to the 1st February 1898, and on the 1st February 1899, the entire balance of the debt and the interest is to be paid. These instalments are protected not merely by the security of the mortgaged property but also by an express

(2) [1914] A. C. 25, 61.
(3) 17 Q. B. 127 (1851).

agreement in these terms: "We shall pay to you at Tuni, the principal according to the aforesaid instalments and the whole of the interest upon the entire debt calculated with reference to the instalments, along with the last instalment." There was a further agreement in the deed by which certain charges which would be incurred by the mortgagee, when in possession, were fixed at the sum of Rs. 4,000 per annum. They are specified as being the usual earthwork repairs annually done to canals, etc., expenses on account of the village headmen, service inams of village headmen, village deities, contingent charges, and other business expenses. The deed also contained two further material provisions. The first that notwithstanding the arrangement by which the mortgagee was to be put into possession a lease was to be granted by him to the mortgagor for a period of two years, and the second that if the provisions of the mortgage deed as to redelivery of the estate to the mortgagee by the mortgagor at the expiration of the lease for two years were not carried out, the mortgaged estate should at the end of the time stand sold to the mortgagee for the entire amount due inclusive of the balance of principal and interest, and further that the mortgagor should not sell any portion of the estate to anybody except the mortgagee. Arrangements were also made by which the mortgagee was to pay all the necessary *peishcush* or quit rent or land cess, and a provision that if that should be raised there should be a further right on his part to recover the money from the mortgagor with interest as therein mentioned. What happened consequent upon the execution of the deed was this: The lease for two years was duly granted to the mortgagor, but at the expiration of the term he did not pay the second instalment due on February 1, 1893, nor did he redeliver possession to the mortgagee. The mortgagee accordingly instituted a suit for recovery and possession and for the amount of the second instalment. To meet this a sum of Rs. 15,000 was paid into Court by the Appellants on behalf of the mortgagor, but possession was not delivered up by him, and he was in fact in possession at the time when the third instalment became due.

Shortly before this date, namely on the 16th January 1894, the mortgagor executed a sale deed for Rs. 160,000 for some of the mortgaged properties, and a mortgage for Rs. 60,000 for the others in favour of the Appellants, and requested them to pay to the mortgagee Rs. 205,000, being the total Rs. 220,000 after deducting the Rs. 15,000 already paid into Court. The Appellants accordingly, on the 10th February 1894, tendered the Rs. 10,000, due on the 1st February to the mortgagee, who refused to accept the money upon the ground that there existed at that date a breach of the bargain made by the mortgagor as to redelivery of possession, and that consequently his acceptance might prejudice his rights. Their Lordships think that this is a mistaken view of the rights which the mortgagee possessed. The agreement for the payment of the instalments of the purchase-money is in fact the main obligation of the mortgage deed, and the whole of the other provisions, however extensive and far-reaching they may be, are really nothing but the security to enforce this obligation. The acceptance of Rs. 10,000 due on the 1st February 1894 would not have prejudiced the mortgagee in any way in the claim he had then pending against the mortgagor for possession; and their lordships think there was consequently no justifica-

tion for his refusal of the tender. The fact that the tender was nine days after the due date is of course immaterial; accordingly, in taking the accounts, interest on the sum of Rs. 10,000 according to the terms of the deed must cease to be charged against the mortgagor from the 10th February 1894.

On the 13th July 1894, the mortgagee obtained a decree for possession, and entered in pursuance of its terms, so that the agreement for the annual allowance of Rs. 4,000 for the particular payments to which reference has been made became operative, and the next question is as to the validity of that agreement. It is urged on behalf of the Appellants that it gives the mortgagee a collateral advantage under the deed which he is not entitled to exact, but their Lordships think that that contention cannot be supported. The truth is that it is a fixed payment to be made in respect of a variable charge, and though it may be assumed that the amount was not fixed so as to prejudice the mortgagee, there is nothing to prevent the mortgagor and mortgagee entering into a bargain as to what sum should be charged annually for expenses that may or may not exceed the agreed figure. They therefore think the objection to the Rs. 4,000 cannot be maintained.

There remains what is after all the most serious part of this appeal, and it is the claim that in February 1899, the Appellants were willing and offered to make a tender of the whole of the outstanding principal and interest, but that the mortgagee so acted as to excuse the actual tender being made, and that in consequence there is no longer any right on the part of the mortgagee to debit interest in the mortgage accounts from that date. This controversy depends upon the true meaning to be placed on two important letters. The first is written on the 17th January 1899, by the Appellants to the mortgagee. It refers to the mortgage and the assignments, and points out that the balance of the monies payable by them to the mortgagor in respect of such transaction—which appear to be stated erroneously at Rs. 2,25,000 instead of Rs, 205,000—had not been paid over but left with them for satisfaction of the mortgage debt, and concludes in this way: "It is requested that, on receipt of this letter, the amount becoming due to you by that date from the estate may be made known at once. Soon after receipt of your letter, we are ready to send respectable men with money and get the repayment of the amount of your debt made in full in the forenoon on the due date. Your reply is requested." Both the Subordinate Judge and the High Court Judges, before whom this case has been heard, have come to the conclusion that that was not a *bonâ fide* offer on the part of the Appellants. They say they had not at that time either the money or the control of the money that would have enabled them to meet the tender of the large amount that was due upon the mortgage deed. Their Lordships think, for reasons that will presently appear, that it is not necessary to consider that question. It is very difficult indeed to say whether or no a man will be able to have control of money at a future date, and the real question to be determined here is not whether that money was within the power of the Appellants but whether the mortgagee in the letter he sent in answer to the offer definitely and unequivocally refused to accept the money were it tendered. Before reading this reply it is well to bear in mind what has been stated by Vice-Chancellor Wigram in the case

of *Hunter* v. *Daniel* (1) as to the true position in such a case. He there says: "The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money." Their Lordships think that that is a true and accurate expression of the law, and the question, therefore, is whether the answer that was sent on behalf of the mortgagee amounted to a clear refusal to accept the money. The letter is dated the 28th February 1899, and is in part in the form of an argument, and the substantial part is as set out in the record in these words:—"As in the face of the suit instituted by us of late in the District Court of Vizagapatam against the proprietor for possession of the entire proprietary estate of Uratla held by us under the terms of our possessory mortgage deed, you have purchased from the proprietor, as you have stated, during the pendency of that suit and subsequent thereto, with full knowledge of the conditions, etc., of our possessory mortgage deed, and yet in contravention of the same and without necessity, a considerable portion of the estate at different times for Rs. 2,40,000 in favour of yourself and others, there is no need for us to pay any of those amounts you state under that head, inasmuch as the right to purchase that estate for that sale price has vested in us.".

The explanation of the earlier part of that paragraph is due to the provisions contained in the deed which prohibit, so far as they had the power, just such a transaction as that which had taken place. The latter part of the letter is unfortunately an obvious mistake or misprint. Either it should run, "there is no need for us to receive," or "there is no need for you to pay us any of those amounts you state under that head." The better reading in favour of the Appellants is the latter, "there is no need for you to pay any of those amounts you state under that head inasmuch as the right to purchase that estate for the sale price is vested in us." Accepting this as the true reading, the meaning of the letter in their Lordships' mind is this, that the rights which the mortgagee had conferred upon him have vested in him the whole of the estate, and that consequently the mortgage is at an end. It was an erroneous view based upon invalid provisions in the deed, but it by no means followed from that that if in fact the tender had been made of the whole of the principal money and interest which was due up to that date, the mortgagee would not have accepted it, and it is remarkable that in the latter part of the letter he continues in these words: "In reply to the letter, dated 14th ultimo, from the Proprietor about the balance of demand after payments made, on the Proprietary Estate of Kota Uratla, we informed him on the 27th instant, that the amount of debt due under our said deed was Rs. 3,19,946-2-2." Now upon the view that this letter was intended to excuse the mortgagor from making any tender at all under the deed, there could have been no possible reason for stating what the amount was that was to be paid. The fact is that this letter contains a reason why the tender is unnecessary, but the reason was wrong because the right to buy according to the terms which the mortgage deed contained was a right which was not enforceable in law. But it is on that hypothesis that they say there is no need for payment to be made. If this were not accepted as

(1) 4 Hare's Rep. 420 (1845).

correct, there is nothing to relieve the Appellants from making the tender. Their Lordships are unable to construe the letter as equivalent to any such clear release to the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt. From, that time to this nothing has in fact been tendered. No money has been paid into Court, and no effort on the part of the mortgagor has been made to satisfy his obligations under the deed. Their Lordships, therefore, think that the Appellant must fail upon that part of his appeal. It follows, therefore, that the appeal succeeds, but succeeds only to a very limited extent, but though it is small in relation to the part in respect of which he fails, he does obtain some substantial relief which could not have been obtained without coming before this Board, and their Lordships therefore think, having considered all the circumstances, that he ought to have one-half of the taxed costs of the appeal, and they will humbly advise His Majesty accordingly.

Solicitor: *Mr. Ed. Delgado* for the Appellants.

Solicitor: *Mr. Douglas Grant* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[Appeal from the Chief Court of Lower Burma.]

Lord Phillimore.
Mr. Ameer Ali.
Sir Lawrence Jenkins.
Lord Salvesen.
1922,
Heard, 14 and 16, November.
Judgment, 16, November.

A. E. Salayjee, **Appellant,**
v.
Fatima Bi Bi, **Respondent.**

Mahomedan law—Will—Bequest to heir—Consent of heirs—Consent of some, effect of—Minor heirs cannot consent.

The Mahomedan law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share.

There can be no question of consent as regards minor heirs.

This was an appeal from a judgment and decree of the Chief Court, Lower Burma, dated the 9th June 1919, which varied a decree of the said Chief Court in its Original Jurisdiction, dated the 3rd July 1918

The parties to the dispute are Sunni Mahomedans. The Appellant is the son and one of the heirs and sole executor of the Will of Ebrahim Salayjee Nanabarva who died at Variar in Baroda State on the 25th February 1907.

The Respondent is a daughter and one of the heirs of the testator.

The testator by his Will appointed the Appellant sole executor and trustee and desired he should sell all his properties and out of the proceeds set apart ¼th share instead of ⅓rd or "suls" and after certain specific bequests authorised the Appellant to dispose of the remainder in such manner as he should think proper, and the testator directed that neither his

A. E. SALAYJEE v. FATIMA BI BI.

heirs nor any person should be entitled to take any account from the executor regarding such disposal, and he authorised the Appellant to charge a commission of 10 per cent. on cash coming to his hands and on the proceeds of all his properties sold.

The suit was instituted by the Respondent for an account and for a declaration that the provisions of the Will which authorised the Appellant to dispose of ¼th share in the estate in such manner as he should think proper and to charge commission were inoperative and void, and that such undisposed of portion of the estate formed part of the estate of the testator divisible among the heirs according to their respective shares. The Appellant contended that the provisions of the Will were valid and alleged the consent of the Respondent to the carrying out of the disputed provisions.

The trial Court (Young, J.) held the disputed provisions to be void but held also that the Respondent had impliedly consented to them, that sec. 42 of the Specific Relief Act made the granting a declaration discretionary and that there were no circumstances to justify such a declaration. On appeal the Chief Court decided that there were no circumstances from which an implied consent on the part of the Respondent could be inferred and reversed the decree of the lower Court on that point.

Messrs. L. DeGruyther, K. C. and *Parikh* for the Appellant contended that the Appellate Court should not have interfered with the discretion exercised by the trial Judge and that the evidence established the consent of the Respondent to the disputed provisions of the Will.

Messrs. A. M. Dunne, K. C. and *Gerard S. Sanders* for the Respondent were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The dispute in this case arises in the course of the administration of the estate of a wealthy Mahomedan, who died on the 25th February 1907, having left a Will dated the 15th June 1903, which was admitted to probate on the 18th March 1908. By that Will he left his only son, the Defendant in this suit and the present Appellant, his executor, and he gave him certain powers and professed to entitle him to a commission of 10 per cent. on the proceeds of the sale of all his estate. That provision is twice over expressed, but substantially the effect is the same on the two occasions. He also, instead of reserving, as by Mahomedan law he could, one-third of his estate for his general disposition, reserved somewhat less—one-fourth, and with regard to that fourth he directed the executor, whom he described also as "executor and trustee" to pay certain charitable legacies amounting to Rs. 13,700, directing at the same time that none of his heirs or any other persons should be entitled to have any right to claim an account of his disbursements from the executor, and, with regard to the balance of the fourth share he gave it to the executor to spend or to dispose of in such manner as to him should seem fit and proper. This has been treated in both Courts as a legacy of the residue of the fourth share to the Defendant, the present Appellant.

There were various heirs, widows and children, by various families. The Plaintiff and Respondent now, a widow lady, was the eldest sister and of the same full blood as the Defendant, Appellant.

In 1917 she instituted this suit alleging that the two provisions for the benefit of her brother, namely, that giving him 10 per cent., and that giving him the balance

A. E. SALAYJEE v. FATIMA BI BI.

of the fourth share, were contrary to Mahomedan law. It appeared in the course of the suit, if it had not appeared before, that several of the heirs had agreed nevertheless to the Appellant retaining his interest, as, according to Mahomedan law, they could, but there remained the Plaintiff, and there remained three minor children, and the contest in the suit was with regard to the Plaintiff. The Mahomedan law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share, and, therefore, when it appeared in the course of the suit that the other heirs had agreed, the only contest was as regards the Plaintiff and the three minors. As regards the three minors there could be no question of their consent and the dispute therefore turned on the question whether the Plaintiff had consented or not.

Now the burden of proving that consent was on the Appellant, the Defendant in the suit. Both parties tendered oral evidence, each putting his or her case more strongly than the trial Judge thought was correct; the Plaintiff averring that she had protested from the first and had been put off by a promise that she should have her proper share (this the trial Judge did not accept); the Defendant averring on the contrary that he had made quite clear to the Plaintiff what the provisions of the Will were, and the Plaintiff, regarding him as the only male in the house, had expressed not only her consent but her pleasure that he should have this benefit. With regard to that the trial Judge found that there was oath against oath; that there was no corroboration, the only other person present being the husband of the Plaintiff, who was by this time dead, and, in the end, he was not satisfied that this consent was proved. He thereupon said that there was no direct evidence of explicit consent and the question turned upon whether there was implied consent, and the only two grounds of implied consent that he relied upon were delay and a certain transaction with regard to a loan and the interest upon it. On those materials he found in favour of the Defendant that there was an implied consent.

The Plaintiff appealed to the Chief Court, and the Chief Court reversing the decision of the primary Judge, found that there was not sufficient evidence of an implied consent, and the learned Judges agreed with the trial Judge that there was no proof of an explicit consent.

Thereupon this appeal was brought; but, in their Lordships' opinion, unsuccessfully. The burden of proof was, as already stated, upon the Defendant, and the only two elements to be considered were the question of time and the question of the loan. As to the first the delay is explained because the estate was not in fact realized until after the suit—by general consent only realized in parts from time to time—and there was no such realization and no such stating of accounts, even temporary or provisional stating of accounts, as could be suggested to have shown to the Plaintiff that the estate was being divided upon the footing that the Defendant was to be entitled to retain these advantages, for both Courts decided that both these advantages were legacies which had to be justified.

With regard to the loan it appears that in 1908 the lady's husband wanted some money to release a mortgage on his house, and the lady, not unnaturally, went to her brother, who was collecting money from time to time and asked for some money—it was not a very large sum—to enable her to pay off this mortgage. He thereupon appears to have said that he had no

money, but as the lady was pressing him and he probably felt that he was an accounting party, he offered to borrow it, but said that she would have to be surety for the loan. She was prepared to do this but demurred to paying interest. Up to that point the parties are in substantial agreement. He did borrow money; she did, jointly with him, execute the promissory note to a Chetty, and she took from her brother a letter promising her that she should not have to pay the interest. Now what was the reason of this transaction? It is suggested for the Defendant that she said to him that he was taking great advantages under their father's Will—more than the Mahomedan law allows, and therefore the least he could do was to pay this interest. She denies this and says that she was asking for some of the money which was coming to her, and therefore it was quite right that he should relieve her from paying this interest. Now if it had appeared that he had really relieved her from paying the interest there would be some substance in the contention, although their Lordships do not say there would be very much substance in it then. But, it appears that he has now debited this lady, as part of her share, with the interest on this loan. After that it becomes of less importance to consider this transaction, but, even apart from that, the transaction is far from sufficient by itself to support an implied consent. That is the view the Chief Court took, and, their Lordships think, quite rightly, and, therefore, they will humbly recommend His Majesty that this appeal should be dismissed with costs.

Solicitors: *Messrs. Mount, Sterry & Wheeler* for the Appellant.

Solicitors: *Messrs. Bramall & White* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

IN

APPEAL FROM ORIGINAL DECREE

No. 118 OF 1922.

SANDERSON, C. J.,
MOOKERJEE, J.
CHATTERJEA, J.
1923,
11 and 12, Jul

RAGHUMULL KHANDELWAL
v.
THE OFFICIAL ASSIGNEE OF CALCUTTA
and ors.

Partnership agreement—Receipt of commission, whether amounts to receipt of share of profits—Indian Contract Act (IX of 1872), sec. 239—Principles of interpretation of statutes.

In a document described as a memorandum of co-partnership agreement between R, D. E, H and D, it was provided that D. E would be in charge of the firm and devote his whole time in the business of the firm and would get Rs. 500 per month over and above 10 per cent. as commission on the net profits of the firm but that he would get no share in the profits of the firm, and that R, H and D would get respectively 12, 2-6 and 1-6 annas shares in the profits of the firm:

Held, *in a suit for dissolution of partnership, that the commission which was to be received by D. E was a share of profits within the meaning of sec. 239 of the Indian Contract Act and that, having regard to the agreement as a whole, D. E was a partner of the firm:*

Principles regulating interpretation of statutes discussed.

VAGLIANO BROTHERS v. THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND (1) *referred to.*

The facts of the case are as follows:—

In June 1919, a business was commenced under the name of Dorian Evans and Co. on terms and conditions set

(1) L. R. [1891] A. C. 107 at p. 144.

out in a memorandum of co-partnership agreement, the relevant portions of which are as follows :—

Memorandum of co-partnership agreement made this day 15th of June in the Christian year one thousand nine hundred and nineteen among Babu Lala Raghumull, son of Budh Sing by caste Khandelwal, by profession Trader, resident at 132, Harrison Road, in the town of Calcutta and Mr. A. H. C. Dorian Evans, son of late Mr. Dorian Evans by caste Christian, by profession Mining Engineer, resident at Jemshedpur and H. C. Ghosh, son of D. N. Ghosh of Bantrah in the District of Howrah by profession Trader and Babu D. N. Sircar, son of late T. N. Sircar by caste Kayastha, by profession Trader, resident at Bantrah in the District of Howrah. Whereas the said persons are desirous of starting a partnership business at . . . . . town of Calcutta, upon (*sic*) on terms and conditions hereinafter contained, *viz.* :—

* * * * *

2. That the capital of the partnership business will be Rs. 1,00,000 and will be supplied by the said Babu Lala Raghumull alone for which he will get from the firm interest at the rate of 6 per cent. per annum as the capital supplied by him over and above his share fixed below.

* * * * *

5. That the said Mr. Dorian Evans will be in charge of the firm and devote his whole time in the business of the firm and will get Rs. 500 per month as his remuneration over and above 10 per cent. as commission on the net profit of the business exclusive of all the cost expense for payment of rent, taxes, municipal license, salaries of servants and all other charges and expenses to be incurred in carrying on partnership business but he will get no shares of profit of the firm.

6. That the Babu Lala Raghumull will get 12 (twelve) annas shares and H. C. Ghosh will get 2-6 annas shares and Babu D. N. Sircar will get 1-6 annas shares in the profits of the said business.

7. That Mr. Dorian Evans shall remain in charge of the firm, will secure orders and devote all his time to improve the business with all his effort and H. C. Ghosh will remain whole time in the firm and supervise sold department of the firm.

8. That the usual books of accounts of the firm shall be kept properly posted up and shall not be removed from the place of business without the consent of the partners. Each partner shall have free access to them all times and shall be at liberty to make such extract therefrom as he may think fit.

9. That during the continuance of the partnership H. C. Ghosh will draw out of the partnership account the monthly sum of Rs. 120 and Babu D. N. Sircar will draw out after quarterly closing the amount of his profit, but if and when it shall appear that either partner has drawn any sum in excess of his share of the profit he shall forthwith repay such excess to the partnership account.

* * * * *

11. That Mr. Dorian Evans and H. C. Ghosh shall not directly or indirectly engage in any other business.

* * * * *

14. That the general management of the firm will entirely remain in the hands of said Mr. Dorian Evans and H. C. Ghosh, they will be responsible for keeping proper accounts and they will prepare a quarterly balance sheet and submit the same to Babu Lala Raghumull.

15. That the appointment and discharge of servants of the firm remained with said Mr. Dorian Evans and H. C. Ghosh, they will select fit and proper man as servant of the firm.

16. About the management and establishment cost, if there be difference of opinion among the partners, the opinion of the majority will prevail and if Babu Lala Raghumull will not be available on such occasion the opinion of the majority of those other partners will prevail.

19. If the firm suffer any loss Mr. Dorian Evans will get his monthly remuneration regularly but he will not get any commission and the other partners will be liable for the said loss according to their shares. Each partner shall be just and faithful to the capitalist partner Babu Lala Raghumull and to one another at all times, give to the others full information and truthful explanation of all matters relative to affairs of the partnership and afford every assistance in his power to carry on the business for mutual advance.

* * * * *

22. The said Mr. Dorian Evans and H. C. Ghosh shall diligently attend to the business and devote their whole time and attention to the business.

23. If the said Mr. Dorian Evans and H. C. Ghosh

(a) commit any breach of any of the provisions of these presents and are unable to indemnify such loss within three months from date of such breach, or

(b) commit any act of bankruptcy, or

(c) become physically unfit to attend to the business, or

(d) commit any criminal offence, or

(e) do or suffer any act which would be a ground for dissolution of the partnership by the Court—

then and in such cases the said Babu Lala Raghumull may within three calendar months after becoming aware thereof by notice in writing determine the partnership.

* * * * *

In January 1921, R filed a suit for dissolution of partnership. Dorian Evans contended that he was not a partner inasmuch as he had no share in the profits of the business. Greaves, J., who tried the suit decided against this contention and gave a decree for dissolution of partnership, etc. Dorian Evans preferred an appeal which was heard by Woodroffe and Richardson, JJ., who differed. The result was that the senior Judge's (Woodroffe, J.) decision prevailed who held that Dorian Evans was not a partner. The present appeal was preferred by Babu Lala Raghumull against this decision. Dorian Evans was adjudicated insolvent during the pendency of the appeal.

The JUDGMENT OF WOODROFFE, J., was as follows :—

The issue in this case is whether the Appellant is a partner of a firm of which the Plaintiff-Respondent and the Respondents H. C. Ghosh and D. N. Sircar were admittedly partners. He says he was not, but was a manager who got Rs. 500 per month and 10 per cent. commission calculated on the net profits of the business as his remuneration for managing the firm. The learned Judge has held that he is a partner and has passed a decree which both sides admit is not a good decree, for it makes no provision for any share of profits going to the Defendant who is found by the judgment to be a partner. I will exclude from consideration a letter by the contesting Respondent Raghumull who now says that the Appellant is a partner but which letter stated that he, Raghumull, was the owner of the business and the Appellant was only to have a monthly allowance, apparently as remuneration of his management.

It may be admitted at once that the memorandum of agreement of the partnership contained provisions which can be referred to, to show that the Appellant is, as the Respondent contends, a partner. The question is whether they can be explained, or if not, whether they outweighed the considerations to which I will refer. Thus the document is called a memorandum of partnership agreement. The parties to the document are said to be desirous of starting a partnership business and, in cl. 12 the Appellant and H. C. Ghosh are directly called managing partners and cl. 23 contemplates an act by the Appellant which might be a ground for dissolution of partnership by the Court. I may here say that callin, a man partner or a man calling himself a partner does not make him such. It must be seen whether the provisions under which the parties come together do constitute in law and fact a partnership. Apart from this, the document being loosely drawn it is possible to construe these references to a partnership in such a way as gives effect to them without affecting the Appellant's contention. Thus the memorandum was in fact a co-partnership agreement as regards three of the parties to it. All of them again may have been desirous of starting a partnership business in which their respective positions were to be those specified in the deed, without referring for the moment to the question whether the position assigned to the Appellant amounted to a partnership so far as he was concerned. The other two points to which I have referred have for whatever they are worth greater weight. Reliance is also placed on the fact that the name of the Appellant was used for the firm and he was given considerable powers. But this may mean that the Respondent Lala Raghumull who was supplying the capital was desirous of having the advantage of an English name for the firm and wisely enough left the management to a man who presumably knew the business which was that of the partnership.

The ground upon which I would decide this appeal is this: A person may share in profits and yet not be a partner. But a person cannot be a partner without sharing in profits. If he does not share in profits he may be called a partner, but is not in law or fact such. The question in short is, was the Appellant to have a share in the profits. This is the whole question in short which arises in this appeal.

To me it seems clear on a construction of the document that he was neither to share in the profits nor to share in the loss. As regards the profits the 5th paragraph of the agreement says: "The said Mr. Dorian Evans will be in charge of the firm and devote his whole time in the business of the firm and will get Rs. 500 per month as remuneration over and above 10 per cent. as commission on the net profit of the business exclusive of all the cost expense for payment of rent, taxes, municipal license, salaries of servants and all other charges and expenses to be incurred in carrying on partnership business but he will get no shares of profit of the firm." After having stated expressly that he will have no share in the profits of the firm the next paragraph proceeds to allocate to the other three persons the shares which they are to get, and states that "Babu Lala Raghumull will get 12 annas share, H. C. Ghosh will get 2-6 annas share and Babu D. N. Sircar will get 1-6 annas share in the profits of the said business." This exhausts the whole 16 annas of profits.

As regards loss para. 19 says: "If the

firm suffer any loss Mr. Dorian Evans will get his monthly remuneration regularly, but he will not get any commission and the other partners will be liable for the said loss according to their shares."

Apparently to meet the case that the Appellant is not a partner the plaint alleges in para. 1 that the Appellant was to get besides remuneration at the rate of Rs. 500 a month, 10 per cent. of the profit and loss and the balance of 90 per cent. of the profit and loss was to be divided between and borne by the Plaintiff and the Defendants Hari Charan Ghosh and Dina Nath Sircar according to the shares mentioned in para. 6 of the agreement to which I have referred. But this is not what the agreement says. The agreement does not say that the Appellant was to have 10 per cent. of the profit and loss, but 10 per cent. was given to him as a commission which was calculated on the amount of the net profit, which is a different thing. On the contrary the agreement expressly says that he is to have no share of the profit of the firm and is not to be liable for any loss. I am unable to agree that a commission, the amount of which is calculated on the net profits, is the same as a share of the profits. Such a provision is a well-known one and acted upon here, namely, the payment to persons as managers of a fixed salary together with a commission calculated on the net profits. This I think is done without it being supposed that the recipient of the commission thereby becomes a partner. Moreover, as I have said, cl. 5 in express terms states that the Appellant is not to get any share of the profits of the firm, and to make it still more clear, cl. 6 which does set out the shares of the profits altogether excludes the Appellant.

This point appears to me to have such force as to justify me in differing from the opinion of my learned brother in this matter—a course which I might otherwise have hesitated to take, seeing that his opinion is also that of the learned Judge whose judgment is under appeal. As in my opinion the Appellant was not to share in the profit or loss it was not a partnership and this is what he contends. In my opinion the appeal ought to be allowed with costs and the suit as regards the Appellant should be dismissed with costs.

The JUDGMENT OF RICHARDSON, J., was as follows :—

The question whether the Appellant Dorian Evans is a partner in the firm of Dorian Evans & Co. turns on the terms of a written agreement, dated the 15th June 1919. This document describes itself as a "memorandum of co-partnership agreement" among four persons, the Plaintiff, the Appellant, and the other two Defendants in the suit H. C. Ghosh and D. N. Sircar (not represented before us). This general description of the nature of the agreement is followed by the words: "Whereas the said persons are desirous of entering into a partnership business upon (*sic*) on terms and conditions hereinafter contained, *viz.*," the sentence such as it is, is never grammatically finished but though the English may be imperfect and the language rough, *primâ facie* no words could more clearly and unequivocally express the intention of the four persons to become partners on the terms and conditions which are then set out in separate clauses numbered from 1 to 23.

By cl. 1 the firm's name was to be Messrs. Dorian Evans & Co.

By cl. 2 the capital of the firm Rs. 1,00,000 was to be supplied by the Plaintiff who in addition to his share of the profits was to receive interest on this

amount at the rate of 6 per cent. per annum.

By cl. 3 the firm was to continue for a period of five years commencing from the 1st July 1919.

Cl. 4 provides: "That the partnership business shall be that of hardware but partners may include other business with their mutual consent."

Cls. 5 and 6 upon which the Appellant takes his stand are as follows :—

"5. That the said Mr. Dorian Evans will be in charge of the firm and devote his whole time in the business of the firm and will get Rs. 500 per month as his remuneration over and above 10 per cent. as commission on the net profit of the business exclusive of all the cost expense for payment of rent, taxes, municipal license, salaries of servants and all other charges and expenses to be incurred in carrying on partnership business but he will get no shares of profit of the firm.

6. That the Babu Lala Raghumull will get 12 (twelve) annas shares and H. C. Ghosh will get 2-6 annas shares and Babu D. N. Sircar will get 1-6 annas shares in the profits of the said business."

These two clauses should be read with the first sentence of cl. 19 which runs :—

"If the firm suffer any loss, Mr. Dorian Evans will get his monthly remuneration regularly but he will not get any commission and the other partners will be liable for the said loss according to their shares."

Cl. 7 like many others is badly expressed but quite intelligible. Dorian Evans is to remain in charge of the firm, to devote all his time to improving the business with all his effort and H. C. Ghosh is to devote his whole time to the firm and to supervise the sale department.

In cl. 12 Dorian Evans and H. C. Ghosh are described as "managing partners."

By cl. 14, the general management of the firm is to remain entirely in the hands of Dorian Evans and H. C. Ghosh.

Cl. 15 empowers the same two persons to appoint and to discharge the servants of the firm.

Cl. 20 is also of some importance on the point of control. It reads :—

"If any big job of value of above Rs. 25,000 (twenty-five thousand) is taken in hand all the partners should be consulted and the premission of the capitalist partner Lala Raghumull be taken."

Cl. 23 is in the nature of a penal clause. If Dorian Evans and H. C. Ghosh do certain things, and *inter alia*, if they "do or suffer any act which would be ground for dissolution of the partnership by the Court," then the Plaintiff as capitalist partner, "may within three calendar months after becoming aware thereof by notice in writing determine the partnership."

My learned brother's view makes me diffident of my own. Otherwise I should have thought that under this deed the Appellant was undoubtedly the partner of the Plaintiff and the other two Defendants.

It is said that cl. 5 of the agreement expressly states that the Appellant "will get no shares of profit of the firm." In my opinion that can only mean in the context that he is to get no share other than the share already provided for, namely, a salary of Rs. 500 a month and a commission of 10 per cent. on the net profits. The first sentence of cl. 19 supports this construction. If the Appellant was not a partner but a mere servant or managing agent, what was the necessity of providing that if the firm should suffer loss

he should still "get his monthly remuneration regularly." The view that the Appellant was a partner is also supported by the powers of control and management conferred on him and H. C. Ghosh by such clauses as 4, 12, 14, 15 and 20. The Appellant was to have at least an equal voice in the management with H. C. Ghosh.

No doubt if cls. 5 and 6 are abstracted from the rest of the document, I should agree that they point to the Appellant being a mere servant or manager remunerated by salary and by a commission on the profits.

But the intention of the parties must be gathered from the agreement as a whole. The agreement as a whole, as I read it, plainly manifests the intention of the parties to it, including the Appellant, to enter into partnership with one another. The Appellant in my opinion became a partner unless it can be said that the receipt of a fixed salary or of a commission on the net profits can never in law amount to sharing in the profits within the meaning of sec. 239 of the Contract Act which defines "partnership" as the relation subsisting between persons "who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them."

A commission of 10 per cent. on the net profits is a fixed share of those profits and the argument for the Appellant seems merely to resuscitate a distinction which has been abandoned with the rule that any "participation in the net profits of a business made the participant liable as a partner to third persons." In the leading case of *Mollwo, March & ors.* v. *The Court of Wards* (2), the Privy Council stigmatized this rule as "evidently an arbitrary one." Their Lordships continue:—"While it was supposed to prevail much hardship arose from its application, and a distinction, equally arbitrary was established between a right to participate in profits generally as such, and a right to payment by way of salary or commission in proportion (to use the words of Lord Eldon) 'to a given quantum of the profits'."

Further on their Lordships say: —

"This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it."

Their Lordships go on to point out that the necessity of resorting to these fine distinctions had been greatly lessened since the rule or presumption itself had lost the rigid character it was originally supposed to possess and the conclusion of the matter is thus stated:—

"It appears to be now established that a right to participate in the profits of trade is a strong test of partnership and that there may be cases when from such participation alone, it may, as a presumption, not of law but of fact, be inferred; yet whether that relation does or does not exist, must depend on the real intention and contract of the parties."

It is true that these observations were made with reference to the liability of an alleged partner to third persons but the reasoning has its application, and has in fact been applied, where the question

(2) L. R. I. A. Sup. Vol. 86; 18 W. R. 384; 10 B. L. R. 312 (1872).

arises between the parties to the agreement which is alleged to constitute a partnership.

The English law on the topic as it stood after the leading case (an Indian case be it noted) was codified in cl. (3) of sec. 2 of the Partnership Act of 1890 (53 and 54, Vic., c. 39). The clause lays down the general rule and then applies it to particular cases dealt with in sub-clauses. The general rule and the relevant sub-cl. (*b*) read as follows:—

"The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent or varying with the profits of a business does not of itself make him a partner in the business and in particular.

"(*b*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not *of itself* make the servant or agent a partner in the business or liable as such."

The principle thus accurately expressed holds true as I conceive as much in India and in England. If that is so and if due emphasis be laid on the words "of itself" which I have underlined, then upon such an agreement as that before us the burden would seem to be on the Appellant to show that he is not a partner rather than on the Plaintiff to show that he is.

I do not, I may add, accept the suggestion of the learned Judge (it was a mere suggestion and not the ground of his judgment) that the Appellant was in some way estopped from contending that as between himself and the other parties to the agreement he was not a partner. If two parties agreed together on terms repugnant to and inconsistent with the partnership relation, they would not be partners in the legal sense *inter se*, however, the terms might be loosely or mistakenly used in the agreement and whatever rights third parties might have against either of them on the principle that he had held himself out as a partner. But that is not the present case. Here as it seems to me, regard being had to the agreement as a whole cls. 5 and 6 not only can but ought to be construed in a sense consistent with the partnership relation. In the agreement which came before the Court in *Walker* v. *Hirsch* (3), the word "partner" was not used, nevertheless the question whether Walker was a partner was taken to the Court of Appeal. It was decided that he was not a partner partly on the ground that he had no voice in the management of the business.

Much was made here of the imperfections of language and the want of art in this agreement. But any argument founded on the form of the agreement as opposed to its substance cuts both ways. It may be possible to say that the terms "partner" and "partnership" were loosely used. But the terms are common business terms and it is much more likely that they were used in their usual legal and business sense and that cls. 5 and 6 were badly constructed.

In my opinion these four persons knew what they wanted. They wanted to be partners. In the agreement before us they sufficiently stated their intention to be partners and nothing therein contained is necessarily inconsistent with the Appellant being a partner. I have no doubt that the Appellant would have claimed the rights of a partner if it had been to his advantage to do so. I hold therefore that the Appellant is a partner with all the rights and liabilities of a

(3) L. R. 27 Ch. Div. 460.

partner compatible with the express terms of the agreement, and if the decision rested with me, I should, with great respect to my learned brother, dismiss the appeal with costs.

[Against this judgment there was a further appeal preferred by the Plaintiff under the Letters Patent.]

Sir B. C. Mitter, and *Mr. S. N. Banerjee* for the Appellant.

Messrs. H. D. Bose and *S. K. Chakrabarti* for the Official Assignee (Respondent).

THE JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal by the Plaintiff in the suit, one Raghumull Khandelwal, and the Respondent is the Official Assignee representing the estate of one Dorian Evans, who was the first Defendant in the suit.

The suit was brought against Dorian Evans, Hari Charan Ghosh and Dino Nath Sircar on the allegation that there was a partnership between the Plaintiff and the Defendants: and, the prayers were for a declaration of the shares of the parties in the partnership and for a declaration that the partnership stood dissolved on the 21st of December 1920 and for incidental reliefs.

The sole question which we have to consider is whether Dorian Evans was a member of the partnership, which admittedly existed between the Plaintiff and the other two Defendants and, the question depends upon the construction of the agreement, dated the 15th June 1919.

My learned brother Mr. Justice Greaves who tried this suit came to the conclusion that Dorian Evans was a partner in the firm.

There was an appeal by Dorian Evans to the Appeal Court, and the appeal was heard by my learned brothers Mr. Justice Woodroffe and Mr. Justice Richardson. These two learned Judges differed in their opinion, Mr. Justice Woodroffe holding that Dorian Evans was not a partner and Mr. Justice Richardson holding that he was a partner. The result was that the opinion of Mr. Justice Woodroffe prevailed and the appeal was allowed.

This appeal is under the Letters Patent against the decision of Mr. Justice Woodroffe.

The terms of the agreement have been so fully dealt with in the judgments of both the learned Judges, who heard the appeal, that I do not think it necessary to go through the clauses in detail. It is sufficient for me to say that but for cls. 5 and 6 of the agreement, in my opinion, there could not be the smallest doubt that Dorian Evans was a partner of the firm in question.

The section of the Contract Act which applies to the matter is sec. 239 which runs as follows: "Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them." That is the definition of *partnership* within the meaning of the Contract Act: and, I desire to emphasize in this case, that which I have said on previous occasions, *viz.*, that the principle which was laid down by Lord Herschell in the case of *Vagliano Brothers* v. *The Governor and Company of the Bank of England* (1) should be observed when the Court has to consider the interpretation which ought to be put upon a section such as that now under consideration. The learned Lord said as follows; "I think the proper course is in the first instance to examine the language of the statute, and to ask what is its natural

(1) L. R. [1891] A. C. 107 at p. 144.

meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated." It is on account of the principle, which was thus laid down, that I do not refer to the English cases, which were cited to us during the argument, and I decide this case having regard to the language of sec. 239 of the Contract Act.

It is not disputed that the proper test is to try and to find out from the agreement. reading it as a whole, what was the real intention and contract of the parties. Applying that test and having regard to the natural meaning of the language used in sec. 239, I have no doubt that the intention of the parties to the agreement was that Mr. Evans should be a partner.

Mr. Justice Woodroffe based his decision on the sole ground that in this case there was no agreement that Dorian Evans should share the profits of the business: and I proceed to deal with that point.

Cl. 5 provides that "the said Mr. Dorian Evans will be in charge of the firm and devote his whole time in the business of the firm and will get Rs. 500 per month as his remuneration over and above 10 per cent. as commission on the net profit of the business exclusive of all the cost expense for payment of rent, taxes, municipal license, salaries of servants and all other charges and expenses to be incurred in carrying on partnership business but he will get no shares of profit of the firm."

Cl. 6 provides that "Babu Lala Raghumull will get 12 annas share and H. C. Ghosh will get 2 annas 6 pies share and Babu D. N. Sircar will get 1 anna 6 pies share in the profits of the said business," making altogether the 16 annas.

I agree with my learned brother Mr. Justice Richardson's conclusion in respect of this part of the contract. The learned Judge said: "It is said that cl. 5 of the agreement expressly states that the Appellant 'will get no shares of profit of the firm.' In my opinion that can only mean in the context that he is to get no share other than the share already provided for, namely, a salary of Rs. 500 a month and a commission of 10 per cent. on the net profits." I agree, with respect to my learned brother, with that conclusion except that I should substitute the word "remuneration" for "salary." The learned Judge then proceeded as follows. "The first sentence of cl. 19 supports this construction. If the Appellant was not a partner but a mere servant or managing agent, what was the necessity of providing that if the firm should suffer loss he should still 'get his monthly remuneration regularly'."

In my judgment, it is clear that the 10 per cent. was to be paid to Dorian Evans out of the net profits of the business when they were ascertained, and although the words "as commission" are used in the agreement, the 10 per cent. which was to be received by Mr. Dorian Evans was a share of profits within the meaning of sec. 239 of the Contract Act.

The conclusion, therefore, at which I arrive, is that Dorian Evans by the terms of the agreement had a share in the profits and that reading the agreement as a whole there is overwhelming evidence that the

intention of the parties was that Dorian Evans as well as the other three persons should be partners of the firm.

For these reasons I agree with the conclusion at which my learned brother Mr. Justice Richardson arrived: and, in my opinion, this appeal should be allowed.

The Appellant Raghumull Khandelwal is entitled to his costs in the appeal before Mr. Justice Woodroffe and Mr. Justice Richardson, and also in the appeal before this Court.

It was pointed out by Mr. Justice Woodroffe that the form of the decree was admittedly defective; consequently the decree will be amended in accordance with the suggestion made by Mr. H. D. Bose, the learned Counsel for the Official Assignee, as follows:—

"It is declared that the Defendant A. H. C. Dorian Evans is a partner of the firm of Dorian Evans & Company in the plaint in this suit mentioned and is entitled to a remuneration of Rs. 500 a month and also a commission of 10 per cent. on the net profit of the business as mentioned in cl. 5 of the Memorandum of Partnership, dated the 15th of June 1919, and it is further declared that the Plaintiff is entitled to twelve annas part or share of the profits of the partnership in the plaint in the suit mentioned and the Defendant Hari Charan Ghosh is entitled to two and a half annas share therein and that the Defendant Dino Nath Sircar is entitled to one and a half share thereof, and are liable for loss in such shares as mentioned in cls. 6 and 19 of the said plaint."

Subject to the above modification the decree of the Court of first instance is restored.

MOOKERJEE, J.—I agree that the view taken by Mr. Justice Richardson must be upheld. I would not have thought it necessary to make any observation but for the fact that there has been a difference of opinion between Mr. Justice Woodroffe and Mr. Justice Richardson.

It is conceded that the relative rights of the parties must be determined upon a true construction of what is described as the memorandum of co-partnership agreement made on the 15th of June 1919 among four persons Raghumull, Dorian Evans, H. C. Ghosh and D. N. Sircar. The true rule of construction is not to take one term of the contract and raise a presumption therefrom, but to ascertain the whole scope of the agreement by reference to all its terms. If this process be adopted it is plain that there is no answer to the appeal. The introductory paragraph makes it abundantly clear that the memorandum was a partnership agreement amongst the four persons and that these persons desired to start a partnership business. The firm itself was named after Evans and the next paragraph stated that the place or places of business were to be determined by agreement of the copartners, *i.e.*, the four persons who had entered into the partnership agreement. The second paragraph entitled the financing partner to get interest not from three of the four persons but from the firm. It is not necessary to examine in detail all the provisions of this agreement but I may refer to para. 19 and para. 23. Para. 19 leaves no doubt that Evans was a partner and that he was entitled to get his monthly remuneration regularly while the other partners would be liable for loss according to their shares. Then follows the sentence "Each partner shall be just and faithful to the capitalist partner." This I have no doubt refers to all the three partners other than the capitalist partner. Para. 23 placed Evans and Ghosh on the same footing in respect of certain matters namely, if either of them committed a breach of the provisions of the memoran-

dum or committed an act of bankruptcy or should become physically unfit to attend to the business or committed a criminal offence or did or suffered an act which would be a ground for dissolution of the partnership by the Court, then the capitalist partner might by notice in writing determine the partnership which according to a previous clause was to continue for a fixed term of five years. To my mind it is inconceivable that if Evans had been a mere Manager, the partners should have ever contemplated that this result would follow merely because he became physically unfit to attend to the business or committed an act of bankruptcy.

The deed taken as a whole leaves no doubt as to the position of Evans, but it is urged that the provisions of the 5th and 6th paragraphs nullify the effect of the other clauses. In this connection an attempt was made to refer to a decision which had no bearing upon the construction of sec. 239 of the Indian Contract Act, this codifies the law on the subject in this country and I agree entirely with the observations made by the learned Chief Justice as to the danger likely to result if provisions of this character were attempted to be interpreted by reference to judicial decisions which, it is well known, cannot be reconciled. Sec. 239 requires that the persons should have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them. The argument on behalf of the Respondent was that the legislature intended to provide that the parties should have agreed to share in the profits "as such" between them. This is precisely what the legislature has not said. Cl. 5 provides for the payment of Rs. 500 as remuneration to Evans and also 10 per cent. of the net profits of the business as commission. It is urged that as the 10 per cent. of the profits was to be paid as commission, this was not a share in the profits within the meaning of sec. 239. I do not think this contention is well-founded. The expression "share of the profits" is simple and a narrow construction ought not to be put on it.

Taking the document as a whole I have no doubt that the view taken by Mr. Justice Richardson is correct.

CHATTERJEA, J.—The question whether Dorian Evans was or was not a partner depends upon the construction of the memorandum of agreement, and there can be no doubt, having regard to the terms of the document (except cls. 5 and 6), that it was intended that Dorian Evans was to be a partner just as the others.

The only question to be considered, to my mind, is whether having regard to the terms of cls. 5 and 6, there was an agreement to share the profits of the business between Dorian Evans and the other partners: in other words, whether the payment of 10 per cent. commission of the net profits of the business was a share of the profits of the business. The expression "a share of the profits" is not defined in the section, and I think there is no sufficient reason for holding that payment of 10 per cent. on the net profits is not a share of the profits. The question whether there was a partnership or not must depend on the real intention and contract of the parties; and, having regard to the agreement of the parties, taken as a whole, I am of opinion that Dorian Evans was a partner.

Messrs. Khaitan & Co., Solicitors for the Appellant.

Messrs. H. N. Datta & Co., Solicitors for the Respondent.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 337 OF 1921.

CHATTERJEA, J.
CUMING, J.
1923,
18, January.

ANIL KUMAR BISWAS and ors., Defendants, Appellants,
v.
RASH MOHAN SAHA and ors., Plaintiffs, Respondents.

Estates Partition Act (V of 1897), sec. 119, Civil Court's jurisdiction to entertain suit which, though not in form but in substance, challenges the correctness of Collectorate partition proceedings—Sec. 59 (2), in case of discrepancy between the partition paper and the map, which should prevail—Question of adverse possession not pressed in the first Court or in the lower Appellate Court, if can be urged in Second Appeal.

The partition papers of a Collectorate partition proceeding showed a certain land to have been allotted to A, but the attached map showed it to have been allotted to B, in accordance with which B got and continued in possession by receipt of rent from the tenant. On an attempt by A to prevent payment of rent, B brought a suit for declaration of his title and confirmation of possession:

Held—*That as the map merely delineates the plots allotted to each co-sharer by the partition papers and must necessarily follow it, where there is a discrepancy between the two, the partition paper should prevail and the map should be rejected as erroneous.*

That the land was allotted to A by the partition papers and under sec. 119 of the Estates Partition Act, the Civil Court had no power to question the correctness of the orders passed in the partition proceedings. Although the suit might not, in form, be one for contesting the correctness of the said orders, in substance it was, and the Civil Court had no power to question them.

Where a plea of adverse possession by B though made in the plaint was not raised in the issues or dealt with in the judgment of the trial Court, nor taken in the grounds of appeal in the lower Appellate Court:

Held—*That under the circumstances the contention of adverse possession in second appeal could not be given effect to.*

This was an appeal preferred on the 11th of November 1921, against the decree of Babu Srish Chandra Banerjee, Subordinate Judge, 1st Court, of Zillah Bakergunj, dated the 29th of June 1921, reversing the decree of Babu Satish Chandra Chakravarti, Munsif, 5th Court at Barisal, dated the 29th of November 1919.

The facts are shortly these:—By a Collectorate partition a certain piece of land was shown in the partition papers to have been allotted to the predecessor of the Defendants-Appellants, but the attached map showed it to have been allotted to the predecessor of the Plaintiffs-Respondents, who had in accordance with the map obtained possession and continued in possession for a number of years by receipt of rent from the tenant. The Defendants-Appellants having, however, attempted to prevent the tenant from paying the rent to the Plaintiffs-Respondents, the latter brought this suit for declaration of his title and for confirmation of possession. The trial Court held that the land had been allotted to the Defendants by the partition papers and that the Civil Court had no power to question the correctness of the orders passed in the partition proceedings. On appeal the Sub-Judge held that the Civil Court had jurisdiction to decide the question, that there were mistakes in the partition papers and that the map was correct. The Defendants thereupon preferred the present second appeal to the High Court.

Babus Gunada Ch. Sen and *Prasanta Bhusan Gupta* for the Appellants.

ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA.

Babu Gopal Ch. Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for declaration of the Plaintiff's title to the land in dispute on the allegation that it was included in a separate estate which was allotted to his predecessor-in-title upon a partition of the parent estate between him, the contesting Defendants and certain other co-sharers. It was further alleged that the disputed land was shown in the partition map as having been allotted to his predecessor-in-title, that the latter had obtained possession of the land in accordance with the map; that the Plaintiff and his predecessor-in-title had been in possession by receipt of rent from the tenant and that as the contesting Defendants Nos. 5 to 7 were attempting to prevent the tenant from paying the rent to the Plaintiff, he brought this suit for declaration of his title and for confirmation of possession.

The main defence was that the land in dispute was allotted to the Defendants' taluk on partition according to the partition papers.

The Court of first instance held that the land in dispute was allotted to the Defendants Nos. 5 to 7 by the partition papers and that the Civil Court had no power to question the correctness of the orders passed in the partition proceedings.

On appeal, the learned Subordinate Judge came to the conclusion that the Civil Court had jurisdiction to decide the question, that there were mistakes in the partition papers and that the map was correct. He accordingly set aside the decree of the Court of first instance and remanded the case to that Court for trial of the other questions raised in the suit.

The Defendants Nos. 5 to 7 have preferred this appeal against the order of remand.

The first question is whether the Civil Court can go into the question of the correctness of the orders passed in the partition proceedings.

Sec. 119 of the Estates Partition Act (V of 1897) provides that no order made under certain sections and Chapters of the Act including Chap. VIII shall be liable to be contested or set aside by suit in any Court or by any means other than those expressly provided in the Act. There is a proviso to the section which, however, does not touch the question before us.

Chap. VIII consists of secs. 57 to 61. Sec. 57, sub-sec. (2) lays down that the Deputy Collector shall "proceed to determine how the lands of the parent estate shall be partitioned into separate estates and shall cause to be prepared, (*a*) a paper of partition, in a form prescribed by rules made by the Board, specifying in detail

(*i*) the lands which he has included in each separate estate, and the area of such lands,

(*ii*) the rental of such lands, and other assets, if any, of each separate estate,

(*iii*) the name or names of the recorded proprietor or proprietors of each separate estate" and certain other matters; and

"(*b*) a map showing the lands which fall within each separate estate and the boundaries of such lands."

Then sec. 58 (*1*) provides that "the partition as made under this Chapter, shall be submitted for the sanction of the Collector and he shall by notice fix a day for the consideration of the same.

(2) Every such notice shall be served on the proprietors and shall be published in the manner prescribed by sec. 104.

ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA.

(3) The day fixed by the said notice shall be not less than 15 days after the publication of the notice at the Collector's Office.

(4) After hearing and disposing of any objection which may be preferred, the Collector shall pass such orders as he may think proper,

(*a*) approving the partition, with or without amendments." It is unnecessary to refer to the other clauses.

Sec. 59 provides: "When the partition has been approved by the Collector, the Deputy Collector shall, after making such alterations as may be necessary in the partition paper or map, or preparing a new partition paper or map, in accordance with the orders passed by the Collector—

(*a*) cause to be prepared a separate extract of the portion of the partition paper which relates to each separate estate;

(*b*) cause to be tendered to any recorded proprietor of a separate estate, or any authorised agent of such proprietor, who may be in attendance at the Deputy Collector's Office, the extract which relates to such separate estate; and

(*c*) publish a notification at his office calling upon every proprietor to whom or to whose agent an extract from the partition paper has not been tendered as aforesaid, to take out of the Deputy Collector's Office the extract of the partition paper relating to his separate estate." And sub-sec. (*2*) lays down: "If the circumstances of the partition so require, an extract of the map prepared by the Deputy Collector, or a copy of such map, shall be annexed to every separate extract from the partition paper mentioned in sub-sec. (*1*)."

It appears, therefore, that the partition papers must be prepared and an extract therefrom must be served upon the recorded proprietors under orders passed by the Collector. A map has also to be prepared and as laid down by sub-sec. (*2*) of sec. 59 in certain cases a copy of the map is also to be annexed to every separate extract from the partition paper mentioned in sub-sec. (*1*).

There can be no doubt upon these sections that the allotment paper which is referred to as extract from the partition paper gives to the owner of each separate estate the lands allotted to him as forming his separate estate. The map is only to delineate the allotments made in the partition paper and must necessarily follow those papers. The title to the lands allotted to each must therefore depend upon the partition papers, and the allotments are based upon the assets of the lands given to each which cannot be disturbed without disturbing the partition.

It is contended on behalf of the Respondents that the suit was not for contesting or setting aside any order in the partition proceedings, but a suit for declaration of the Plaintiff's title, and for rent as against the tenant Defendants and sec. 119 of the Act therefore has no application to the case.

The Plaintiff, however, sought a declaration of his title to the lands as being included within the separate estate allotted to him and for a further declaration that the lands were not included in the separate estate allotted to the Defendants. The learned Subordinate Judge came to the conclusion that the partition paper was erroneous and unless the paper was held to be erroneous, the Plaintiff's title could not be declared to the land in dispute as being included within the separate estate allotted to him. Although, therefore, the suit may not, in form, be one for contesting the correctness of any order in the partition proceedings, in substance it was; and as a matter of fact the Plaintiff con-

ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA.

tested the partition paper which was prepared under the orders of the Collector and the learned Subordinate Judge has given effect to that contention. This, we think, the Court had no power to do.

It is further contended on behalf of the Respondent that the partition paper and the map are merely pieces of evidence and that it is for the Court dealing with facts to attach such weight, as it thinks proper, to the partition paper and the map respectively. If, however, the partition paper is to be taken as the title deed of each proprietor in respect of the lands allotted to him under the partition, as we think it should, it is open to us to consider in case of a discrepancy between such papers and the map, as to which of them should prevail. As already stated, the map merely delineates the plots allotted to each co-sharer by the partition paper and must necessarily follow it and we think that where there is a discrepancy between the two, the partition paper should prevail. The map by giving a particular colour to some of the plots, shows to which of the owners those plots had been allotted by the partition papers and if it differs from the partition papers, it should be rejected as erroneous.

It has been contended by the learned Pleader for the Respondent that the suit was also based upon the ground that the Plaintiff and his predecessor-in-title had been in adverse possession for 12 years.

Such an allegation appears to have been made in the plaint but the issues did not raise the question and we do not find any trace of it in the judgment of the Court of first instance.

The learned Pleader for the Respondents, however, say that the question might be covered by issue No. 6.

As a matter of fact, however, the question of adverse possession was not gone into in the judgment of the Court of first instance. The Munsif no doubt refers to the evidence of possession on both sides; but that is evidently in connection with the question of title based upon the partition.

Then again, the Plaintiff lost his suit in the Court of first instance and he appealed to the lower Appellate Court. But in the grounds of appeal no objection was taken on the ground that the question of adverse possession had not been dealt with by the Court of first instance. Under these circumstances, we are unable to give effect to the contention of the learned Pleader for the Respondents.

That being so, the appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs here and below.

J. N. R. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.
LORD SALVESEN.
1922,
Heard, 6 and 7, November.
Judgment, 8, December.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Appellant,
v.
LAXMIBAI and anr., Respondents.

Saranjam *grant, what passes – Presumption—Pleadings and proof.*

There is no presumption that a grant of a saranjam *is a grant of the soil. It may be a grant either of the soil and the whole revenue derived from it or a grant of the royal share of the revenue only. It must be determined in each case upon the facts what was the quality of the original grant although it may well be that it is ordinarily a grant of the royal revenue only.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* LAXMIBAI.

ADUSUMILLI SURYANARAYANA *v.* ACHUTA POTHANNA (1) *and* CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL *v.* VEERAMA REDDI (2) *followed.*

Although it is not the practice to construe pleadings too strictly or to exclude a plea which was not embodied in the plaint from being made an issue in the case, the fact that a case which was argued on the Plaintiff's behalf at the hearing was not put forward in the plaint has a bearing on the question as to the proper inference to be drawn from the evidence adduced.

This was an appeal from a judgment and decree of the High Court at Bombay, dated the 22nd December 1916, reversing a decree of the District Judge of Dharwar, dated the 6th January 1913.

The suit was instituted for the recovery of certain lands forming part of the Kasba Hebli estate.

The original grant of the Kasba Hebli Estate was made to Balwantrao by the Peshwa. At the introduction of the British Government, the estate was held by Lakshmanrao bin Suryarao, and his uncle Ramchandrarao. Lakshmanrao died in 1836 and was succeeded by his son Appajirao. Ramchandrarao was succeeded in A. D. 1818 by his sons Krishnarao and Raghunathrao. The latter adopted Ramchandrarao, and this adoption was recognised by the British Government in 1839. Krishnarao died in 1842, and was succeeded by his son Pandurangrao. Pandurangrao died in 1899.

The share of the Hebli estate held by Pandurangrao was resumed by the Bombay Government and re-granted to Narsingrao Ramchandra in 1901. The Secretary of State for India in Council, however, ultimately directed in 1904 that Pandurangrao's estate should be resumed and re-granted to Vithalrao, the great grandson of Pandurangrao. As a result of this grant to Vithalrao the present Plaintiff was dispossessed of the lands in suit.

The Plaintiff Gururao (since deceased and represented by his widow the 1st Respondent) filed the present suit in 1911 in the District Court of Dharwar to recover possession of the property mentioned in the Schedule referred to in the plaint with mesne profits. He based his claim mainly upon two grounds: firstly, that the grant to Pandurangrao was a *sarva inam* and not a *saranjam* and that therefore it was not resumable by Government, but heritable and partible property; and secondly, that even assuming the grant to Pandurangrao to be a *saranjam*, the Government could resume what they granted, *viz.*, the royal share of the revenue and not the lands and that the Government could assess the lands and recover the royal share of the revenue but could not dispossess the Plaintiff. The property described in the Schedule attached to the plaint was claimed as forming one-sixteenth share of the whole estate, *i.e.*, one-fourth of Pandurangrao's one-fourth share in the estate. The suit was filed against the Secretary of State for India in Council, who was Defendant No. 1, and Vithalrao, the new grantee, who was Defendant No. 2.

The defences raised by the Defendant No. 1, briefly stated, were that the suit was barred by sec. 4, cl. (*a*) of the Revenue Jurisdiction Act (X of 1876), that the grant was not a *sarva* but a *saranjam*, that the Plaintiff was not entitled to recover separate possession of the property, as the *saranjam* was impartible except to such ex-

(1) L. R. 4. I. A. 209: s. c. 23 C. W. N. 273 (1918).

(2) L. R. 49 I. A. 286: s. c. 27 C. W. N. 245 (1922).

tent as might be recognised by the Government, and that the Government could take possession of the lands in effecting resumption. Defendant No. 2 made no separate defence but adopted the contentions of the Defendant No. 1.

The District Judge found that the grant to Pandurangrao, which was declared by the Government in 1863 to be *saranjam* and not *sarva inam*, must be treated as *saranjam* and that the Court had no jurisdiction to question the declaration, made by the Government. He further found that though the grant was of land revenue the right to hold the land went with and therefore formed part of the grant, and that the lands were resumable as the grant was. He also found that the lands being held as part of the *saranjam*, the suit was barred by the Revenue Jurisdiction Act, and in the result dismissed the suit with costs.

Against the said decree of the District Judge, the Plaintiff appealed to the High Court of Judicature at Bombay, and on the 22nd December 1916, that Court delivered judgment allowing the appeal with costs in both Courts. The Plaintiff did not contend before the High Court that the original grant was not *saranjam*, but the learned Judges, who heard the appeal, held that the decisions of the Inam Commissioner and the Government under Act XI of 1852, that the grant was *saranjam*, were final. The learned Judges also held that in the case of *saranjam* or *jaghir* (the terms being convertible), the grant was ordinarily of the royal share of the revenue and not of the soil; that the burden of proving that in any particular case it was a grant of the soil, was upon the party alleging it; that the Secretary of State for India on whom that burden lay had failed to prove that the grant here was of the soil and not merely of the royal share of the land revenue; that there was nothing to show that the original grant by the Peshwas was of the soil and not merely of the royal share of the land revenue, or that it had any relation to the occupation of lands by Balwantrao; that when the British Government first confirmed the grants in favour of the descendants of Balwantrao they were in occupation of the lands; that the grants were, as usual, grants of the royal share of the land revenue and had no relation to the possession of the lands; and that the right to resume the lands at the time of the resumption and re-grant of the *saranjam* was never put forward by the Government till after the death of Pandurang and was asserted for the first time in 1904. They further held that the Government could resume what they had granted as *saranjam*, *viz.*, the royal share of the land revenue; that the right to the occupation of the land, subject to the payment of the full assessment, could and did survive the resumption of this *saranjam*; that the Plaintiff's occupation of the lands in suit could not be disturbed in consequence of the resumption on Pandurang's death and the re-grant of the *saranjam* to Defendant No. 2; that inasmuch as the lands were neither granted nor held as *saranjam*, the Plaintiff's alternative claim was not barred by sec. 4 of the Revenue Jurisdiction Act X of 1876. They decided that the Plaintiff's claim for possession of lands, subject to payment of the royal share of the land revenue, was not barred by sec. 4 of the Pensions Act XXIII of 1871. In the result they allowed the Plaintiff's claim for possession of the lands in suit, subject to his liability to pay the royal share of the land revenue, and gave him mesne profits for three years prior to the date of the suit, and from the date of the suit to the date

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* LAXMIBAI.

of the delivery of possession or the expiration of three years from the date of the judgment whichever event occurred first, and ordered that the mesne profits should be determined by the Court below, that the rest of the Plaintiff's claim should be disallowed, and that he should have costs throughout.

Sir Geo. Lowndes, *K. C.* and *Kenworthy Brown* for the Appellant.—The High Court were in error in presuming that the grant was only of revenue.

Adusumilli Suryanarayana v. *Achuta Pothanna* (1) and *Chidambara Sivaprakasa* v. *Veerama Reddi* (2).

If there is any presumption as to the nature of the grant, that is displaced by the evidence. The High Court really decided on the basis of "*seri*" right in the *saranjamdar*, as to which see William's Glossary and *Ramchandra* v. *Venkatrao* (3).

This case and *Ganpatrao Trimbak* v. *Ganesh Baji Bhat* (4) have been misapplied by the High Court and *Rajya* v. *Balkrishna Gangadhar* (5) relied on by them is not in point.

A *saranjamdar* cannot either as "*seridar*" or otherwise become a permanent occupier adversely to Government. The right as "*Seridar*" is not independent of the right of *saranjamdar* but part of that right and ends on resumption. The doctrine formulated in sec. 90 of the Trusts Act, 1882, is applicable.

Shekh Sultan Sani v. *Sheikh Ajmodin* (6) is indicative of the evidence requisite to show ownership by grant.

The sanad there is found in *Trimbak Ramchandra* v. *Gulam Zilani* (7).

They also referred to *Vasudev Pandit* v. *Collector of Puna* (8) and *Ravji Narayan* v. *Dadaji Bapuji Desai* (9).

The history of this *caranjam* is set out in the report of the Inam Commission which is on the record and shows a grant of the soil. The question of jurisdiction depends on whether it is land or revenue. If it was a grant of revenue only and they had no other right there was no jurisdiction.

This case arises through a loophole left in *Ramrav Govindrao* v. *Secretary of State* (10).

Messrs. DeGruyther, *K. C.* and *L. M. Parikh* for the 1st Respondent.—The Plaintiff and his ancestors have been in possession since before 1775, at which date the Government had no property in the land so as to entitle them to make a grant.

The cases show that a *saranjam* is a series of life estates and is impartible without the consent of Government but in the present case there is found a series of divisions without the consent of Government. The burden of proof is on the Government to establish its right, not to assess the revenue, but to obtain possession of the property.

An "occupant" in Bombay is not necessarily a cultivator, he is an owner and has tenants. The Inam Commission did not determine the title to lands but the liability to revenue. Resumption was merely a re-assessment. If as I contend

(1) L. R. 45 I. A 209: s. c. 23 C. W. N. 273 (1918).

(2) L. R 49 I. A. 286, 301, 302: s. c. 27 C. W. N. 245 (1922).

(3) I. L. R. 6 Bom. 598 (1882)

(4) I. L. R. 10 Bom. 112, 117 (1885).

(5) I. L. R 29 Bom. 415 (1905).

(6) L. R. 20 I. A. 50; s. c. I. L. R. 17 Bom. 431 (1892).

(7) I. L. R. 34 Bom. 329, 330 (1903).

(8) 10 Bom H. C. R. 471, 474 (1873).

(9) I. L. R. 1 Bom. 523, 527 (1876).

(10) I. L. R 34 Bom 232 (1900).

the grant was one of revenue the Plaintiff's rights are untouched, although there remains the Government right to a re-assessment.

Pandurang died in 1899 and there was a re-grant. The authorities were in error in assuming that the Inam Rules applied to an estate of this kind.

Inam Rules, Bombay, 1898, rr. 5, 6.

The terms of the re-grant do not indicate a grant of land.

See Elphinstone's Report on territories conquered from the Maharattas, pp. 22, 129.

It was under the Mahratta system that this kind of grant came into use.

Reference was also made to Etheridge's Narrative of Bombay Land Commission.

Sir G. Lowndes, K. C. in reply.—There was no suggestion in the plaint of occupancy rights being acquired. The District Judge found that there was no occupancy right and that finding was never challenged before the High Court.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SALVESEN.—This is an appeal against a decree of the High Court of Judicature at Bombay, dated the 22nd December 1916, which reversed a decree of the District Judge of Dharwar, dated the 6th January 1913. The suit relates to a part of the Hebli estate, from which the Plaintiff was evicted by the Government on the death of his grand-father, Pandurangrao. Their object in doing so was to prevent partition of what they regarded as an impartible estate held under a grant of *saranjam.*

It is not necessary to recapitulate the facts which have been very fully stated in the judgment of the District Judge of Dharwar or to consider the majority of the points which were disposed of by him and on appeal by the High Court at Bombay. The sole issue which remains for determination is whether the *saranjam* grant made by the British Government in favour of an ancestor of the Plaintiff was a grant of the royal revenue only, or was a grant of the land itself, or of the whole revenue of the land coupled with a right to hold it. The learned District Judge held that the original grant by the British Government was a grant of the whole revenue of the land, and that this carried with it the right to make the best possible use of unoccupied land. The High Court at Bombay in reversing his decision held that the grant was one of the royal share of the revenue only and not of the soil. In reaching this conclusion it is impossible to resist the view that the Judges of the High Court were much influenced by their view that there is a presumption that a grant of *saranjam* is a grant of royal revenue only, and accordingly that the burden of proving that, in any particular case of *saranjam*, it is a grant of the soil, lies upon the party alleging it. They relied upon various cases cited and which at that time seemed to establish this proposition. They had not, however, the benefit of two recent decisions of this Board, *viz.*: *Adusumilli Suryanarayana* v. *Achuta Pothanna* (1) and *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (2) in both of which it was held that there is no such presumption.

In conformity with these decisions their Lordships are of opinion that a grant of *saranjam* may be either of the soil and the whole revenue derived from it, or a grant of the royal share of the revenue

(1) L. R. 45 I. A. 209: s. c. 23 C. W. N. 273 (1918).

(2) L. R. 49 I. A. 286: s. c. 27 C. W. N. 245 (1922).

only. It must be determined in each case upon the facts what was the quality of the original grant, although it may well be that it is ordinarily a grant of the royal revenue only. It may be that as the Plaintiff was dispossessed by the British Government in 1901 there is a certain *onus* upon the Appellant to justify his dispossession, but this becomes of little materiality when evidence is adduced from which a conclusion in fact may be legitimately drawn. In the present case the oral evidence is of no value as supporting the Plaintiff's case, and an inference must be drawn one way or the other from the documents that have been produced in the case. T have been examined in detail by the District Judge on pp. 35 and 36 of the record, and their Lordships concur generally in the result of his analysis. It is plain that the original grant was made in respect of political services; and while it is no doubt possible that the grantees were at that time the owners of the estate, and that all that the grant was intended to give them was a release from payment of the royal share of the revenue, there is nothing in any of the documents produced which suggests such a limitation. On the contrary, in one of the early documents founded on, the grant was made expressly of the Kasba Hebli with its hamlets and Watnhal, with the Mahal Jukath and Mokassa "with the whole of the dues and cesses and hidden treasures, exclusive, however, of the dues of Huckdars and Inamdars," and the language of the other documents is in similar terms. It is significant also, that in the deed of partition executed by Pandurangrao in 1879, the property partitioned is described as the Jahagir villages of Kasba Hebli and Majre Watnhal and the Mouza of Talvai and Kurdapur "obtained from the British Government." Throughout the documents there is no suggestion that what was conveyed was merely the royal share of the land revenue. They assume throughout that the whole revenue of the lands was conveyed to the grantees and the amount of the nazarana which has been levied from time to time appears to have been based on the yearly revenue of the estate, "there being no suggestion (as the learned District Judge says) that revenue derived by the holder as occupant, as distinct from '*saranjamdar* was not liable to nazarana." All these considerations are sufficient in their Lordships' opinion to justify the inference that the original grant was a grant of the soil.

It is significant as bearing on the result at which their Lordships have arrived, that the Plaintiff in his original plaint nowhere maintained the view upon which the learned judges of the High Court proceeded. His main claim was that he was a full owner of the property in dispute, and that the estate in question was granted as *sarva inam* hereditarily in recognition of the services which his ancestors had rendered in assisting the British in settling the country conquered from the Peshwas. This claim was rejected by the District Judge and has now been admitted by the Plaintiff to be untenable. As an alternative to this claim, based on the grant by the British Government, the plaint proceeds as follows:—

"Saranjam grant is a grant of the Revenue only, and the Government cannot resume the Raitava rights which the Plaintiff and his ancestors have been enjoying from ancient times. And even if the Saranjam grant be of the soil, Government has no right to resume it. And the estate in suit is partible."

It is not clear what is meant by "Raitava rights," but the statement sufficiently discloses that they are rights

of occupancy only and not of ownership, and a claim of this kind was strenuously maintained in the Lower Court with regard to the occupation of lands which were unoccupied at the date of the original grant. This latter claim has now been abandoned. In no part of the plaint is it possible to find a claim that the *saranjam* grant was a grant of the royal share of the revenue only. It appears, however, that this point was argued, and it has not been the practice of their Lordships to construe the pleadings too strictly, or to exclude a plea, which was not embodied in the plaint, from being made an issue in the case. The fact, however, that it did not occur to the Plaintiff's advisers to propound this contention on the evidence which he adduced has a bearing on the question as to the proper inference to be drawn in fact from that evidence.

As the case was framed, the jurisdiction of the Civil Courts in India was apparently not ousted. But in the view which their Lordship now take, the right of the Government to resume these lands could not be questioned in the Civil Courts.

In the result their Lordships will humbly advise His Majesty that the decree of the High Court at Bombay should be set aside and the suit dismissed with costs, here and in the Courts below.

Solicitor: *Solicitor, India Office* for the Appellant.

Solicitor: *Mr. E. Delgado* for the 1st Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

VISCOUNT FINLAY.
LORD DUNEDIN.
LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1923
Heard, 12, February.
Judgment, 12, February.

BAIJNATH GOENKA BAHADUR, since deceased (now represented by Kedar Nath Goenka), Appellant,
v.
NANDA KUMAR SINGH and ors., Respondents

Mesne profits, decree in trial Court ordering payment of, from date of decree to delivery of possession Appeal from decree dismissed by Order in Council Mesne profits, whether to be assessed from date of trial Court's decree or Order in Council.

On 28th November 1905, the trial Court passed a decree in Plaintiffs' favour for recovery of possession and mesne profits, to be ascertained at the execution stage, from the date of the decree to that of the recovery of possession. The Defendant appealed unsuccessfully to the High Court and to the Privy Council, the Order in Council dismissing his appeal being dated 7th March 1913:

Held—*That the decree-holders were entitled to mesne profits from 28th November 1905, the date of the trial Court's decree and not from 7th March 1913, the date of the Order in Council, till delivery of possession.*

RAJA BHUP INDAR BAHADUR SINGH v. BIJAI BAHADUR SINGH (1) *applied.*

This was an appeal from a decree of the High Court at Patna, dated the 20th July 1917 which varied an order of the Subordinate Judge of Monghyr, dated the 13th March 1916.

The question in this appeal was as to the period for which mesne profits should

(1) L. R. 27 I. A. 209: s. c. I. L. R. 23 All. 152; 5 C. W. N. 52 (1900).

be calculated under the following circumstances.

In the year 1901 the Respondents and one Baijnath Singh brought a suit against the Appellants in the Court of the Subordinate Judge of Monghyr for possession of certain property and mesne profits from date of their—the Plaintiffs'—dispossession therefrom, that is to say, from 21st June 1900.

On the 28th November 1905, the said Court decreed possession with mesne profits only from the date of decree to that of recovery of possession the amount of which was to be ascertained at the execution stage.

The Appellants made an appeal to the High Court unsuccessfully and then to His Majesty in Council, but this appeal was dismissed by Order in Council, dated the 7th March 1913.

Baijnath Singh, one of the Plaintiffs, took possession of the property decreed to him shortly after the decree of the Subordinate Judge but the Respondents took no steps to obtain possession and executed the decree for costs only.

The Respondents then petitioned the said Subordinate Judge's Court in execution for mesne profits from 28th November 1905 to the 29th May 1914 when delivery of possession was given to them.

On the 13th March 1916, the said Subordinate Judge heard the said petition and directed an enquiry as to mesne profits from the date of the Order in Council to the delivery of possession holding that mesne profits were only given from decree and that the decree which was to be executed was the Order in Council.

The Respondents appealed to the High Court which on the 20th July 1917, allowed the appeal and directed an inquiry as to mesne profits from the 28th November 1905, till delivery of possession.

In their judgment the learned Judges agreed with the Subordinate Judge that the decree to be executed was the Order in Council, but they considered that as that Order affirmed the decree of the Subordinate Judge of 28th November 1905, and as that decree was to the effect that Respondents were to get mesne profits from (the date of the) decree, therefore the Order in Council was an order directing that the Respondents were to get mesne profits from 28th November 1905, till delivery of possession. They further held that the order so construed was not in contravention of Or. 20, r. 12 of the Civil Procedure Code, because as they held, it gave mesne profits from the 28th November 1905, a date after the institution of the suit till the delivery of possession which was within three years of the Privy Council decree.

From this decree the Appellant appealed to His Majesty in Council.

Messrs. A. M. Dunne, K. C. and *E. B. Raikes* for the Appellant.

Mr. Hyam for the Respondents was not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT FINLAY.—In their Lordships' opinion this case is governed by the judgment in the case of *Raja Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1).

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: *Messrs. Watkins & Hunter* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers & Neville* for the Respondents.

G. D. M.

(1) L. R. 27 I. A. 209: s. c. I. L. R. 23 All. 152; 5 C. W. N. 52 (1900).

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL
No. 8 OF 1921.

MOOKERJEE, J.
CUMING, J.
1922,
13, February.

DWIJENDRA MOHAN SARMA, Plaintiff, Appellant,
v.
SM. MONORAMA DASSI and ors., Defendants, Respondents.

Guardians and Wards Act (VIII of 1890), sec. 29, District Judge's sanction, if rendered unnecessary by compliance with the provisions of Or. 21, r. 83, Civil Procedure Code (Act V of 1908)—Sec. 30, person prejudicially affected by an unauthorised sale by the guardian, how far bound to indemnify the previous purchaser.

A guardian appointed under the Guardians and Wards Act sold a minor's property without obtaining the permission of the District Judge, but with the sanction of the execution Court under Or. 21, r. 83, C. P. Code, as the property was at the time under attachment in execution of a money decree. Subsequently the guardian sold the same property to a third party with the permission of the District Judge:

Held—*That the scope of an enquiry under sec. 29 of the Guardians and Wards Act is entirely distinct from the scope of an enquiry under Or. 21, r. 83, C. P. C. When an application is made under the former to a District Judge the matter to be considered is the benefit to the infant. When an application is made to an execution Court to sanction an intended transfer under the latter, the matter for enquiry is the protection of the execution creditor. Compliance with the provisions of Or. 21, r. 83, C. P. C. should not consequently render unnecessary the fulfilment of the requirements of sec. 29 of the Guardians and Wards Act, in a case which falls within the scope of both these provisions of the law.*

DATTARAM *v.* GANGARAM (1) *and* SARJU *v.* DISTRICT JUDGE OF BENARES (2) *relied on.*

BARKAR *v.* JAMILA (3), ABDUR RASHID *v.* SHEIKH KHANDKAR (4), NAKIMO DEWANI *v.* PEMBA DITCHEN (5) *and* BIKU *v.* MOHESH (6) *distinguished.*

Held, further—*That sec. 30 of the Guardians and Wards Act makes the transaction, unauthorised by the District Judge, voidable, that is, liable to be avoided in a proper proceeding. Consequently when the person affected by such a transaction seeks to avoid its consequence, he is in the position of a person who seeks equity and must do equity. Thus, not only can he not ignore the transaction but he must offer to re-imburse the prior transferee whose money has benefitted the infant.*

THE EASTERN MORTGAGE AND AGENCY CO. *v.* REBATI KUMAR RAY (7), HEM CHANDRA *v.* LALIT MOHAN (8) *and* MANASHARAM DAS *v.* AHMAD HOSSEIN (9) *relied on.*

The Plaintiff never having offered to reimburse the Defendant, the transfer in whose favour was for the benefit of the minor, should not be allowed at the late stage to set matters right and thereby change the whole aspect of the case.

This was an appeal under cl. 15 of the Letters Patent preferred on the 20th January 1921 against the judgment of Mr. Justice Shamsul Huda, dated the 22nd December 1920, in appeal from Appellate Decree No. 1613 of 1919, which

(1) I. L. R. 23 Bom. 287 (1898).
(2) I. L. R. 31 All. 378 (1909).
(3) [1918] P. W. R. 61.
(4) 35 C. L. J. 206 (1918).
(5) I. L. R. 44 Cal. 829 (1917).
(6) 8 C. L. J. 268 (1907).
(7) 3 C. L. J. 260 (1906).
(8) 16 C. W. N. 715: s. c. 16 C. L. J. 537 (1912).
(9) 21 C. W. N. 63 (1916).

had been preferred against a decree of Babu Hem Chandra Bose, Subordinate Judge of Sylhet, dated the 18th June 1919, reversing a decree of Babu Ashutosh Ghosh, Munsif of Sylhet, dated the 28th February 1918.

The facts are briefly as follows:— One Kamini Kumar was appointed by the District Judge as guardian of his minor son's property, *viz.*, an one-third share of a homestead. The property of the minor being under attachment in execution of a decree for money, the guardian, with the sanction of the execution Court, sold the property by a conveyance, dated the 4th April 1905, to one Gourhari. Subsequently the guardian Kamini Kumar with the permission of the District Judge sold the property to one Sitanath by a conveyance, dated the 14th January 1906. Sitanath's successor-in-interest brought the present suit for declaration of title to, and recovery of possession of, the aforesaid one-third share of the homestead on the basis of the *kobala*, dated the 14th January 1906. The trial Court dismissed the suit and on appeal, the Subordinate Judge decreed the suit. On second appeal to the High Court, Mr. Justice Huda set aside the decree of the Subordinate Judge and passed the following judgment:—

SHAMSUL HUDA, J.—This appeal arises out of a suit for declaration of title to, and recovery of possession of, one-third share of a homestead described in the plaint and for certain other reliefs. The suit was dismissed by the first Court but on appeal that decree was reversed and the Plaintiff's suit was decreed. The Defendant No. 1 is the Appellant before this Court. The facts of the case are somewhat complicated but having regard to the points that have been urged before me by either side they may be shortly stated to be these. One-third of the disputed homestead belongs to one Kandarpa who was a minor and his father was his guardian appointed by the District Judge. With the permission of the District Judge the guardian sold Kandarpa's one-third share to one Sitanath by a *kobala*, dated the 1st Magh 1312. Plaintiff derives his title from Sitanath. The main defence with which I am concerned in this appeal is that Kamini before the sale to Sitanath had sold the one-third share of the minor to one Gourhari on the 22nd Chaitra 1311 and that after such sale no interest was left in the minor which the guardian could convey to Sitanath even with the sanction of the District Judge. Defendant claims to have acquired title to the land by various purchases.

The lower Appellate Court accepts the contention that if the sale to Gourhari was a valid sale, Plaintiff cannot succeed in this suit and this is not disputed. In the opinion of the Court below, however, the sale to Gourhari was not a valid sale, because it was effected by the guardian of the minor without the permission of the District Judge obtained under sec. 29 of the Guardians and Wards Act. Defendants, however, contended that the permission of the District Judge was obtained and he relies on a recital in Gourhari's *kobala* in support of this contention. The Defendant also urged that the property of the minor had been attached in execution of two decrees obtained against the minor and the sale to Gourhari was effected with the previous permission of the attaching Court under sec. 305 of the old Code of Civil Procedure and that this was sufficient even without the sanction of the Judge. The learned Judge, however, overruled these contentions and held that sanction of the Dis-

DWIJENDRA MOHAN SARMA *v.* SM. MONORAMA DASSI.

trict Judge under sec. 29 to the sale to Gourhari had not been proved. That there was no evidence to prove the fact except the recital in the *kobala* and that such recital was no evidence against the Plaintiff. The learned Judge, however, held that substantial compliance with the provisions of sec. 305 of the Civil Procedure Code had been established but that this was not enough. Two main points have been argued in support of the appeal—(1) that the recital in Gourhari's *kobala* was evidence in the case and the Court below was wrong in holding the contrary; (2) that even if no such sanction was obtained the permission under sec. 305 was sufficient, and these are the only two main points that arise for my consideration and in my opinion both these contentions must prevail.

In support of the first contention the learned Vakil for the Appellant relies on the case of *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (10), which lays down that a recital is evidence between the parties and those claiming under them. In this case the recital in the *kobala* executed by the guardian was evidence against him and is also evidence against the Plaintiff who derives his title through the same guardian.

As regards the second point I am of opinion that compliance with the provisions of sec. 305 was sufficient to validate the sale even if there was no permission under sec. 29 of the Guardians and Wards Act.

The learned Vakil for the Respondents has relied on the cases of *Sarju* v. *District Judge of Benares* (2) and *Dattaram* v. *Gangaram* (1) as supporting his contention that the sanction of the District Judge was necessary. In my opinion the point involved in this case did not directly arise in either of the two cases.

I hold that the special provision of sec. 305 is not controlled by the provisions of sec. 29 of the Guardians and Wards Act. The unreported decision of this Court referred to in the judgment of the Court below, though not a direct authority, lends some support to the view I have taken. On these grounds I allow the appeal, set aside the decree passed by the Court below and restore the decree of the first Court. The Defendants are entitled to their costs throughout.

Against this judgment and decree the present Letters Patent Appeal was preferred.

Babus Brojolal Chakravartty and *Hemendra Kumar Das* for the Appellant.

Babu Birendra Chandra Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal under cl. 15 of the Letters Patent from the judgment of Mr. Justice Huda in a suit for recovery of possession of an one-third share of a homestead upon declaration of title and for incidental reliefs. The Court of first instance dismissed the suit. Upon appeal, the Subordinate Judge reversed that decision. On second appeal to this Court, Mr. Justice Huda has set aside the decree of the Subordinate Judge and restored that of the primary Court.

The disputed property belonged to an infant Kandarpa Kumar Sen whose father Kamini Kumar Sen was appointed as guardian of his property by the District Judge. The root of the title of the Plaintiff is a conveyance executed by the guardian on the 14th January 1906 with the

(1) I. L. R. 23 Bom. 287 (1898).
(2) I. L. R. 31 All. 378 (1909).
(10) I. L. R. 44 Cal. 186 : s. c. 21 C. W. N. 925 (P. C.) (1916).

DWIJENDRA MOHAN SARMA *v.* SM. MONORAMA DASSI.

sanction of the District Judge and registered three days later. The foundation of the title of the contesting Defendants is a prior conveyance executed by the guardian on the 4th April 1905 and registered six days later. This conveyance, like the one previously mentioned, recites that "it has been executed with the sanction of the District Judge." The Defendants, however, failed to satisfy the Courts below that the assertion made by the executant of their conveyance was well-founded on fact, for whereas the record shows that the transaction of the 14th January 1906 was sanctioned by the District Judge, no order has been traced in favour of the transaction of the 4th April 1905. The case has consequently been tried on the hypothesis that the conveyance set up by the Defendant, though prior in point of time, was executed without the sanction of the District Judge, while the conveyance set up by the Plaintiff, though subsequent in point of time, was executed with the sanction of the District Judge. In these circumstances, the question arose, whether the Plaintiff is entitled to treat the Defendants as persons without title and to obtain relief on that basis.

Sec. 29 of the Guardians and Wards Act, 1890, provides that a guardian of the property of a ward shall not, without the previous permission of the Court, mortgage, charge or transfer by sale, gift, exchange or otherwise, any part of the immoveable property of his ward. Sec. 30 then ordains that the disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby. It cannot consequently be maintained that the conveyance which is the foundation of the title of the Defendants is not liable to be impeached. The Defendants have appreciated this danger and have relied upon a circumstance extraneous to the provisions of the Guardians and Wards Act.

It appears that at the time when the transfer in favour of the Defendants was made, the property was under attachment in execution of a decree for money held by a creditor of the infant. The transfer could consequently be effected, only with the sanction of the execution Court obtained in the manner prescribed in sec. 305 of the Code of Civil Procedure, 1882, which has since been replaced by Or. 21, r. 83 of the Code of 1908. The Court below has held that there was substantial compliance with the provisions of sec. 305 and we shall assume without discussion that this view is well-founded. This consequently raises the question, whether compliance with the provisions of sec. 305 cures the defect which attaches to a transaction effected in violation of the provisions of sec. 29 of the Guardians and Wards Act. The decisions in *Dattaram* v. *Gangaram* (1) and *Sarju* v. *District Judge of Benares* (2) point to the conclusion that the answer should be in the negative. These cases are authorities for the proposition that a private alienation, though confirmed by the execution Court under sec. 305 of the Code of 1882, is not validated, if such alienation is made by a certificated guardian and the transaction is not confirmed by the Court which appointed the guardian. We are of opinion that this conclusion is sound on principle.

The scope of an enquiry under sec. 29 of the Guardians and Wards Act is entirely distinct from the scope of an enquiry under sec. 305 of the Civil Procedure Code

(1) I. L. R. 23 Bom. 287 (1898).
(2) I. L. R. 31 All. 878 (1909).

of 1882. When an application is made under sec. 29 of the Guardians and Wards Act to a District Judge to sanction a proposed alienation, the matter to be considered is the benefit of the infant. When an application is made to an execution Court to sanction an intended transfer under sec. 305 of the Code of 1882, the matter for enquiry is the protection of the execution creditor. Compliance with the provisions of sec. 305 of the Civil Procedure Code should not consequently render unnecessary the fulfilment of the requirements of sec. 29 of the Guardians and Wards Act, in a case which falls within the scope of both these provisions of the law. This view is not opposed to the decisions in *Barkar* v. *Jamila* (3), *Abdur Rashid* v. *Sheikh Khandkar* (4) and *Nakimo Dewani* v. *Pemba Ditchen* (5). In the first of these cases the transfer was effected, not by a certificated guardian but by a guardian *ad litem* appointed for the purpose of a suit and the Punjab Chief Court held that sec. 29 of the Guardians and Wards Act could not by its very terms be applied to such a contingency. In the second case, the question was considered, whether Or. 32, r. 7 of the Code of 1908 rendered unnecessary compliance with the requirements of sec. 29 of the Guardians and Wards Act. The answer was given in the affirmative. This view may perhaps be justified on the hypothesis that the objects of these provisions of the law are identical, namely, the protection of the infant concerned. On this ground alone, the decision is distinguishable and we need not express an opinion as to its soundness. In the third case, the question was raised whether the fact that a compromise had been sanctioned by the Court of Wards rendered needless a compliance with the provisions of Or. 32, r. 7 of the Civil Procedure Code, and the answer was given in the affirmative. There is no real analogy between the provisions of the Court of Wards Act and the Guardians and Wards Act.

Finally, our attention has been drawn to the decision in *Biku* v. *Mohesh* (6) which deals with the question of the power of a certificated guardian to compromise a suit without the sanction of the District Judge. This is plainly of no assistance to the Respondent. We consequently hold that the position of the Defendant must be adjudged on the assumption that the conveyance which is the root of his title did not comply with the requirements of sec. 29. It was assumed in the Courts below that a transaction of this description might be ignored by the party prejudicially affected thereby and that the guardian who had executed the conveyance of the 4th April 1905 might indicate his repudiation of the transaction by execution of the conveyance of the 14th January 1906. In our opinion, this position is manifestly untenable.

Sec. 30 of the Guardians and Wards Act makes the transaction voidable, that is, liable to be avoided in a proper proceeding. Consequently when the person affected by such a transaction seeks to avoid its consequence, he is in the position of a person who seeks equity and must do equity. Thus, not only can he not ignore the transaction but he must offer to reimburse the prior transferee whose money has benefitted the infant. In support of this proposition reference may be made to the decisions in *The Eastern Mortgage and Agency Coy.* v. *Rebati Kumar Ray* (7), *Hem Chandra* v. *Lalit Mohan* (8) and *Manasharam Das* v. *Ahmad*

(3) [1918] P. W. R. 61.
(4) 35 C. L. J. 206 (1913).
(5) I. L. R. 44 Cal 829 (1917).
(6) 8 C. L. J. 269 (1907).

DWIJENDRA MOHAN SARMA *v.* SM. MONORAMA DASSI.

Hossein (9). As was observed in the first of these cases nothing can be more unjust than to permit a person to sell a tract of land and take the purchase-money, and then because the sale happens to be informal and void, to allow him or, which is the same thing, the person on whose behalf he acts, to recover back the land and keep the money; any Code of law which would tolerate this would seem to be liable to the reproach of being a very imperfect or a very inequitable one. The Plaintiff in this litigation has ignored this view and has entirely misconceived his remedy. He has never offered to reimburse the Defendant, for there is no question that the transfer in favour of the Defendant must have been for the benefit of the infant whose property was under attachment at the time. We have considered whether the Plaintiff may at this stage legitimately expect an opportunity to set matters right and we have arrived at the conclusion that the answer should be in the negative, as he should not be permitted to change the whole aspect of the case.

We consequently affirm the decree of dismissal made by Mr. Justice Huda, but not on the grounds stated in his judgment, and dismiss the appeal with costs.

J. N. R. *Appeal dismissed.*

(7) 8 C. L. J. 260 (1908).

(8) 16 C. W. N. 715: s. c. 16 C. L. J. 587 (1912).

(9) 21 C. W. N. 63 (1916).

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE No. 2018 OF 1920.

MOOKERJEE, J.
RANKIN, J.
1922,
17, August.

ABDUL LATIF KAZI, Defendant, Appellant,
v.
ABDUL HUQ KAZI, Plaintiff, Respondent.

Benami, *finding as to whether a transaction is, to be based on legal testimony and not upon suspicion—Onus of proof in claiming against the tenor of a deed—Presumption of truth of recitals in a deed—Second Appeal, finding of fact, e.g., of* benami, *based on general observations or probabilities, liable to be set aside in—Recitals in a judgment how far admissible in evidence in a subsequent action.*

Though in cases of alleged benami *transactions, there may be grounds for suspicion, yet the Court's decision must rest, not upon suspicion but upon legal grounds established by legal testimony. The determination of the question must depend not merely upon direct oral evidence, but also upon circumstances, such as, the source of the purchase-money, the possession of the property, the custody of the title deeds, the adequacy of consideration and like facts.*

MINA KUMARI BIBI *v.* BEJOY SINGH DHUDHURIA (1) *referred to.*

The burden of proof lies on the person who claims against the tenor of a deed, for the statement in a deed is to be taken as primâ facie *true, but may be established to be false or not intended to be acted upon. That, however, is a question to be determined upon evidence, which cannot be disposed of upon general observations as to probabilities.*

SULEIMAN KADER BAHADUR *v.* MEHNDI

(1) L. R. 44 I. A. 72 at p. 77: s. c. I. L. R. 44 Cal. 662; 21 C. W. N. 585 (1916).

ABDUL LATIF KAZI *v.* ABDUL HUQ KAZI.

AFSUR BAHU (2) *and* IRSHAD ALI *v.* KARIMAN (3) *referred to.*

The fact that a judgment is admitted in evidence in order to prove that there was a litigation which terminated in a certain way, does not make all the recitals in that judgment part of the evidence in the subsequent action.

KASHI NATH PAL *v.* JAGAT KISHORE ACHARYA CHOWDHURY (4) *and* TRIPURANA SEETHAPATI *v.* ROKKAM VENCANNA (5) *referred to.*

Where the lower Appellate Court based a finding of fact, viz., that a certain document was not a genuine one but was a benami *transaction, upon general observations as to probabilities or upon suspicion, the finding was set aside in second appeal.*

This was an appeal preferred on the 6th of August 1920 against the decree of Babu Girish Chandra Sen, Subordinate Judge of Zillah Jessore, dated the 14th of July 1920, modifying the decree of Babu Narendra Nath Lahiri, Munsif, 2nd Court at Magura, dated the 23rd of January 1919.

The facts were briefly these :—A conveyance by a Mahomedan husband in favour of his wife recited that dower debt was due to the lady and that as the executant was not in a position to pay her in cash he transferred to her the properties covered by the deed. After the husband's death, the son sued for recovery of possession of the properties upon establishment of title by inheritance. The trial Court held that the conveyance represented a real transaction and so the Plaintiff could not succeed on the basis of title by inheritance and dismissed the suit. Upon appeal, the District Judge held that the *kobala* did not represent a genuine transaction but was a collusive *benami* transaction and decreed the suit. The following portion of his judgment will be found relevant :—

"The learned Munsif held that both the *kobalas* were genuine documents for consideration, and has dismissed Plaintiff's suit.

"The matter is not an easy one to decide. The oral evidence in such cases is altogether without value. There was on the one hand strong indications of the *benami* character of the transaction. There is no doubt that Aber was indebted to Defendant No. 26 and that the latter had obtained a decree against him. A collusive sale to the wife of the debtor is an extremely common form of *benami* and the allegation that money was due as dower is a very easy one to make and a very difficult one to disprove. There is really no evidence on the record that Defendant No. 17 was actually owed anything for dower. The learned Munsif says that there is a presumption that some dower was paid upon the marriage. He is right; but there is no presumption that long after the marriage, dower was still due.

"There is no documentary evidence showing what were the arrangements at the time of marriage; and the oral evidence is not worth anything. I am, therefore, of opinion that the circumstances are in favour of the view that the sale to Defendant No. 17 was collusive. I think that the two *kobalas* must be considered together; and I am justified in my view that the first was collusive by the circumstance which attended the execution of the second.

(2) L. R. 25 I. A 15 ; s. c. I. L. R. 25 Cal. 473 ; 2 C W. N 186 (1897).
(3) 22 C. W N 580 (P. C.) (1917).
(4) 20 C. W. N 648 ; s. c. 23 C. L. J. 593 (1915).
(5) 43 Mad. L. J. 324 (F. B.) (1922).

ABDUL LATIF KAZI *v.* ABDUL HUQ KAZI.

"The question of the second *kobala* was very satisfactorily dealt with by the Court, which decided the title suit brought by Defendant No. 1. Its judgment is Ex. 1 in this case. The learned Munsif has found that that Court was wrong; but his reasons for thinking so are not convincing. The property is said to have been sold after Defendant No. 26 had taken out execution proceedings against Defendant No. 17. As a matter of fact the *kobala* was executed a very few days after the notice of these execution proceedings was served on Defendant No. 17. That this property was in danger is shown by the fact that it was actually attached in the course of the proceedings, and Defendant No. 1 actually put in his claim relying on this *kobala*. A more flagrant case of a *benami* sale to defeat a creditor would be difficult to imagine. It certainly did not deceive the Court 10 years ago; and I do not think it should have deceived the learned Munsif now.

"There are of course circumstances on the other side; but they are not difficult to explain. There may have been several reasons why Defendant No. 17 should have executed a *kabuliyat* in favour of Defendant No. 1. She may have done it in order to safe-guard herself against *malâ fides* on his part; or she may have done so in order to create an atmosphere of genuineness. After all documents are easy to execute; and it is common to bolster up a *benami* transaction with a few documents of this sort. In the present case nothing can be deduced from possession of the land or from possession of the documents. The relationship existing between Aber and Defendant No. 17, and Defendant No. 17 and Plaintiff being what it was, the possession of one was the possession of the other. The possession of the documents by the Defendants is easily accounted for by the fact that Plaintiff was a minor at the time of Aber's death, and his mother since her re-marriage has colluded with the other Defendants and has taken sides against him."

Babus Sarat Chandra Roy Chowdhury, Jitendra Nath Roy (for *Babu Nakuleswar Mukerjee*) and *Rama Prosad Mookerjee* for the Appellant.

Dr. Jadunath Kanjilal for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Defendant in a suit for recovery of possession of land upon establishment of title by inheritance. The property admittedly belonged at one time to Aber Kazi. The case for the Plaintiff is that Aber Kazi (his father) remained the owner of the property till his death in 1907 and that consequently he is entitled to a share by right of inheritance. The Plaintiff, however, is met by a conveyance which was executed by his father on 8th July 1905 in favour of the seventeenth Defendant who was the wife of Aber Kazi and step-mother of the Plaintiff. The conveyance recites that dower debt was due to the lady and that as the executant was not in a position to pay her in cash, the only course left open to him was to transfer to her the properties covered by the deed. If this document represented a real transaction, Aber Kazi ceased to be the owner of the disputed properties before his death, and the Plaintiff cannot succeed on the basis of title by inheritance. The essential question for consideration, consequently, is, whether this conveyance did or did not represent a real transaction. Upon this point, the Courts below have come to divergent conclusions. The

ABDUL LATIF KAZI *v.* ABDUL HUQ KAZI.

urt of first instance held that the conveyance represented a real transaction and dismissed the suit. Upon appeal, the District Judge has taken a different view and decreed the suit. We are of opinion that the decision of the District Judge cannot be supported.

In the first place, the District Judge has adopted the very course which was condemned by the Judicial Committee in *Mina Kumari Bibi* v. *Bejoy Singh Dhudhuria* (1), where Sir Lawrence Jenkins observed that though in cases of alleged *benami* transactions, there may be grounds for suspicion, yet the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. In cases of this character, the determination of the question must depend not merely upon direct oral evidence, but also upon circumstances, such as the source of the purchase-money, the possession of the disputed property, the custody of the title-deeds, the adequacy of consideration and like facts. The District Judge has not approached the case from this point of view, nor has he given effect to the principle enunciated by the Judicial Committee in *Suleiman Kader Bahadur* v. *Mehndi Afsur Bahu* (2), where Lord Davey stated that the burden of proof lies on the person who claims against the tenor of the deed. The Plaintiff seeks in substance a declaration that the deed executed by his father was fictitious. There is a recital in the document that dower debt was due to his wife. There is no reason why that statement should not be taken as *primâ facie* true [*Irshad Ali* v. *Kariman* (3)], but it may be established to be false, and it may also be possible to prove that the conveyance was never intended to transfer the title. That, however, is a question to be determined upon evidence, which cannot be disposed of upon general observations as to the possibility of fraud in cases of this character or as to the extreme probability of a collusive sale to the wife by a person who was not in affluent circumstances. One of the facts relied upon by the Plaintiff is that his father was in debt at the time of this transaction. The District Judge has not referred to the evidence which bears directly upon this point; but his judgment mentions a decree which was obtained by a creditor against the father of the Plaintiff after the execution of the conveyance. The decree itself has not been produced, and we are not able to find from the record when the decree was made. The Courts below further appear to have gathered information from a judgment in a suit which was instituted by the present Appellant against a creditor for the cancellation of an order dismissing a claim preferred in execution proceedings. But the recitals in that judgment are not admissible in evidence. The fact that a judgment is admitted in evidence in order to prove that there was litigation which terminated in a certain way, does not make all the recitals in that judgment part of the evidence in the subsequent action; *Kashi Nath Pal* v. *Jagat Kishore Acharya Chowdhury* (4) and *Tripurana Seethapati* v. *Rokkam Vencanna* (5). The District Judge has further overlooked that this very judgment was set aside by consent of parties; that makes it still more difficult to refer to the recitals therein. We are of opinion that

(1) L. R. 44 I. A. 72 at p. 77: s. c. I. L. R. 44 Cal 662; 21 C. W. N. 585 (1916).

(2) L. R. 25 I. A. 15: s. c. I. L. R. 25 Cal. 473; 2 C. W. N. 186 (1897).

(3) 22 C. W. N. 580 (P. C.) (1917).

(4) 20 C. W. N. 643: s. c. 23, C. L. J. 588 (1915).

(5) 42 Mad. L. J. 324 (F. B.) (1922).

ABDUL LATIF KAZI v. ABDUL HUQ KAZI.

this case has not been considered from the correct standpoint and that the judgment of the District Judge is erroneous in law.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him for reconsideration. The District Judge will be at liberty to permit the parties to adduce fresh evidence to be taken either by himself or by the primary Court, if he considers such a course necessary in the interest of justice. Costs will abide the result.

J. N. R. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 1597 AND 1702 TO 1711 OF 1918.

WALMSLEY, J.
BUCKLAND, J.
1923,
25, May.

ANNADA MOHON ROY CHOWDHURY, Plaintiff, Appellant,
v.
KINA DAS and ors., Defendants, Respondents.

Limitation Act (IX of 1908), Sch. I, sec. 2 (8), Arts. 144, 149—Suit to recover from person adversely in possession by purchaser from Government within 60 years of, but more than 12 years from, commencement of adverse possession, but within 12 years of purchase, if barred.

Certain lands acquired by Government in 1873 were sold by Government to the Plaintiffs on 13th July 1913. In a suit instituted by the Plaintiffs on 9th July 1915 for recovery of the same, it was established that the Defendants were in adverse possession of the land from 1873:

Held—*That the suit was governed by Art. 144 of the Limitation Act, the period commencing from the date when the Defendants' possession became adverse to the Government, the word Plaintiff including his predecessors-in-title by force of sec. 2, sub-sec.* (8) *of the Limitation Act.*

That the contention that by reading Arts. 144 and 149 together, the Plaintiff would be entitled to get, before his righ became extinguished, either 12 years from the date of his purchase or the period to which the Government would still be entitled, whichever was less, was not maintainable.

These were appeals preferred on the 22nd of August 1918 against the judgment of the District Judge of Zilla Rungpur (G. C. Sankey, Esq.), dated the 16th May 1918, reversing the decree of the Munsif of that place (Babu Gopal Ch. Basu), dated the 26th January 1917.

These appeals were brought by Plaintiff in suits for recovery of possession on declaration of Plaintiff's title in respect of certain "B class" surplus lands which had been acquired by Government for a Railway.

The lands were acquired by Government in 1873, and the surplus lands put up to auction and purchased by Plaintiff on 13th July 1913. The suits were instituted on 9th July 1915.

One of the pleas taken in defence was limitation, the case of the Defendants being that despite acquisition by Government, the principal Defendants had been all along in actual possession as tenants under the *pro formâ* Defendants who were the original proprietors and neither Government nor the Plaintiff was ever in actual possession.

The learned Munsif overruled the plea of limitation holding that at the date of the transfer to the Plaintiff, the Government had a subsisting title which the Plaintiff acquired by his purchase and the suits having been instituted within 12 years from the date of the transfer, they were well within time. In other words, according to the learned Munsif, the Plaintiff would get his own start of limitation from the date of his purchase.

ANNADA MOHON ROY CHOWDHURY v. KINA DAS.

On appeal, the learned District Judge held that the suits were barred because, the Plaintiff was out of possession for more than 12 years. He took the view that the Plaintiff being the assignee from Government was not entitled to the 60 years' rule of limitation under Art. 149—but to the ordinary 12 years' rule, and as the Plaintiff's predecessor, the Government, was admittedly out of possession for over 12 years, "the Plaintiff" would be barred as soon as he took the transfer.

On second appeal, the High Court (Walmsley and Buckland, JJ.), held that Art. 144 applied to this case—hence whatever may be the period necessary to bar the Plaintiff, Defendants were bound to prove adverse possession and as there was no finding in the judgment of the learned District Judge as to the character of the Defendants' possession, the cases were remitted to him for a clear finding on the question of adverse possession.

The appeals came back after remand with the finding by the District Judge that the possession of the Defendants was adverse from the very beginning, *i.e.*, since 1873.

Babu Bimal Ch. Das Gupta for the Appellant.—Following questions require consideration :—(1) Whether on the facts found, the inference of adverse possession by the Defendants was sustainable in law. (2) If so, what would be the period necessary to bar the Plaintiff.

As to point (1), finding amounts to this that Government having failed to prove realisation of rent from the principal Defendants who have been in open possession and cultivation of the disputed lands to the knowledge of the Government and without interference by the latter, the possession of the principal Defendants must be held to be adverse since 1873. This is not correct.

In 1873, when the lands were acquired and compensation taken out by the Defendants, the possession of the Defendants after receipt of compensation was mer permissive. They became licensees under the Government and unless Defendants can shew that they asserted a hostile title to the knowledge of the Government at a subsequent period, their possession would not become adverse. It may be objected that there is no finding or evidence regarding payment of compensation, but it being admitted that the Defendants owned and possessed the lands from before acquisition it may be presumed under sec. 114 of the Evidence Act, that they got the compensation. Hence the finding that possession became adverse from the beginning is wrong and there being no finding that at any subsequent period, the possession of the Defendants became adverse, the decision of the District Judge was incorrect.

As to point (2), this depends on the construction of Art. 144, for I do not for a moment contend that Plaintiff would be entitled to the benefit of Art. 149.

I concede that Plaintiff would get only 12 years, but the question is, when would the 12 years commence to run. In other words, whether the word Plaintiff as used in Col. 3 of that article includes the Secretary of State from or through whom he derived his right to sue.

Ordinarily this would be so. Where the period necessary to bar the Plaintiff and his predecessor is the same, there can be no difficulty; but where these periods differ, a good deal of difficulty arises . adopting the ordinary interpretation of the term Plaintiff. As the interpretation clause itself says, "this interpretation would apply only if there was nothing repugnant in the subject or context.

Now, under Art. 149, a suit by Govern-

ANNADA MOHON ROY CHOWDHURY *v.* KINA DAS.

ment would not be barred before the lapse of 60 years, nor could the Government's title be extinguished before the lapse of that period. See sec. 28 of the Limitation Act. If so, Government had a good title in 1903. If it had a title, it certainly had the right to transfer it and did transfer the same to the Plaintiff in whom it became vested by the transfer. But if the ordinary interpretation of the term Plaintiff were adopted, the Plaintiff would find himself barred the moment the transfer became complete. This is reducing things to a practical absurdity. Art. 144, Art. 149 and sec. 28 should be read together and the interpretation that would avoid a repugnancy should be adopted. So in this case, Plaintiff, as used in Col. 3 of Art. 144, must mean Plaintiff himself and ought not to include his predecessor.

In this connection see the case of *Lambert* v. *Taylor* (1).

This case laid down that an assignee from the Crown in respect of a Crown debt, was entitled to sue for and recover the debt within 6 years from the date of assignment by the Crown, even though more than 6 years had elapsed from the date of accrual of the original cause of action. This case therefore supports the principle of my contention.

But it may be objected that the law even in England was different so far as assignment of land was concerned. See *Doe d. Watt* v. *Morris* (2).

In this case the Plaintiff got an assignment of a certain manor from His Majesty's Commissioners of Woods and Forests and sued the Defendant for recovery of certain waste lands within that manor which the Defendant had enclosed and been in possession of for over 20 years prior to the assignment. On a suit by the Plaintiff it was held that the Plaintiff was not entitled to recover because the Defendant had been in possession for over 20 years (the time limited for ordinary suits for recovery of possession of land).

But this decision proceeded on the interpretation of an English Statute, 21 Jac. 1, c. 14, which enacted that although the Crown would not be barred before the lapse of 60 years, yet after the lapse of 20 years, the Crown's rights would be qualified to this extent that the Crown would merely have the right of filing an information of intrusion and the intruder would be entitled to remain in possession pending adjudgment of title to the Crown. But no such qualification is imposed on the Crown's rights by the Indian law. Short of total extinction by reason of the lapse of 60 years no other restriction or limitation is to be found in the Indian Statute. But the result of the District Judge's view would appear to be that after the lapse of 12 years, Government loses the right to transfer. There is no warrant for this view.

Lastly, I would contend that even if the purchaser cannot have the full 12 years from the date of his purchase, he would at least get the 12 years subject to the 60 years' rule, *i.e.* to say, he would have either the full 12 years or the unexpired portion of 60 years whichever is less. See *Kali Kishore* v. *Dhununjoy* (3).

Babus Ramani Mohan Chatterjee, Girija Prosanna Sanyal, Indu Prakash Chatterji, Hemendra Chandra Sen and *Probodh Chunder Bose* for the Respondents were not called upon.

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—These appeals have now

(1) 4 B. & C. 138 (1825).
(2) 2 Bing. N. C. 189 (1835).
(3) I. L. R. 3 Cal. 228, 230 (1877).

ANNADA MOHON ROY CHOWDHURY *v.* KINA DAS.

to be disposed of finally after remand for a finding as to adverse possession. The learned District Judge has found not only that the Defendants have all along been in possession since 1873, but also that their possession has been adverse as against the Government. This finding is challenged as not being justified by the facts. The suits not only had been fully heard when they came before us on second appeal on the previous occasion, but we also gave the parties permission to adduce further evidence if so advised and they have done so. The matter has been very fully considered and there are no grounds for interfering with the finding.

On such finding a further point has been argued, as to the date from which adverse possession should be deemed to run. Art. 144 of the first schedule to the Limitation Act provides that in a suit for possession of immoveable property the period of limitation shall be twelve years from the time when the possession of the Defendants becomes adverse to the Plaintiff. The property was bought by the Plaintiff from the Government in July 1903. Under Art. 149 had this suit been instituted by the Government it would not have become barred for sixty years. Consequently, we are asked to hold that in such circumstances, the word "Plaintiff" should not include the Plaintiff's predecessors-in-title, that is the Government, as ordinarily required by sec. 2, sub-sec. (8), because it is submitted that that would be repugnant to the intention of the Act since, if there has been more than twelve years' adverse possession as against the Government, though a suit by the Government might not be, a suit by a private purchaser from the Government would be barred. We are asked by reading the two articles together to say that a private person in such circumstances is entitled to get, before his right becomes extinguished, either 12 years from the date of his purchase or the period to which the Government would still be entitled, whichever is the less.

I see no grounds whatever for any such construction. It would give such purchaser an advantage which the law does not allow. If the period of 12 years was the less then the previous adverse possession against the Crown, and consequently sec. 2 (8), would be entirely ignored, if the balance of the period to which the Crown is entitled were the less, the Plaintiff would be obtaining the benefit of the full period of 60 years allowed to the Crown, to which it is conceded he is not entitled.

It was submitted that where there has been more than twelve years' adverse possession against the Government, if it was impossible for the Government's successor-in-interest to sue, the Act would be reduced to an absurdity. The answer to that, as is often the case, is a practical one, that when a conveyance of property is to be taken from Government against whom other persons are in adverse possession, it should not be taken until the Government has instituted proceedings and obtained an order for possession and is in a position to transfer the property free from such blot on the title.

The appeals must be dismissed with costs, separate sets of costs being allowed to the separate sets of Respondents who have appeared.

WALMSLEY, J.—I agree.

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 56 OF 1923.

NEWBOULD, J.	DULA MEAH,
RANKIN, J.	Defendant, Petitioner,
1923,	v.
Heard, 21, May.	MOULAVI ABDUL
Judgment,	RAHAMAN, Plaintiff,
31, May.	Opposite Party.

Suit based on bond materially altered, if maintainable—Loan if recoverable when established by evidence apart from the bond—Evidence Act (I of 1872), sec. 91, verbal negotiations leading up to written contract, if admssible in evidence as an independent contract.

Where a bond sued on is proved to have been materially altered by the Plaintiff, then, even apart from the question of merger, a suit on the original debt would not lie unless it can be proved as an independent contract apart from the bond.

Per RANKIN, J.—*Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence. Moreover, where there is an express promise, an implied promise will not be inferred.*

Per NEWBOULD, J.—*There is no decided authority that the material alteration of a written contract destroys the original debt, if the debt is not merged in the written contract.*

This was a Rule issued on 29th of January 1923 against the judgment and decree of the Munsif at Lakhipur (Babu G. C. Biswas), in the District of Noakhali in exercise of the powers of a Court of Small Causes, on 31st December 1922.

The Opposite Party sued the Petitioner on a simple bond for Rs. 25. The Petitioner admitted having taken a loan of Rs. 15 only and having executed a bond for this amount. The Small Cause Court Judge held that Rs. 15 seemed to have been changed to Rs. 25; and that Rs. 5 out of that had been paid. He found the bond due and decreed the suit for Rs. 38, the true amount of principal and interest due in his opinion under the bond as it originally stood. The Petitioner thereupon moved the High Court and obtained the present Rule.

Babu Radha Binode Pal (for *Babu Hem Kumar Bose*) for the Petitioner.

Babu Radhika Ranjan Guha for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

NEWBOULD, J.—The Plaintiff sued the Defendant No. 1, who is the Petitioner in this rule on a bond in the Court of the Small Cause Court Judge at Lakhipur. The Plaintiff's case was that the Petitioner took a loan of Rs. 25 from him and executed a simple bond for Rs. 25 in favour of one Mafizulla who was the Plaintiff's benamdar and was made Defendant No. 2 in the suit. The Petitioner admitted having taken a loan of Rs. 15 only from Defendant No. 2 and having executed a bond for this amount in his favour and alleged that the amount due on this bond had been paid to Defendant No. 2. The judgment of the Small Cause Court Judge was as follows : "Payment of the bond is not proved save as to Rs. 5. Rs. 15 seems to be changed as Rs. 25. Defendant No. 2 does not file W. S. I find that Rs. 15 were paid and the bond is due." He decreed the suit for Rs. 38 but did not allow costs.

The Petitioner relying on the doctrine of *Master* v. *Miller* (1) contends that as it has been found that there was a material alteration of the bond the claim based on it should not have been decreed. The contention cannot be disputed, but on behalf of the Plaintiff Opposite Party it is urged that though he cannot successfully base a claim on the bond he is entitled to

(1) 1 Sm. L. C. 767 (11th Ed.) (1791).

DULA MEAH *v.* MOULAVI ABDUL RAHAMAN.

a decree on proof of the loan by independent evidence. Reliance is placed on the decision of Panton, J., and myself in an unreported case, Rule No. 708 of 1921, decided on the 17th February 1922. In that case a suit brought on an altered bond had been dismissed and we held that the Plaintiff was entitled to a decree for the money found to have been advanced. On behalf of the Petitioner it is pointed out that the debtor was not represented at the hearing of the case. It is suggested that on that account we overlooked an important difference in the case on which we based our decision: *Mati Lal Saha* v. *Monmohan Gossami* (2). That was a case where the whole bond was held to be a forgery and it was not a case of material alteration. Still this decision though not directly in point is important in its reliance on the decision in the case of *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (3). In that case it was held that "an implied contract to repay money lent arises from the fact that the money is lent even though no express promise either written or verbal is made to repay it. Therefore in a case where the Defendant admits the loan and has not repaid it the Plaintiff may maintain an action against him for breach of his promise or contract entirely independent of any security which may have been given for the advance." That was a case in which the *hathchitta* on which the Plaintiff relied was improperly stamped but the principle is equally applicable to the present case. This decision has been dissented from by a single Judge of the Allahabad High Court in *Parsotam Narain* v. *Taley Singh* (4). But it was cited as an authority by a divisional Bench of this Court in the case of *Ram Bahadur* v. *Dusari Ram* (5), where it was held that where a claim is founded on the original consideration it can be enforced provided that the original consideration has not merged in the bond or the promissory note which is excluded from evidence. A later case of the Allahabad High Court *Benarsi Prasad* v. *Fazal Ahmed* (6) was also there cited in support of this principle. On behalf of the Respondent reliance is placed on the case of *Gour Chandra Das* v. *Prasanna Kumar Chandra* (7) and more particularly on the remarks at p. 819. These were not necessary for the decision of the case and I can find no decided authority that the material alteration of a written contract destroys the original debt if the debt is not merged in the written contract. If the written contract is a negotiable instrument this would usually happen. But in the case of a simple bond I would hold that the alteration prevents a suit being based on the bond, and that the question whether a suit would lie on the original debt depends on whether there is a separate contract which can be proved apart from the bond.

In the present case I would hold that the authorities support the Opposite Party's contention that he is entitled to recover the loan if he can establish his claim on evidence apart from the bond. But in the present case the findings have been arrived at after treating the bond as evidence and it cannot be said whether the Defendant would have been found liable if the bond had been excluded. The claim on the original debt is on the face of it barred by limitation. As a suit on the bond, limitation was saved by the proof of a payment of Rs. 5 which was

(2) 5 C. W. N. 56 (1900).
(3) I. L. R. 23 Cal. 851 (1896).
(4) I. L. R. 26 All. 176 (1903).
(5) 17 C. L. J. 399 (1912).
(6) I. L. R. 28 All. 298 (1905).
(7) I. L. R. 33 Cal. 812 (1906).

DULA MEAH *v.* MOULAVI ABDUL RAHAMAN.

alleged to be a payment of interest as such. But apart from the bond no contract to pay interest can be proved and on the findings arrived at there is nothing that would extend the period of limitation.

I would therefore make this rule absolute and reverse the judgment and decree of the Small Cause Court Judge and dismiss the suit with costs and allow the Petitioner his costs in this Court with hearing fee one gold mohur.

RANKIN, J.—I agree in the order proposed. The learned Judge on his own findings was dealing with a fraudulent suit brought upon a pretended bond for Rs. 25. He found that when in the custody of the Plaintiff the document sued on had been altered from Rs. 15 to Rs. 25. Though he granted sanction to prosecute he found that "the bond is due" and decreed the suit for Rs. 38, this being the true amount of principal and interest due in his opinion under the bond as it originally stood. No other interpretation of his decision seems possible.

In my opinion this is wholly contrary to law and can be corrected under sec. 25 of the Provincial Small Cause Courts Act 1887.

To the bond pleaded and tendered in evidence the Defendant has the simplest of all defences—*non est factum.* If the Plaintiff asked leave to amend his claim and sue upon the bond as it originally stood such leave should have been refused [*Gagan Chandra Ghose* v. *Dharani Dhar Mandal* (8)], but in any event such an amendment would effect nothing. The Plaintiff in such a case as this cannot recover on the bond at all—not even if he sues upon it in its original state : *Master* v. *Miller* (1) is undoubted law in India [*Cf. Gour Chandra* v. *Prasanna Kumar* (7)].

This is sufficient to show that the decision complained of cannot stand : in the present case it is not open to the Plaintiff to recover apart from the bond. A bill of exchange or promissory note is frequently given as conditional payment of or as security for the price of goods sold or some other debt. If the instrument is afterwards altered it cannot be sued on (as between the original parties) but the contract for the sale of goods (*e.g.*) can in such cases be enforced against the acceptor or maker who purchased the goods. As between an indorsee and indorser the case is different [*Alderson* v. *Langdale* (9), Negotiable Instruments Act, 1881, sec. 87] because the indorser's remedy against prior parties has been prejudiced : this consideration does not affect a maker or acceptor who may therefore maintain an action on the original debt, [cf. *Atkinson* v. *Hawdon* (10)] so too a *hathchitta* is frequently given as an acknowledgment of a pre-existing date. Subject to any question of merger the same position may arise in the case of a bond. But an independent cause of action must be shown if the doctrine of *Master* v. *Miller* (1) is not to take effect.

Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence (Evidence Act, sec. 91). Moreover, where there is an express promise an implied promise will not be inferred. In the present case I see no materials upon which the Plaintiff can make out an independent contract. Nor is it necessary to consider whether

(1) 1 Sm. L. C. 767 (11th Ed.) (1791).
(8) I. L. R. 7 Cal. 616, 619 (1881).

(1) 1 Sm. L. C. 767 (11th Ed.) (1791).
(7) I. L. R. 33 Cal. 812 (1906).
(9) 3 B. & Ad. 660 (1832).
(10) 2 A. & E. 628 (1835).

DULA MEAH v. MOULAVI ABDUL RAHAMAN.

an honest Plaintiff whose bond had, while in his custody, been altered could on a case properly alleged and proved recover back the actual money lent as money had and received to his use. I think this rule should be made absolute and the suit dismissed with costs.

J. N. R. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD ATKINSON. LORD SUMNER. LORD CARSON. MR. AMEER ALI. 1922, Heard, 7, November. Judgment, 20, December.	HARICHAND MANCHARAM, Appellant, v. GOVIND LUXMAN GOKHALE, since deceased, Respondent.

Specific performance, suit for—Agreement whether subject to condition or a concluded contract—Principal terms settled but execution of a formal document in contemplation, effect of.

Where documents executed by the parties embodied the principal terms of the bargain on which they were in absolute agreement and regarding which they did not contemplate any variation or change, a reservation in respect of a formal document to be prepared by a vakil only meant that it should be put into proper shape and in legal phraseology with any subsidiary terms that the vakil might consider necessary for insertion in a formal document. The plea that there was no completed contract is not maintainable in such a case.

RIDGWAY v. WHARTON (1) *and* VON HATZFELDT-WILDENBURG v. ALEXANDER (2) *referred to.*

This was an appeal from the judgment of the Appellate Court at Bombay, dated the 29th July 1919, allowing an appeal from the judgment of Marten, J., in the High Court at Bombay, dated the 1st February 1919.

(1) 6 H. L. C. 238 (1857).
(2) [1912] 1 Ch. 284.

The principal question on this appeal was whether an agreement between the Appellant and Govind Luxman Gokhale (hereinafter called the deceased Respondent), dated the 28th November 1917, providing for the sale by the Appellant to the deceased Respondent of a certain property in Grant Road, Bombay, was a concluded contract or whether the same amounted merely to negotiation and was dependent upon a formal contract being prepared.

On the 28th November 1917, the Appellant and the deceased Respondent drew up two documents in the Gujrati language and character which are Exs. "A" and "A1" in the case. It was admitted that for all intents and purposes the documents were in identical terms. Ex. A was addressed to the deceased Respondent and signed by the Appellant and Ex. A1 was addressed to the Appellant and signed by the deceased Respondent. The document signed by the Appellant, after a very full and careful description of the property by its number in Grant Road and by reference to its old and new numbers in the books of the Collector and in the old and new surveys, a statement of the exact measurement in square yards and a statement of the sum to be paid each year to the Government on account of ground rent, continued: "I agree to give you in sale the said immoveable property together with the messuage building (standing thereon) for the price of rupees two lacs and fifteen thousand." The document signed by the deceased Respondent similarly stated "I agree to purchase." The documents then continued that the conditions of the sale were that the bargain paper in respect of the sale should be made

HARICHAND MANCHARAM v. GOVIND LUXMAN GOKHALE.

through a vakil within two days and at the time of making the bargain paper the Appellant was to take from the deceased Respondent by way of earnest money Rs. 10,000 and the balance of Rs. 2,05,000 was to be paid at the time of the execution of the sale deed. Careful provision was then made with respect to certain suits which were pending against the Appellant in the High Court at Bombay in relation to the property, it being provided that if these suits were decided against the Appellant "the bargain" should be cancelled and he should return the earnest money. Provision was also made for the costs of the sale and registration and the time of completion was fixed as six months after the date of the bargain paper, it being also provided that the Appellant should make out a marketable title and that if the said suits were not disposed of within six months "this agreement" should be in force until the suits were decided in the Appellant's favour. Provision was also made that the Appellant should get the signature of a certain person Ishwarlal on the sale deed and should not pay any brokerage. The documents then concluded with a statement that "the agreement" had been taken of the parties' own free will and pleasure.

After these documents were executed the Appellant's solicitors prepared a draft contract in English, but the parties could not agree as to its terms. Eventually on the 8th December 1917, the Appellant's solicitors wrote that as the deceased Respondent did not agree to the terms of the draft agreement as altered by them there was no course left open to the Appellant but to break off what was alleged to be the negotiations for the sale of the property. In consequence this suit was brought by the deceased Respondent. As was pointed out by the learned trial Judge in his judgment that the deceased Respondent's solicitors in entertaining and altering the draft agreement were particularly careful to do so without prejudice to his rights under the existing document Ex. A which they contended was a binding agreement.

The learned trial Judge in his judgment after reviewing the authorities, including *Rossiter* v. *Miller* (9), *Winn* v. *Bull* (3) and *Von Hatzfeldt-Wildenburg* v. *Alexander* (2), proceeded: "Now applying to Ex. A the principles laid down in the above judgments I think the words 'the conditions in respect thereof are as follows' are important and that it is also important that the first of the conditions referred to is for a bargain paper through a vakil. The reference to the more formal document (*viz.*, the bargain paper) is therefore a 'condition' and according to Lord Parker that fact is generally, if not invariably, conclusive against the reference being treated as the expression of a mere 'desire.'" He therefore held that the agreement was subject to a more formal document being prepared and dismissed the suit.

The Appellate Court, (MacLeod, C. J. and Heaton, J.), unanimously reversed this decision. MacLeod, C. J., dealt with the use of the word "condition" as follows:—"The word 'condition' has two meanings. It is often used as synonymous with 'terms'. and ordinarily when it is stated in a document which takes the form of an agreement that the 'conditions are as follows,' as it is stated in Ex. A, the word 'condition' means 'term.' The commonest occasion where the word has this meaning is when conditions of sale are drawn up for an auction. Where a successful bidder signs the agree-

(2) [1912] 1 Ch. 284.
(3) 7 Ch Div. 29 (1877).
(9) 3 A. C. 1124 (1878).

ment annexed to the conditions of sale those conditions become part of the contract. Therefore the mere fact that a bargain paper was to be made through a vakil cannot of itself prove that there was a condition precedent to the agreement becoming effectual as a term of the agreement." Then after reviewing the authorities he pointed out that the present case was distinguishable from all those relied on by the Appellant in that in those cases the words "subject to" were used and it was held that they imported a condition. The Appellate Court therefore held that there was a concluded contract. The suits referred to in the contract having been settled and the Appellant being free to convey the property, the Appellate Court accordingly decreed specific performance of the contract.

On the 20th November 1919, the Appellant obtained from the Appellate Court at Bombay a certificate granting leave to appeal to His Majesty in Council against the decree of that Court and on the 20th December 1919 an order was made declaring the appeal to be admitted.

The deceased Respondent died on the 1st January 1922 and by Order of His Majesty in Council made on the 14th July 1922, it was ordered that the Respondents Dattatraya Govind Luxman Gokhale and Manohar Govind Luxman Gokhale, minors, should be substituted as Respondents in the place of the deceased Respondent and that Bai Satyabhamabai should be appointed their guardian *ad litem*.

Messrs. Upjohn, K. C., DeGruyther, K. C., Holman Gregory, K. C., E. B. Raikes and *Parikh* for the Appellant.—The Gujrati writings signed by the parties were merely the terms agreed on as a basis for a contract. The contract itself was to be made through a vakil and was never concluded.

There was merely a conditional agreement of which specific performance cannot be obtained. *Winn* v. *Bull* (3), *Lloyd* v. *Nowell* (4), *Watson* v. *McAllum* (5) and *Von Hatzfeldt-Wildenburg* v. *Alexander* (2).

The Courts have wrongly excluded evidence of an oral agreement which was the foundation of the written agreement.

Proviso 3, sec. 92, Indian Evidence Act, 1872.

Rogers v. *Hadley* (6) and *Pym* v. *Campbell* (7).

Messrs. Clauson, K. C., Tomlin, K. C. and *R. J. T. Gibson* for the Respondent.—The documents in Gujrati have provisions which contain the language of the contract and the clear terms agreed to between the parties.

The function of the vakil was purely ministerial, *i.e.*, to put into legal language the terms already agreed on between the parties. *Bonnewall* v. *Jenkins* (8), *Rossiter* v. *Miller* (9) and *Ridgway* v. *Wharton* (1).

Mr. E. B. Raikes replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The suit which has given rise to this appeal was brought by the Plaintiff in the High Court of Bombay in its Original Civil Jurisdiction for a decree against the Defendant for specific performance of a contract entered into on the 28th November 1917, for the sale, by the Defendant to the Plaintiff, of certain immoveable property in Bombay. Two

(1) 6 H. L. C 238, 263, 264 (1857).
(2) [1912] 1 Ch 284
(3) 7 Ch. Div. 29 (1877).
(4) [1895] 2 Ch. 744.
(5) 87 L. T. 547 (1902).
(6) 2 H. & C. 227, 249 (1863).
(7) 6 E. & B. 37 (1856).
(8) 8 Ch. Div. 70 (1878).
(9) 3 A. C. 1124, 1151 (1878).

HARICHAND MANCHARAM v. GOVIND LUXMAN GOKHALE.

documents in the Gujrati vernacular were prepared on the occasion, one of which was signed by the Defendant Harichand Mancharam, the other by the Plaintiff, the vendee, Govind Luxman Gokhale. Both bear one and the same date, and are practically in identical terms. The document executed by the Defendant is marked in these proceedings as Ex. "A"; the other, signed by the Plaintiff, is marked Ex. "A1." Ex. "A," after giving the name and designation of the intending purchaser, the Plaintiff, and describing the vendor, Harichand Mancharam, proceeds thus:—

"I agree to give you in sale the said immovable property, together with the messuage building (standing thereon), for the price of Rupees two lacs and fifteen thousand."

It then gives the "conditions" of the sale in these terms:—

"The conditions thereof are as follows:—

"1. The bargain paper in respect of the sale of the said immoveable property shall be made through a vakil within two days from this day and at the time of making the bargain paper I am to take from you by way of earnest money in respect thereof Rs. 10,000, that is, you are to pay the same to me and as regards Rs. 2 lacs and five thousand being the balance you are to pay the same to me at the time of the execution of the sale deed by me and by way of earnest thereof I am to take from you, that is to say, you are to pay to me Rs. 10 ten thousand at the time of the (execution of the) bargain paper and the balance of Rupees two lacs five thousand is to be paid to me by you at the time when the deed of sale is executed by me.

"2. As regards the said Jaga premises to be sold suits are pending against me in the High Court. If perchance these suits are decided against me then this bargain shall be treated as cancelled and if such a thing happens then I am to return to you the Rs. ten thousand without interest received as earnest money by me.

"3. As to the costs in respect of stamp, registration, vakil, &c., in the matter of the said sale which may be incurred on behalf of both the parties, i.e., you and myself the same shall be totalled up and borne by you and me half and half.

"4. The time of completing the said matter of the said sale deed is agreed to be six months from the date of the bargain paper on the decision in the case being given in my favour during the said period,* I am to get passed, *i.e.*, made out marketable title for you and to complete the matter of sale. If perchance the suit pending in the High Court not disposed of within six months then this agreement shall be in force till the disposal of the said suit and on the said suits being decided in my favour I am to complete the matter of this sale, and if the High Court suits be decided in my favour within six months I am to complete and you are to get completed the matter of sale within six months.

"5. For the purpose of the sale you are to get for me the signature of Ishwarlal the adopted son of Shankerbhai along with your signature on the sale deed.

"6. In the matter of this sale I am not to pay brokerage.

"The agreement I have given and taken from you to the above effect of my and your free will and pleasure. The 28th day of November 1918 correspond with the sud 15th of Kartak 1974, Wednesday."

Ex. "A1," after reciting the terms of the contract, in para. 7 says as follows:—

"7. This bargain is for the purchase of this immoveable property together with buildings and structures thereon, (you) have given and I have taken from you the agreement to the above effect, of our free will and pleasure. The 28th day of the month of November in the year 1918 (corresponding with) the 15th of Kartak sud of Samvat 1974, Wednesday."

The case came on for trial before Mr. Justice Marten on the Original Side of the Court. The Plaintiff contended that the two documents which formed the foundation of the suit, formed a completed contract; whilst the Defendant-vendor

* The equivalent of I and you are partly altered in the original.

urged that it was only a provisional arrangement conditioned to the preparation by a vakil of a formal document evidencing the contract. The learned Judge framed a number of issues, but so far as the present appeal is concerned only the two following are material :—

"(1) Whether suit is maintainable having regard to fact that the writing sued on was conditional upon an agreement being entered into?

"(2) Whether there was a concluded contract between the parties and if so what are the terms thereof?"

At the trial the Defendant attempted to tender some oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the Plaintiff. The trial Judge refused the application in these words : "I reject that evidence : irrelevant and inadmissible."

In their Lordships' opinion he was quite right, under sec. 92 of the Indian Evidence Act, in rejecting the evidence, and no attempt appears to have been made on appeal to take exception on behalf of the Defendant to this part of Mr. Justice Marten's order. Their Lordships do not think it necessary to refer further to this matter.

On the main case the trial Judge came to the conclusion that Exs. "A" and "A1" did not constitute a completed contract, chiefly relying on the use of the words, "the conditions thereof are as follows." He considered that the condition that the "bargain paper" in respect of the sale shall be made by a vakil within two days from the date of the agreement was a condition to which the whole bargain was subject, so that until the vakil prepared a bargain paper "there was no completed contract." He accordingly dismissed the Plaintiff's suit with costs. On appeal by the Plaintiff to the High Court in its Appellate Jurisdiction the learned Judges (Macleod, C. J., and Heaton, J.) arrived at a different conclusion. They held that the two documents executed on the 28th November 1917, constituted a "binding agreement," and that the provision relating to the preparation of a "bargain paper" by a vakil was not a condition to which the contract was subject, and accordingly they reversed the order of the trial Judge and decreed the Plaintiff's suit.

On appeal before the Board it is urged, on behalf of the Defendant as it was urged in the Appellate Court in India, that the Gujratihahers of the 28th November 1917 represented only a provisional arrangement on which no decree could be made. In support of this contention various clauses in the document executed by the Defendant were referred to. It is said that the fact that the bargain paper was to be made within two days from the date of the execution of the documents "A" and "A1," and was to be prepared by a vakil, and that at the making of the bargain paper the earnest money is to be paid, shows that the real and effective contract was to be founded on the paper prepared by the vakil. Again, reference was made to cl. 1, Ex. "A," *viz.*, that "the time of completing the said matter of the said sale deed is agreed to be six months from the date of the bargain paper on the decision in the case being given in my favour during the said period." It may be remarked here that two suits had been brought against the Defendant contesting his title to the property which he had bargained to convey to the Plaintiff, and the reference in para. 4 is to these two suits. Their Lordships understand that these two actions were subsequently settled, and there is no dispute now as regards the title of the vendor (the Defendant).

The Appellant's counsel refers also, in support of his contention, to the fact that formal documents were prepared by the Defendant's solicitors, in which certain additional terms were inserted, and he urges that the insertion of those terms indicates that the original agreement entered into on the 28th November 1917, was not intended to be a completed contract. On behalf of the Respondent reliance has been placed on the whole tenor of the two documents, and especially on cl. 7 of Ex. "A1," to show that the parties intended to have a definite and completed agreement on that date when they executed those two papers, and what was left to be done by the vakil was only to embody the contract in a formal document and to insert in it such subsidiary terms as are usual in such conveyances. The learned Chief Justice points out in his judgment that the word "conditions" used at the beginning of Ex. "A," in connection with the preparation of the "bargain paper" by a vakil, does not mean that it is a condition to which the bargain is subject, but that it is only one of the "terms" of the contract. Their Lordships concur in that view.

He has also examined at some length the cases in which the principle applicable to the construction of such documents is laid down; it is, therefore, not necessary to refer to them in detail in this judgment. Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway* v. *Wharton* (1), the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In *Von Hatzfeldt-Wildenburg* v. *Alexander* (2), Lord (then Mr. Justice) Parker laid down that where "the acceptance by the Plaintiff was subject to a condition that the Plaintiff's solicitors should approve the title to and covenants contained in the lease, the title from the free-holder and the form of contract," the negotiations did not form a binding agreement between the parties.

The facts of that case were wholly different from the present, but the judgment marks the difference between a completed and binding agreement and one subject to a condition. Here Exs. "A" and "A1" show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and in legal phraseology, with any subsidiary terms that the vakil might consider necessary for insertion in a formal document. The letter of the 1st December 1917 by the Defendant's attorney to the Plaintiff's solicitor shows that the terms of the vernacular document "A" were regarded by them as forming the foundation of the contract. They are as follows:—

"With reference to your letter of yesterday, delivered to us by your articled clerk after 4 P.M., we note that you agree that the alterations which you had made in the

(1) 6 H. L. C. 238 (1857).

(2) [1912] 1 Ch. 284.

English draft agreement prepared by us and handed to your client are not in consonance with the terms of the Gujrati Chitti which our client gave to yours. We, however, do not agree with you that the English agreement as drafted by us originally, or as sent to you with our letter of the 29th ultimo, is not in consonance with the terms of the said Chitti."

Cl. 7 of Ex. "A1," to which reference has already been made, is explicit :—

"This bargain is for the purchase of this immoveable property, together with buildings and structures thereon, (you) have given and I have taken from you the agreement to the above effect, of our free will and pleasure. The 28th day of the month of November in the year 1918 (corresponding with) the 15th of Kartak sud of Samvat 1974, Wednesday."

It shows clearly that a completed bargain was intended by the Plaintiff.

On the whole, therefore, their Lordships are of opinion that the judgment appealed from is correct, and that this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors : *Messrs. Lattey & Hart* for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD BUCKMASTER. SIR JOHN EDGE. MR. AMEER ALI. SIR LAWRENCE JENKINS. 1921, Heard, 10, November. Judgment, 9, December.	MOHAMMAD SHER KHAN, Appellant, v. RAJA SETH SWAMI DAYAL, Respondent.

Transfer of Property Act (IV of 1882), secs. 60, 98—Anomalous mortgage, provision in mortgage that mortgagee may take possession if property not redeemed at the end of term and remain in possession for 12 years appropriating profits towards interest and without right in the mortgagor to redeem during this period—Redemption, suit for, during period of possession, if maintainable—Clog on redemption

A mortgage of immoveable property for five years inter alia *provided that if it was not redeemed at the end of that period the mortgagee would be entitled to take possession and remain in possession for twelve years during which period the right of the mortgagor to redeem would be suspended and the mortgagee would have the right to take the profits in lieu of interest without any obligation of account:*

Held—*That assuming the mortgage to have been an "anomalous mortgage" within the meaning of sec. 98 of the Transfer of Property Act, it would still be governed by the provisions of sec. 60 of the Act, under which the right to redeem arose as soon as the term of five years expired. This statutory right could not be defeated or hindered by the provision suspending the right to redeem during the period of the mortgagee's possession after the expiry of the term.*

An anomalous mortgage enabling the mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid, if it did not also hinder an existing right to redeem.

Held—*That as the provision authorising the mortgagee during possession to appropriate the profits in lieu of interest was valid, the mortgagee was not accountable for the profits during the period of his possession nor the mortgagor for interest.*

These were two consolidated appeals from two decrees, dated the 9th February 1915, and the 19th June, 1918, of the Court of the Judicial Commissioner of

Oudh, which affirmed two decrees, dated the 7th September 1914, and the 17th April 1916, of the Subordinate Judge of Kheri respectively.

The principal question for determination on the present appeal was whether the Appellant was entitled to redeem the mortgage in suit, dated the 9th June 1908, which was executed by the Appellant in favour of Seth Raghubar Dayal (since deceased), father of the Respondent.

The principal amount secured by the mortgage was Rs. 82,000 payable with interest under the following terms :—

(1) That I shall pay interest on the said mortgage money at the rate of 9½ annas per cent. per month, in respect of the 1st six-months, at the end of Aghan 1316 Fasli, for the first time and thereafter, I shall each year pay, similarly, interest every six-months, at the end of Aghan and Jeth, under a duly executed receipt signed by the mortgagee. If the interest for any six-months be not paid on due date it will be added to the principal, and interest at the above rate will run on the total amount of principal and interest, and this system of payment of interest and of compound interest by six-monthly instalments will continue, during the stipulated period as well as after that, till redemption and payment of the entire demand.

(2) That after five years, at the end of Jeth 1320 Fasli, in the fallow season, I shall pay, at a time and in a lump sum, the entire principal interest, and compound interest, and redeem the mortgaged property.

(3) That if interest for four six-months be not paid in full, or if at the stipulated time, *i.e.*, after five years, I do not get the mortgaged property redeemed on payment of the entire amount of principal, interest and compound interest, then, in both cases, the mortgagee will have the option either to take possession of the mortgaged property, in lieu of the principal for a period of 12 years commencing from the date of entering into posession, or to let his interest and compound interest run as usual, in which case I shall not raise the objection to the effect that the mortgagee did not take possession in order to let his interest accumulate, the mortgagee having the option to choose one of the two alternatives.

(4) That in case the mortgagee takes possession, I, the mortgagor, shall get mutation of names effected in his favour; and if I fail to do so, the mortgagee may himself get mutation effected in his favour, I being liable for the costs thereof. In case the mortgagee has to file a suit on account of my breach of promise, or for possession of the mortgaged villages on account of non-payment of four six-monthly instalments of interest, then the costs thereof will be borne by me, and I shall pay the same with interest, at the above rate, without any objection.

(5) That the mortgagee will remain in possession for twelve years from the date on which he takes possession of the mortgaged property, and the mortgagor will not have the right of redemption during this period of twelve years.

(6) That, during the period of possession, the mortgagee will appropriate, in lieu of interest, all the produce, *mal* and *sewai*, and profits of the mortgaged villages, after payment of the Government revenue according to the present settlement. During the period of possession, neither the mortgagee will have any claim to interest, nor I, the mortgagor, to profits: nor will there be any accounting as to shortage or surplusage of profits at the time of redemption.

(7) That from the date of possession, the mortgagee shall enjoy all proprietary rights

as I do. He will have, like myself, the right of enhancing or altering rent, increasing or reducing the area of holdings, ejecting tenants, dismissal and retention of Patwari and Chaukidar and all other rights. No interference will be made on my behalf, during the period of mortgagee's possession. I shall give up *sir* and *khudkasht*, if any, in the mortgaged villages, and the mortgagee will have the power to arrange for the cultivation of such lands.

(8) That during the period of possession, all wood, green or dry, which might fall from trees in the groves or from other trees, will be appropriated by the mortgagee, and he will have the power to cut up to four trees, green or dry, every year, and I will advance no claim in respect thereof at the time of redemption. Every building used for the accommodation of myself, or of my peons and *karindas*, will remain in the mortgagee's possession, and no interference will be made on my behalf so long as he is in possession. The mortgagee will receive, like myself, all the zemindari dues, *parjot*, etc., the crops of groves and gardens, and all kinds of products along with *mal* and *sewai*, generally, and I will advance no claim in respect thereof at the time of redemption.

(9) That on the expiry of twelve years, at the month of Jeth, *i.e.*, on Puranmashi, in the fallow season, I shall redeem the mortgaged property on payment of principal, interest, and compound interest, together with arrears and *taqawi*, due from tenants, such as may be recoverable. Pending the payment of the entire demands due hereunder, together with arrears and *takawi*, due from tenants, the mortgagee will, as usual, remain in possession and occupation of the mortgaged property in accordance with the above-mentioned conditions.

The mortgagee having died, the Respondent, his heir, filed the first of the present suits (No. 234 of 1913) against the Appellant on the 14th July 1913, in the Court of the said Subordinate Judge. He stated in the plaint that the Appellant had not paid the principal and interest of the debt due under the mortgage within the period specified therein, and that under the terms of the mortgage quoted above, the Respondent was entitled to obtain possession of the mortgaged property, and he accordingly claimed a decree for possession thereof.

The Appellant filed a written statement denying the Respondent's claim to obtain possession of the mortgaged property, and offering to redeem the said mortgage. The Subordinate Judge who tried the suit framed the following among other issues:—

(4) Has the Plaintiff become entitled to possession over the mortgaged estate on account of breach on the part of the Defendant of any of the mortgaged terms and to retain possession for twelve years from the date he obtained it?

(5) Or, is the Defendant entitled to pay off the mortgage-debt and need not surrender possession?

The Subordinate Judge delivered judgment on the 7th September 1914. He held that the Appellant was not entitled to redeem the mortgage, and said as follows:—

"I have already discussed and held that the mortgage in suit is an anomalous mortgage and that the rights and liabilities of the parties to it should be determined according to its terms. It expressly provides that on default of the mortgage-debt at the due date the mortgagee shall be entitled to take possession over the mortgaged property and to retain it for twelve years. There is no dis-

MOHAMMAD SHER KHAN v. RAJA SETH SWAMI DAYAL.

pute that the breach of this contract has taken place. Therefore the right to possession vested in the Plaintiff and he is entitled to the relief claimed. The Defendant is precluded, in my opinion, from withholding the possession from the Plaintiff and cannot pay off the mortgage. Therefore I find the 4th issue for the Plaintiff and the 5th issue against the Defendant."

The Subordinate Judge therefore made a decree for possession of the mortgaged property in favour of the Respondent, and from that decree the Appellant appealed to the Court of the Judicial Commissioner of Oudh, and the appeal was registered, First Appeal No. 126 of 1914. The learned Judicial Commissioners delivered judgment on the 9th February 1915. They held that the said mortgage was not an anomalous mortgage as defined in sec. 98 of the Transfer of Property Act, IV of 1882, but that it was a combination of a simple and a usufructuary mortgage. In other respects they agreed with the said Subordinate Judge in holding that the Appellant was not entitled to redeem the mortgage, and they accordingly made a decree dismissing the appeal. In the course of their judgment they said as follows :—

"We do not, however, find that the Appellant has been able to make out any case for the setting aside or the modification of the decree. There is nothing in the provisions of the Transfer of Property Act which will give him a right to redeem other than the right which he agreed to accept under the terms of the deed. It is not open to him to obtain a right of redemption which would have the effect of defeating the claim for possession by obtaining a decree in this case stating the amount which would have to be paid as a condition precedent to redemption."

The Appellant thereupon filed the second of the present suits (No. 93 of 1915) on the 18th June 1915, in the Court of the same Subordinate Judge. In his plaint the Appellant stated that the Respondent had obtained possession of the mortgaged property in execution of the decree on the 14th February 1915. He further stated that the annual profits from the mortgaged property were not less than Rs. 12,255 and odd, and that the Appellant was entitled to redeem the said mortgage. The Appellant therefore claimed possession of the mortgaged property from the Respondent, who denied the Appellant's claim, and filed a written statement.

The Subordinate Judge delivered judgment on the 17th April 1916. He held that the terms of the deed contained in cl. 5 thereof did not amount to a clog on the equity of redemption, and that the Appellant was not entitled to redeem the mortgage before the expiry of twelve years from the 14th February 1915, the date on which the Respondent obtained possession of the mortgaged property. He concluded as follows :—

"Certainly it would have been much better for the Plaintiff, and an honour to the Defendant himself, if the Defendant could have seen his way to accept the Plaintiff's offer and afford him a chance to redeem the mortgage, but he has, like the implacable banker in Shakespear's play, elected to continue a profitable investment of his money and to avail himself of the conditions of the contract, and there is nothing in the law to deprive him of it."

The Subordinate Judge therefore held that the suit filed by the Appellant for redemption of the mortgage was premature, and he therefore made a decree dismissing it with costs, and from that decree the Appellant appealed to the Court

of the Judicial Commissioner of Oudh, and the appeal was registered, No. 78 of 1916. The learned Judicial Commissioners delivered judgment on the 19th June 1918, agreeing with the findings of the said Subordinate Judge and dismissing the appeal. They concluded their judgment in the following words :—

"The agreement by which the exercise of the right of redemption is postponed for a period of twelve years cannot by itself be treated as a clog : the parties are allowed to settle the period of redemption by contract between themselves, and to arrange the date after which redemption may be had. Here we have a time for redemption fixed by the parties themselves, and unless the mortgage is, if it legally can be, satisfied from the usufruct meanwhile, there is no ground apparent upon which the Plaintiff shou'd be allowed to depart from his agreement and seek redemption at an earlier date.

"The clause by which the mortgagor is debarred from making payments towards principal during the period of the mortgagee's possession is part and parcel of the arrangement by which the exercise of the right of redemption is postponed : it is not a collateral or independent clause in restriction of the exercise of a right already agreed upon."

Hence these appeals by special leave from the said decrees, dated the 9th February 1915, and the 19th June 1918, of the Court of the Judicial Commissioner of Oudh to His Majesty in Council.

Messrs. Upjohn, K. C. and *Dubé* for the Appellant.—This was a simple mortgage under the definition of sec. 58 of the Transfer of Property Act, 1882, and there was a right to redeem under sec. 60 of that Act.

Cl. 5 in the mortgage is bad in that it purports to take away that statutory right of redemption.

The mortgage was not a combination of a simple and usufructuary mortgage but a succession of one to the other and sec. 98 of the Transfer of Property Act does not apply to it. They referred to *Lingam Krishna* v. *Maharaja of Vizianagram* (1).

Messrs. DeGruyther, K. C. and *Parikh* for the Respondent.—Sec. 98 of the Transfer of Property Act is applicable or alternatively there is a separate contract added to a simple mortgage which is valid.

Mr. Upjohn, K. C. replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—These are consolidated appeals preferred by special leave of His Majesty in Council from two decrees, dated the 9th February 1915, and the 19th June 1918, of the Court of the Judicial Commissioner of Oudh, which affirmed two decrees passed by the Subordinate Judge of Kheri on the 7th September 1914, and the 17th April 1916, in suits No. 234 of 1913 and No. 93 of 1915.

The question for determination is whether Mohammad Sher Khan, the mortgagor and Appellant in both appeals, has a present right on payment of the mortgage-money to redeem the mortgaged property. This has been decided adversely to him in both the lower Courts.

The mortgage is dated the 9th of June 1908, and is Ex. A. 36 on the record. The sum of Rs. 82,000 is recited to be due, and the mortgagor declares : "Therefore I . . . . . do hereby mortgage for five years", the immoveable property there described. Then follow the terms.

Cl. 1 provides for the payment of interest half-yearly at the rate of 9½ annas

(1) 15 C. W. N. 441 (P. C.) (1911).

per cent. per month, for compound interest, in the event of default, and that—

"This system of payment of interest and of compound interest by six-monthly instalments will continue during the stipulated period as well as after that till redemption and payment of the entire amount."

Cl. 2 is in these terms :—

"After five years at the end of Jeth 1320 Fasli in the fallow season I shall pay at a time and in a lump sum the entire principal, interest and compound interest and redeem the mortgaged property."

Cl. 3 provides :—

"That if interest for four six-months be not paid in full, or if at the stipulated period, *i.e.*, after five years, I do not get the mortgaged property redeemed on payment of the entire amount of principal interest and compound interest, then in both cases the mortgagee will have the option either to take possession of the mortgaged property in lieu of the principal for a period of twelve years commencing from the date of entering into possession or to let his interest and compound interest run as usual, in which case I shall not raise the objection to the effect that the mortgagee did not take possession in order to let his interest accumulate—the mortgagee having the option to choose one of the two alternatives."

Cl. 4 deals with mutation of names.

Cl. 5 is in these terms :—

"The mortgagee will remain in possession for twelve years from the date on which he takes possession of the mortgaged property and the mortgagor will not have the right of redemption during the period of twelve years."

Cl. 6 stipulates for the appropriation of produce and profits in lieu of interest, and that during the period of possession neither the mortgagee will have any claim to interest nor the mortgagor to profits, and there will be no accounting as to shortage or surplusage of profits at the time of redemption. . . .

Cl. 9 provides :—

"That on the expiry of twelve years at the end of Jeth, *i.e.*, on Puranmashi in the fallow season I shall redeem the mortgaged property on payment of principal, interest and compound interest," and other specified payments.

"Pending the payment of the entire demands due hereunder the mortgagee will as usual remain in possession and occupation of the mortgaged property in accordance with the above-mentioned conditions."

Interest fell into arrear, and at the stipulated time the mortgage-money was not paid. Thereupon suit No. 234 of 1913 was instituted by Raja Seth Swami Dayal, the mortgagee, for possession of the mortgaged property under the terms of the mortgage. He was resisted by the mortgagor, who pleaded that he intended to redeem the property.

On the 7th September 1914, the Subordinate Judge decided in favour of the mortgagee, who obtained possession on the 14th February 1915. An appeal was preferred by the mortgagor to the Court of the Judicial Commissioner of Oudh, but it was dismissed on the 19th February 1915, the Court at the same time declaring that the decree would not affect any right of redemption exercised in the manner provided by law before the delivery of possession. On the 25th February 1915, the mortgagor applied for leave to appeal to His Majesty in Council, but his application was dismissed on the 26th April 1915. On the 18th June 1915, the mortgagor instituted suit No. 93 of 1915 for redemption. It was dismissed in the first Court on the 17th April 1916, and this was affirmed on the 19th June 1918 by the Appeal Court on the ground that the suit was premature. On the 23rd August 1918, the mortgagor applied to the Court of the Judicial Commissioner for leave to appeal to His Majesty in Council, but without success.

Finally, the mortgagor, on an applica-

tion here, obtained special leave to appeal from the Appellate decrees in both suits on the 30th May 1919.

Many questions were raised in the Courts below which have now disappeared, and all that now remains to be determined is whether the present claim to redeem is premature. Mortgages of immoveable property are governed by the provisions contained in Chap. IV of the Transfer of Property Act, 1882. In sec. 58 four kinds of mortgage are described—a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, and an English mortgage. Sec. 98, headed "Anomalous Mortgages," contemplates a mortgage that does not fall under any of the four descriptions contained in sec. 58, and is not a combination of a simple and a usufructuary mortgage or of a mortgage by conditional sale and a usufructuary mortgage. In the case of such a mortgage the rights and liabilities of the parties are to be determined by their contract as evidenced in the mortgage-deed and so far as such contract does not extend by local usage.

By sec. 60 of the Act it is provided that at any time after the principal money has become payable the mortgagor has a right to redeem, and a suit to enforce it is called a suit for redemption.

The contest between the parties to this litigation turns upon whether the mortgagor's right to redeem is suspended by the provision in the mortgage which purports to entitle the mortgagee to remain in possession for twelve years from the date on which he took possession.

In the argument there has been considerable discussion as to the category to which this mortgage belongs, and more especially as to whether or not it is an anomalous mortgage. But their Lordships do not think it necessary to pursue this enquiry, for, in the view they take, the rights and liabilities of the litigants must depend on the terms of the instrument as controlled by the Transfer of Property Act, for, even if it were an anomalous mortgage, its provisions offend against the statutory right of redemption conferred by sec. 60, and the provisions of the one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under sec. 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage-money to redeem.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect. In this view the mortgagor's right to redeem must be affirmed, and as both suits are now before the Board there will be no difficulty in passing one decree in both so framed as to give due effect to this right.

Though the Appellant has succeeded in these appeals, by his procedure and dilatoriness, he must be held responsible for this protracted litigation, and the consequent wasted expense; and to mark their disapproval of his conduct their Lordships will not interfere with the orders as to costs made by the lower Courts, nor will

MOHAMMAD SHER KHAN *v.* RAJA SETH SWAMI DAYAL.

they allow him any costs of these appeals.

The decrees of the lower Courts should therefore be discharged except so far as they order payment of costs by the mortgagor.

There should then (in their Lordships' opinion) be one preliminary decree for redemption in both suits in accordance with Or. 34, r. 7 of the Code of Civil Procedure, 1908. But in taking the accounts the period during which the mortgagee may have been in possession under the decree in suit No. 234 of 1913 should be excluded for, though the provisions of the mortgage entitling the mortgagee to possession cannot operate to defeat sec. 60 of the Transfer of Property Act, effect should be given to them so far as they provide that the mortgagee is to appropriate in lieu of interest all the produce *mal* and *sewai* and profits of the mortgaged villages after payment of the Government revenue. And so, during this period, as in effect provided by the mortgage, neither will the mortgagee be accountable for profits nor the mortgagor for interest.

The decree should further provide that if payment is not made on the fixed day the mortgaged property should be sold.

Their Lordships will humbly advise His Majesty that the case ought to be remitted to the Court of the Judicial Commissioner of Oudh with directions to pass a decree in accordance with the opinion expressed. There will be no order as to the costs of these appeals.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER No. 305 OF 1923.

MOOKERJEE, J.
CHOTZNER, J.
1923,
Heard, 28 and 29, August.
Judgment, 29, August.

BHUPENDRA NATH MUKHERJEE, Plaintiff, Appellant,
v.
MONOHAR MUKHERJEE, Defendant, Respondent.

Receiver, principles regulating the appointment of—Court's discretion in the matter not arbitrary but regulated by well-settled legal principles—Desirability of appointing a disinterested person—Persons entitled to present possession are the only necessary parties in an appeal for the appointment of a Receiver.

Where in a suit for construction of a Will and for determination of a variety of questions in relation to a debuttar *estate, the Plaintiff applied to the Court for appointing himself as the Receiver and the Court rejected the application and also expressed a decisive opinion as to the rights of the parties:*

Held—*That it is a dangerous course for the Court to express a decisive opinion as to the rights of the parties while disposing of an application for the appointment of a Receiver, as it would be prejudging the matter in controversy.*

RAM SUNDAR DAS *v.* KAMAL JHA (3) *referred to.*

Held, further—*That the appointment as well as the removal of a Receiver is a matter which rests in the sound discretion of the Court. In exercising its discretion, the Court should proceed with caution and be governed by a view of the whole circumstances of the case. A Receiver should not be appointed in supersession of a* bonâ fide *possessor of the property in controversy unless there is some substantial ground for interference. The*

(3) I. L. R. 32 Cal. 741 (1905).

BHUPENDRA NATH MUKHERJEE v. MONOHAR MUKHERJEE.

power to appoint a Receiver is not to be exercised as a matter of course or for the reason that it can do no harm to appoint one.

The words "just and convenient" in Or. 40, r. 1, of the Code mean that the Court should appoint a Receiver for the protection of property or the prevention of injury according to legal principles, and not that the Court can make such appointment because it thinks convenient to do so. They confer no arbitrary and non-regulated discretion on the Court.

SIDDHESWARI DABI v. ABHOYESWARI DABI (4), CHANDIDAT JHA v. PADMANAND SINGH (5), MATHURIA DEBYA v. SHIBDAYAL SINGH (6) *and* PROSANNOMOYEE DEBI v. BENI MADHAB ROY (7) *relied on.*

Where, however, the subject-matter of a litigation is, as it were, in medio, *in the enjoyment of no one, the Court can hardly do wrong in taking possession by its officer. It is the common interest of all the parties that the Court should prevent a scramble.*

KHUBSURAT v. SARODA CHARAN (8), MADANESWAR v. MAHAMAYA (9) *and* OWEN v. HOMAN (10) *referred to.*

The Receiver appointed by the Court should, as a general rule, be a person wholly disinterested in the subject-matter. But it is competent to the Court upon the consent of the parties, and in a proper case without such consent, to appoint as Receiver a person who is mixed up in the subject-matter of the litigation, if it is satisfied that the appointment will be attended with benefit to the estate.

KALI KUMARI v. BACHUN SINGH (11), RE: LLOYD (13), TAYLOR v. ECKERSLEY (14) *and other cases referred to.*

Where the object of the appointment of a Receiver is to secure properties during the pendency of a litigation, the parties necessary to an appeal against an order refusing to appoint a Receiver, are only the persons entitled to present possession.

This was an appeal preferred on the 20th of August 1923, against the order of Babu Saroda Prosad Banerjee, Subordinate Judge of Zillah Hoogly, dated the 15th of August 1923.

The Appellant Bhupendra Nath Mukherjee instituted a suit for construction of the Will of the founder of an endowment and for determination of a variety of questions in relation to the *debuttar* estate. The plaint contained a prayer for the appointment of a Receiver, and the Plaintiff made an application in that behalf. There were several Defendants in the suit, but only the first Defendant-Respondent contested the application for the appointment of a Receiver. The Subordinate Judge having dismissed the application for the appointment of a Receiver, the Plaintiff preferred the present appeal to the High Court, making only the first Defendant Respondent in the appeal.

Babus Dwarkanath Chakraberty, Narendra Kumar Bose, Haradhan Chatterjee and *Ramaprosad Mukherjee* for the Appellant.

Babus Sarat Ch. Roy Chowdhury and *Hiralal Chakrabarty* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal under Or. 43, r. 1, cl. (s) from an order rejecting an application for the appointment of a Receiver under

(4) I. L. R. 15 Cal. 818 (1888).
(5) I. L. R. 22 Cal. 459 (1895).
(6) 14 C. W. N. 252 (1909).
(7) I. L. R. 5 All. 556 (1883).
(8) 14 C. L. J. 526 (1911).
(9) 15 C. W. N. 672 : s. c. 13 C. L. J. 487 (1911).
(10) 4 H. L. C. 997, 1032 ; 94 R. R. 516, 527 (1853).
(11) 17 C. W. N. 974 (1913).
(13) 13 Ch. Div. 447, 451 (1879).
(14) 2 Ch. Div. 302 (1876).

Or. 40, r. 1, C. P. C., in a suit for construction of a Will, for establishment of title to *sebaitship* of a *debuttar* estate and for incidental reliefs.

The history of this endowment is set out in the judgment of this Court in *Monohar Mukherjee* v. *Peary Mohon Mukherjee* (1), which was confirmed on appeal by the Judicial Committee [*Peary Mohon Mukherjee* v. *Monohar Mukherjee* (2)]. It is sufficient to state that the endowment was created by Jagomohan Mukherjee, the common ancestor of the parties to this suit, who made a testamentary disposition of his properties on the 11th September 1840. A suit was instituted by the first Defendant Monohar Mukherjee for construction of the Will, for the administration of the trust created thereby, for the removal of Raja Peary Mohon Mukherjee from the *shebaitship*, for the appointment of a new *shebait* or a Receiver, and other incidental declarations. The suit was dismissed by the trial Court on the 23rd December 1915. That judgment was reversed by this Court on appeal on the 24th July 1919. The effect of this judgment was to remove Raja Peary Mohon Mukherjee from the *shebaitship* and to place the *debuttar* estate in the hands of a Receiver appointed by this Court. Since then, the Receiver has continued in occupation and has discharged his duties under the direction of this Court. Raja Peary Mohon Mukherjee died on the 16th January 1923 and the succession to the *shebaitship* opened out on his death. In the normal course of events, the Receiver would have been discharged on the death of Raja Peary Mohon Mukherjee. Disputes, however, broke out between Monohar Mukherjee and the representatives in interest of Raja Peary Mohon Mukherjee, and at the desire of all parties, this Court directed the Receiver to continue to hold the estate until further orders. On the 9th February 1923, an application was made to this Court on behalf of Monohar Mukherjee to the effect that the Receiver might be directed to make over possession of the *debuttar* estate and all the papers in relation thereto to him as the next person entitled to hold the *shebaitship* under the terms of the Will of the founder. The application was opposed by a representative of Raja Peary Mohon Mukherjee who was a party to the original suit also in his own right. On that occasion, the Court made the following order :—

"Before possession can be taken by the *shebait*, or in the event of a dispute, before a Receiver can be appointed by a competent Court to take charge of the *debuttar* estate, it is necessary that the Receiver appointed by this Court should continue. We accordingly authorise the Receiver to continue in occupation till the 1st day of the new Bengali year. If, in the meanwhile, the parties can agree upon a person to take possession of the estate as the new *shebait* and the matter is reported to us, the Receiver will be authorised to withdraw forthwith. If, on the other hand, the dispute is not ended and the Receiver is appointed by a competent Court where the suit has been instituted, the Receiver will be directed to make over possession to the new Receiver."

We directed the Receiver to continue in occupation till the first day of the new Bengali year, because it was pointed to us by both sides that if the Receiver were to withdraw from the management at an earlier date, considerable difficulties might arise in the way of institution of rent suits,

(1) 24 C. W. N 478: s. c. 30 C. L. J. 177 (1919).

(2) L. R. 48 I. A. 258: s. c. 26 C. W. N. 133 (1921).

as the period of limitation would expire in ordinary course on the last day of the then current Bengali year. Thereafter, both parties awaited further developments, each anxiously expectant as to what action might be taken by his opponent. At length, on the 14th April 1923, that is, just after the expiry of the date fixed by this Court Bhupendra Nath Mukherjee, the son of Raja Peary Mohon Mukherjee, instituted a suit in the Court of the Subordinate Judge of Hughli for construction of the Will of the founder and for determination of a variety of questions in relation to the *debuttar* estate. Thirty-eight persons—all of them, except one, members of the Mukherjee family of Uttarparah—were brought on the record as Defendants. The list included the Receiver appointed by this Court. Four other persons were subsequently brought on the record as additional Defendants. 17 of these 42 Defendants entered appearance. The plaint contained a prayer for the appointment of a Receiver, and five days later, an application was made by the Plaintiff in that behalf. The only Defendant who contested the application for the appointment of a Receiver was the first Defendant Monohar Mukherjee. On the 15th August 1923, the Subordinate Judge dismissed the application for the appointment of a Receiver. Five days later, the present appeal was lodged in this Court by the Plaintiff. The only person brought on the record as Respondent in the appeal is the first Defendant Monohar Mukherjee. We have now to consider whether the order of the Subordinate Judge can be supported on the merits.

A preliminary objection has been taken that the appeal should not be heard, until notice has been served upon all the other Defendants, at any rate, upon the Defendants who had entered appearance in the trial Court. We are of opinion that there is no substance in this contention. The object of the appointment of a Receiver in the present case is to secure the properties during the pendency of the litigation. If a Receiver is appointed, the only person materially prejudiced thereby would be the person entitled to present possession as *shebait*. In this category may be included the Plaintiff as also the first Defendant, as they are rival claimants to the possession of the *debuttar* estate. There is no allegation that there is a third person amongst the Defendants who is entitled to present possession or has even advanced a claim to that effect. They are necessary parties to the suit, which has been instituted for construction of the Will and for other reliefs, which may affect the endowment wherein they are or their successors-in-interest may become interested either in the present or in the future. But there is no suggestion that any of these Defendants is entitled to present possession, and consequently it is not necessary to have them on the record of this appeal.

We shall now proceed to consider the merits of the order under appeal. We observe that the Subordinate Judge has not only narrated the previous history of the endowment but has also expressed a decisive opinion as to the rights of the parties. The danger of such a course was pointed out by this Court in *Ram Sundar Das* v. *Kamal Jha* (3). The Subordinate Judge has also referred to the decisions in *Siddheswari Dabi* v. *Abhoyeswari Dabi* (4) and *Chandidat Jha* v. *Padmanand Singh* (5). In these cases, the Court considered the principles which should regulate the appointment of Receivers,

(3) I. L. R. 32 Cal. 741 (1905).
(4) I. L. R. 15 Cal. 818 (1888).
(5) I. L. R. 22 Cal. 459 (1895).

BHUPENDRA NATH MUKHERJEE *v.* MONOHAR MUKHERJEE.

where the effect of the appointment is to oust a person who is in possession of the property in dispute. The principles applicable in cases of that character were clearly stated by Sir John Woodroffe in his work on Receivers. The appointment as well as the removal of a Receiver is a matter which rests in the sound discretion of the Court. In exercising its discretion, the Court should proceed with caution and be governed by a view of the whole circumstances of the case. A Receiver should not be appointed in supersession of a *bonâ fide* possessor of the property in controversy, unless there is some substantial ground for interference: *Mathuria Debya* v. *Shibdayal Singh* (6). The power conferred by the Code of Civil Procedure to appoint a Receiver is not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a Receiver, that it can do no harm to appoint one: *Prosannomoyee Debi* v. *Beni Madhab Roy* (7). The words "just and convenient" in Or. 40, r. 1 of the Code mean that the Court should appoint a Receiver for the protection of property or the prevention of injury according to legal principles and not that the Court can make such appointment because it thinks convenient to do so. They confer no arbitrary and non-regulated discretion on the Court.

These are well-settled principles, but the case before us possesses special features which have been overlooked by the Subordinate Judge. Here, as in *Khubsurat* v. *Saroda Charan* (8) and *Madaneswar* v. *Mahamaya* (9), the subject-matter of litigation is not in the occupation of either the Plaintiff or the contesting Defendant. The property is in the custody of this Court, in the hands of the Receiver appointed by us in connection with the suit previously mentioned. Such a contingency was foreseen by Lord Cranworth in the case of *Owen* v. *Homan* (10), when he made the following observations:—

"The Receiver must be appointed on the principle on which the Court of Chancery acts of preserving property pending the litigation which is to decide the rights of the litigant parties. In such cases, the Court must of necessity exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of interim protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all the parties that the Court should prevent a scramble. Such is the case when a Receiver of the property of a deceased person is appointed pending a litigation in the ecclesiastical Court as to the right of probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant. But where the object of the Plaintiff is to assert a right to property of which the Defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the Plaintiff may be doing a wrong to the Defendant, in some cases an irreparable wrong. If the Plaintiff should eventually fail in establishing his

(6) 14 C. W. N. 252 (1909).
(7) I. L. R. 5 All 556 (1883).
(8) 14 C. L. J. 526 (1911).
(9) 15 C. W. N. 672; s. c. 13 C. L. J. 487 (1911).
(10) 4 H. L. C. 997, 1032; 94 R. R. 516, 527 (1853).

right against the Defendant, the Court may by its interim interference have caused mischief to the Defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the Court interferes by appointing a Receiver of property in the possession of the Defendant before the title of the Plaintiff is established by decree, it exercises a discretion to be governed by all the circumstances of the case."

In the case before us, the property is in the hands of a Receiver appointed by this Court. The Defendant urges not only that a Receiver should not be appointed by the Subordinate Judge but that the Receiver previously appointed by this Court should be discharged and the properties made over to him, because, in the opinion of this Court, he is the person entitled to the *shebaitship* on the death of the last incumbent. In our judgment, it would not be right for this Court to adopt this suggestion. If we were to express an opinion that the first Defendant is entitled to the *shebaitship* in the events which have happened, we should only prejudge the matter in controversy in the litigation before the Subordinate Judge. We are consequently of opinion that a Receiver should have been appointed in this case by the Subordinate Judge and we proceed to make the order which should have been passed by him.

The view has been pressed on us as well by the Plaintiff as by the first Defendant that if a Receiver is appointed, the Plaintiff or the Defendant should be such Receiver. Each has offered to find funds, if necessary, for the management of the endowment. Each has pointed out that inestimable benefit would accrue if he were appointed Receiver. Each has urged that he will make no charge for management. Each has explained that he has an efficient machinery at his disposal for management of zemindaris and that the *debuttar* estate would be effectively and economically managed if the estate were placed in his hands. Neither of the litigants, however, has the remotest confidence in the other and neither is prepared to see his opponent appointed as Receiver, notwithstanding the high estimate formed by each of his own capacity for management. In such circumstances, we cannot overlook the principles which have been applied when an application has been made by one of the parties litigants for appointment of himself as Receiver; *Kali Kumari* v. *Bachun Singh* (11) and *Suprasanna Roy* v. *Upendra Narain Roy* (12). The Receiver appointed in an action should as a general rule be a person wholly disinterested in the subject-matter; *Re : Lloyd* (13). But it is competent to the Court upon the consent of the parties, and in a proper case, without such consent, to appoint as Receiver a person who is mixed up in the subject-matter of the litigation, if it is satisfied that the appointment will be attended with benefit to the estate; *Taylor* v. *Eckersley* (14), *Hyde* v. *Warden* (15), *Fuggle* v. *Bland* (16), *Boyle* v. *Bettws L. C. Co.* (17), *Blakeway* v. *Blakeway* (18) and *Cookes* v. *Cookes* (19). We regret that we have not been able to satisfy ourselves that benefit would accrue to the *debuttar* estate if either of the rival claimants were

(11) 17 C. W. N. 974 (1913).
(12) 18 C. W. N. 533: s. c. 18 C. L. J. 638 (1913).
(13) 12 Ch. Div. 447, 451 (1879).
(14) 2 Ch. Div. 302 (1876).
(15) 1 Exch. Div. 309.
(16) 11 Q. B. D. 711 (1883).
(17) 2 Ch. Div. 726 (1876).
(18) 2 L. J Ch. 75
(19) 2 DeG. J & S 526, 531 (1865).

appointed Receiver. We are of opinion that the Receiver previously appointed should be appointed Receiver in this suit. The fact that he has been able to manage the estate efficiently notwithstanding the conflicting interests of powerful litigants, justifies the expectation that he will continue to be successful in the discharge of his difficult and responsible duties as Receiver. We accordingly appoint Babu Ramtaran Chatterjee, a Vakil of this Court and one of its officers on the Appellate Side, to be the Receiver in the suit. He will continue to perform his duties under the orders of this Court. This arrangement possesses the manifest advantage that there will be no change in the management. We are convinced that a change of management or policy at this stage would be detrimental to the interest of the endowment.

The Appellant will have costs both of this Court and of the Court below. We assess the hearing fee in this Court at ten gold mohurs.

We direct the Subordinate Judge to take up the suit for final disposal in accordance with law as early as practicable.

J. N. R. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE No. 2731 OF 1919.

WALMSLEY, J. SUHRAWARDY, J. 1922, Heard, 3, 7 and 8, March. Judgment, 4, April.	KRISTOPADA RAY and ors., Plaintiffs, Appellants, *v.* CHAITANYA CHARAN MONDAL and ors., Defendants, Respondents.

*Purchaser in execution of a mortgage decree, if can recover possession from a transferee of the equity of redemption who was not a party to the mortgage decree—Notice, at the time of the mortgage suit, of the interest of the transferee of the equity of redemption, effect of—*Khas *possession for denial of landlord's title, how far allowable, when the denial was by some of several joint tenants*

Two joint owners A. and B. mortgaged a property to J. Subsequently C. got a decree against B. alone, purchased his share in execution and taking kabuliyats *from the tenants on the land continued in possession through the tenants for 20 years till the institution of the present suit. Subsequent to C.'s purchase, J. sued on his mortgage without making C. a party to the suit and purchased the whole property in execution of his mortgage decree. After the institution of J.'s mortgage suit A. sold his share to D. who too continued in possession by receipt of rent from the tenants on the land. After J.'s purchase, some of the tenants denied J.'s rights as landlord in a rent suit by J., and about 20 years after his purchase, J. instituted the present suit for declaration of his title in respect of both A.'s and B.'s shares and for* khas *possession against the tenants:*

Held, *per* WALMSLEY, J.—*That the mortgagee purchaser J. could succeed in his suit for possession only on proof of title to present possession at the date of suit. His simple mortgage did not entitle him to possession as against any one. His decree for sale being in a suit to which C., a purchaser of the equity of redemption was not a party, had no effect as against C. and his purchase at the sale held under the decree conferred on him no title to possession as against C., especially as 20 years were allowed to pass between his purchase and the institution of the suit.*

HARGULAL SINGH *v.* GOBIND RAI (6) *and* MANDANLAL *v.* BHAGWAN DAS (7) *followed.*

MOHAN MANOR *v.* TOGU UKA (1),

(1) I. L. R. 10 Bom. 224 (1885).
(6) I. L. R. 19 All. 541 (F. B.) (1897).
(7) I. L. R. 21 All. 235 (F. B.) (1899).

KRISTOPADA RAY v. CHAITANYA CHARAN MONDAL.

DADOBA ARJUNJI v. DAMODAR RAGHU NATH (2), ENTHOLI KIZKAKKIKANDY KANARAN v. VALLATH KOYLIL UNNOOLI (3), PRATAP CHANDRA MANDAL v. ISHAN CHANDRA CHOUDHURY (4) *and* MURUGASER MARIMUTTU v. CHARLES HENRY DE LOYSU (5) *distinguished.*

That khas possession against tenants should not be decreed as one of the tenants was not, but should have been, made a party to the rent suit in which the tenants denied J.'s rights as landlord.

Semble, *per* SUHRAWARDY, J.—*That a purchaser in execution of a mortgage decree cannot recover possession from a transferee of the equity of redemption who was not a party to the mortgage decree, but his only remedy is to bring a suit against such transferee to have his right declared to sell the property to satisfy his mortgage debts.*

AGHORE NATH v. DEB NARAIN (8), HABIBULLAH v. JUGDEO (11) *and* RADHA PARSHAD v. MONOHAR DAS (13) *followed.*

GANGADAS v. JOGENDRA NATH (9), JUGDEO v. HABIBULLAH (12), PRATAP v. ISHAN (4) *and* GIRISH CHANDRA v. ISWAR CHANDRA (10) *distinguished.*

Held—*That the mortgagee purchaser, not having made the transferee of the equity of redemption a party to his suit, although he had notice of his interest and possession, was not entitled to recover possession from him.*

AGHORE NATH v. DEB NARAIN (8) *followed.*

(2) I. L. R. 16 Bom. 486 (1891).
(3) I. L. R. 30 Mad. 500 (1907).
(4) 4 C. W. N. 266 (1898).
(5) [1891] App. Cas. 69.
(8) 11 C. W. N. 314 (1906).
(9) 11 C. W. N. 403 (1907).
(10) 4 C. W. N. 452 (1898).
(11) 6 C. L. J. 609 (1901).
(12) 6 C. L. J. 612 (1907).
(13) I. L. R. 6 Cal. 317 (1880).

GANGADAS v. JOGENDRA NATH (9) *distinguished.*

This was an appeal against a decree of the Subordinate Judge of Howrah (Babu Bejoy Gopal Chatterjee), dated the 26th June 1919, modifying a decree of the Munsif of Uluberiah (Babu Sashi Jiban Sen), dated the 17th January 1918.

The material facts of this case are as follows :—Two brothers, Akhoy and Abhoy, mortgaged their joint ancestral property to one Jiban in 1297 (1890). Subsequently, one Abinash obtained a decree against Abhoy alone and bought the interest of Abhoy in execution sale in 1894. He took *kabuliyat* from the tenants on the land and continued in possession through the tenants for about 20 years till the institution of the present suit. After the said purchase by Abinash, Jiban sued on his mortgage, without making Abinash a party to the suit and in 1896 obtained a mortgage decree and bought the mortgaged property in execution in 1897. After the institution of Jiban's mortgage suit Akhoy too sold his share by separate *kobalas* to two persons Ishan and Hem Chandra, who took *kabuliyats* from the tenants on the land and continued in possession by receipt of rent from the tenants. In a rent suit brought by Jiban against some of the tenants in 1913, the tenants denied that he was their landlord. Jiban's successors consequently brought the present suit (1) for a declaration of their title against the successors of Abinash and of Ishan and Hem Chandra, the purchasers respectively of the shares of Akhoy and Abhoy, and (2) for *khas* possession against the tenant Defendants on the ground that in consequence of their denial of the landlord's title the tenants had forfeited their right to remain as tenants on the land. The lower Court gave the Plaintiffs a de-

(9) 11 C. W. N. 403 (1907).

cree in respect of Akhoy's half but did not give them *khas* possession. The Plaintiffs therefore preferred the present second appeal to the High Court for a declaration in regard to Abhoy's share against the successors of Abinash, and for recovery of *khas* possession as against the tenant Defendants in regard to the whole area.

Babus Hur Coomar Mitter and *Rupendra Coomar Mitter* for the Appellants.

Babu Asiranjan Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Plaintiffs are the Appellants. Their suit was for establishment of their title as against Defendants Nos. 6 to 11, and for recovery of *khas* possession as against the tenant Defendants, Nos. 1 to 5. They lost in the first Court, and on appeal they succeeded in part: they now prefer this appeal in regard to the part of their claim that has been disallowed.

The property in suit is two-thirds of a plot measuring 10 bighas 16 kattas. This portion was bought by one Syama Charan Mukerjee in 1273 B. S., he died leaving two sons, Akhoy and Abhoy. They together, mortgaged it to Jiban Krishna Ray, father of Plaintiffs Nos. 1, 2 and 3, and of Defendant No. 12, and grandfather of Plaintiffs Nos. 4 and 5. The mortgage was dated 1297. Jiban got a decree on the mortgage in 1896, and bought the mortgaged property in execution on 12th January 1897.

Meanwhile Abinash, the predecessor of Defendants Nos. 8 to 11, had obtained a decree against Abhoy alone, and bought the interest of Abhoy in an execution sale on 9th June 1894. At that time the tenants under Akhoy and Abhoy, namely, Chaitanya, Defendant No. 1, Sridhar, Defendant No. 5, and Krishna, the father of Defendants Nos. 2, 3 and 4, were in occupation of the land. Abinash took a *kabuliyat* from Krishna and Sridhar. Although Abinash had bought Abhoy's interest before Jiban brought his suit, he was not made a party to that suit.

Akhoy also dealt with his share, but after the institution of the suit by Jiban; he sold it on Falgun 2 and 3, 1304 by separate *kobalas* to Ishan, predecessor of Defendant No. 6, and Hem Chandra Defendant No. 7. On 28th Agrahan 1306, Chaitanya and Sridhar executed a *kabuliyat* in favour of Ishan and Hem Chandra.

The case for the Plaintiffs is that Jiban obtained possession of the property after his purchase at the auction sale, and that he received rent from the tenants amicably and by suit; but when he brought a suit in 1913 (No. 885 of 1913) for recovery of the rents of 1317 to 1320 the tenants denied that he was their landlord, and in consequence the Plaintiffs assert that the tenant Defendants have forfeited their right to remain as tenants of the land.

The claim of the Plaintiffs is therefore two-fold; for a declaration of their title as against Defendants Nos. 6 to 11, and for *khas* possession as against the tenant Defendants Nos. 1 to 5.

The decree which they have obtained is in respect of Akhoy's half, but it does not give them *khas* possession. The objects of the appeal therefore are firstly a declaration of title in regard to Abhoy's share against the successors of Abinash and secondly recovery of *khas* possession as against tenant Defendants in regard to the whole area.

I will deal first with the claim to title as regards Abhoy's share. The first argument on this subject is that granting that

KRISTOPADA RAY v. CHAITANYA CHARAN MONDAL.

Abinash was not bound by Jiban's mortgage decree, the right which he held was no more than it would have been if he had been made a party, that is to say, he had a right to redeem and he and his successors cannot retain possession without redeeming the Plaintiffs' mortgage. Reliance is placed on two Bombay decisions *Mohan Manor* v. *Togu Uka* (1) and *Dadoba Arjunji* v. *Damodar Raghu Nath* (2). In the first case the lower Court held that as Plaintiff would not satisfy the Defendant's mortgage, the suit must be dismissed. The High Court held that it was not for the Plaintiff to satisfy the Defendant, but for the Defendant to have an opportunity of satisfying the Plaintiff, and so Plaintiff was given a conditional decree. In the second case a conditional decree was granted by the lower Court, and when the Plaintiff appealed, the High Court said that the Defendant was clearly entitled to an opportunity of redemption, and then proceeded to examine the terms. The question under consideration, therefore, was different from the one before us, and it is not necessary to examine the decision further, or to refer to the comments upon it in the case of *Entholi Kizkakkikandy Kanaram* v. *Vallath Koylil Unnooli* (3).

Another case quoted to us was that of *Pratap Chandra Mandal* v. *Ishan Chandra Choudhury* (4), but that was a case in which the Plaintiff was the purchaser of the equity of redemption, and the decision is of no assistance in the present case. Another case—that of *Murugaser Marimuttu* v. *Charles Henry de Loysu* (5) is complicated by some of the facts, and it is also a case in which the parties stand in the reverse position.

(1) I. L. R. 10 Bom. 224 (1885)
(2) I. L. R. 16 Bom 486 (1891).
(3) I. L. R. 30 Mad. 500 (1907).
(4) 4 C. W. N. 266 (1898).
(5) [1891] App. Cas 69.

On the other hand, there are two Full Bench decisions of the Allahabad Court, in which the facts appear to be exactly similar to those of the present case. They are *Hargulal Singh* v. *Gobind Rai* (6) and *Mandanlal* v. *Bhagwan Das* (7). In the former case the learned Judges said: "The Plaintiff can only succeed in this suit for possession on proof of title to a present possession at the date of his suit. His simple mortgage did not entitle him to possession as against any one, his decree for sale, being in a suit to which these Defendants were not parties, had no effect as against them, and his purchase at the sale held under the decree conferred on him no title as against these Defendants. The result is that the Plaintiff had no title to possession at the commencement of the suit against these Defendants, and his suit was properly dismissed." These remarks were amplified in the later case. In the present case too, the mortgage was a simple one, and the Plaintiffs asked for an absolute decree and not a conditional one. My learned brother has dealt with the decisions in this Court, and it is not necessary for me to add to what he has said. I admit that the earlier of the Bombay cases appears to be in favour of the Plaintiffs' contention, but I think we should accept the principle laid down in the Allahabad cases, more especially because in the present case twenty years were allowed to pass between Jiban's purchase and the institution of the suit.

As against the successors of Abinash it is also said that Plaintiffs have acquired title by adverse possession. The learned Judge's remarks on this subject are rather confused, but as I understand them he ends by accepting the finding of the Munsif, at least to the extent that the

(6) I. L. R. 19 All. 541 (F. B.) (1897).
(7) I. L. R. 21 All. 235 (F. B.) (1899).

KRISTOPADA RAY v. CHAITANYA CHARAN MONDAL.

Plaintiffs had not proved possession for the statutory period.

Another argument put forward was that the lower Appellate Court was wrong in treating possession as coming to an end when rent ceased to be paid : it is said that he should have held that the possession ceased when in the suit for the rent that was not paid the tenants denied the Plaintiffs' title. This argument however was not set out in the grounds of appeal, so we did not allow it to be pressed.

The one question that remains is whether in regard to Akhoy's share the Plaintiffs should be given *khas* possession. The learned Judge refused the prayer because Sridhar was not a party to the rent suit in which the tenants denied the Plaintiffs' rights. He clearly should have been made a party to that suit, for he is and was one of the tenants on the land. It is argued that the disclaimer by one of the joint tenants is operative as against all if the making of it was within the scope of his authority. Such an argument involves an investigation into the scope of the authority and no investigation has been made because the argument was not put forward in either of the lower Courts. I think it is too late for the Plaintiffs to ask us now to order such an enquiry to be made.

The result is that the Plaintiffs' appeal fails and it must be dismissed with costs.

SUHRAWARDY, J.—The only substantial question raised in this appeal is "whether a mortgagee who has purchased the mortgaged property in execution of his mortgage decree is entitled to recover possession of it from a transferee of the equity of redemption subsequent to the mortgage who was not a party to the mortgage suit, subject to the right of the latter to redeem the mortgage."

The High Courts in India are not in agreement on this point. The Bombay and Allahabad High Courts have taken diametrically opposite views and the Madras High Court has sided with Allahabad. See *Dadoba* v. *Damodar* (2), *Madanlal* v. *Bhagwan Das* (7) and *Entholi* v. *Vallath* (3).

On an examination of the cases it appears that the divergence of opinion is due to the question whether the purchaser in the above circumstances purchases the equity of redemption as it stood at the date of the mortgage which is the *ratio decidendi* of the Bombay cases or whether in view of sec. 85 of the Transfer of Property Act and the general law regarding a decree of no value against one not a party to it, he purchases only the right, title and interest of the judgment-debtor mortgagor at the date of the auction sale by Court, which seems to be the point of view of the Allahabad cases.

In this Court also there is a conflict of opinion and some of the cases cannot be reconciled. I will not attempt to notice all the cases bearing on the point but refer to only some of recent date that lay down opposite views.

In the case of *Aghore Nath* v. *Deb Narain* (8), Rampini and Woodroffe, JJ., following the Allahabad cases above noticed held that a purchaser in execution of a mortgage decree cannot recover possession from a transferee of the equity of redemption who was not a party to the mortgage decree. In the same volume at p. 403, Mookerjee and Holmwood, JJ., held in the case of *Gangadas* v. *Jogendra Nath* (9) that such a purchaser is entitled to recover such possession subject to the

(2) I. L. R. 16 Bom 486 (1891).
(3) I. L. R. 30 Mad. 500 (1907).
(7) I. L. R. 21 All. 235 (F. B.) (1899).
(8) 11 C. W. N. 314 (1906).
(9) 11 C. W. N. 403 (1907).

Defendants' right to redeem [see also *Pratap* v. *Ishan* (4) and *Girish Chandra* v. *Iswar Chandra* (10)].

In the case of *Habibullah* v. *Jugdeo* (11), Rampini and Brett, JJ., held that a purchaser in execution of a mortgage decree has no right to retain possession of the property obtained through civil Court against a purchaser of the equity of redemption who was not a party in the suit on the mortgage. In the same volume at p. 612 in the case of *Jugdeo* v. *Habibullah* (12) the dispute between the same parties again came for consideration and Brett and Mookerjee, JJ., held that the purchaser at the mortgage sale is entitled to recover possession of the property subject to the exercise of the right of redemption by the purchaser of the equity of redemption. It is to be noted that Brett, J., was a party to both these decisions which apparently do not appear to be in unison on principle and similarly O'Kinealy, J., was one of the Judges who decided the two cases reported in the 4th volume of the Calcutta Weekly Notes above referred to. It seems logically fallacious to attempt to reconcile cases which lay down that such a transferee is entitled to recover possession from a purchaser under a mortgage decree dispossessing the former from the mortgaged property and the cases which allow the purchaser to recover possession of such property from the transferee subject to the latter's right to redeem. The views consistently expressed by Rampini, J., find support in an earlier case, *Radha Pershad* v. *Monohar Das* (13), where Garth, C. J., expressly laid down that the purchaser at a mortgage sale has no right to sue for the *khas* possession of the property as against a transferee of the equity of redemption who was not a party to the suit on the mortgage, but his only remedy is to bring a suit against such transferee to have his right declared to sell the property to satisfy his mortgage debts.

In this unsettled state of law, if it were incumbent upon us to come to a decision on this question, it would have been necessary to refer the matter to a Full Bench, but we are relieved of this necessity by the special facts of this case. The equity of redemption of one of the mortgagors Abhoy was purchased by one Abinash, the predecessor-in-interest of Defendants Nos. 8 to 11 in this case, in 1894 in a Court sale, and Abinash was in possession of Abhoy's share in 1897 when the Plaintiff purchased the property in execution of the mortgage decree. Abinash and his successors continued in possession through Defendants Nos. 1 to 5, until the date of the present suit, and the Plaintiffs did not take any steps, for twenty years to recover possession from him. In this state of things it may be safe to presume, and it is deducible from the findings of the lower Appellate Court that Jiban Krishna, the predecessor of the Plaintiff, was aware when he brought the suit on his mortgage that Abinash was in possession of a part of the property and still he did not make him a party in the suit. That being so, the case of *Aghore Nath* v. *Deb Narain* (8) is an authority for the proposition that in such circumstances the Plaintiff cannot sue for recovery of possession. The case of *Gangadas* v. *Jogendra Nath* (9) which holds the contrary view has for its special feature the fact that the mortgagee at the

(4) 4 C. W. N. 266 (1898).
(10) 4 C. W. N. 452 (1898).
(11) 6 C. L. J. 609 (1907).
(12) 6 C. L. J. 612 (1907).
(13) I. L. R. 6 Cal. 317 (1880).

(8) 11 C. W. N. 314 (1906).
(9) 11 C. W. N. 403 (1907).

time of the suit had no notice of the interest of the transferee of the equity of redemption. The present case therefore seems to be covered by the former decision, and the Plaintiff's claim must fail. It was found by the first Court that the Plaintiff's claim was barred by limitation inasmuch as he was never in possession of this half share of Abhoy since his purchases in 1897. The lower Appellate Court has not reversed that finding, but assuming the Plaintiff's case to be true has held that the Plaintiff is not entitled to *khas* possession. In this view also, the Plaintiff's suit is liable to be dismissed.

As regards the other points urged in this appeal, I concur with my learned brother in the conclusions he has arrived at. In the result I agree in dismissing this appeal with costs.

J. N. R. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD BUCKMASTER. SIR JOHN EDGE. SIR LAWRENCE JENKINS. LORD SALVESEN. 1922, Heard, 24 and 26, October. Judgment, 20, December.	RANI JAGADAMBA KUMARI, Appellant, v. THAKUR WAZIR NARAIN SINGH, Respondent.

Impartible estate—Income of estate, if necessarily an accretion thereto—Income and properties purchased therefrom treated in the accounts as parts of zemindari—Intention to treat them as part of impartible estate, if to be presumed—Moveables, if can be accretions of impartible estate—Ordinary joint family property and impartible estate, incomes of, how differ—Separation, question of, whether of fact or law.

Where the question whether a member of a Mitakshara joint family has separated or not was concurrently determined by two Courts in India, the argument open before the Judicial Committee to the party adversely affected is not upon the facts found but that those facts, when accepted, do not establish the conclusion arrived at.

The cases of GIRJA BAI *v.* SADASHIV DHUNDIRAJ (1) *and* KAWAL NAIN *v.* PRABHU LAL (2) *are clear decisions that it is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever, and this is also true with regard to an impartible estate; but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation.*

The produce of an impartible estate does not naturally belong to and form an accretion to the original property. The income when received is the absolute property of the owner of the estate and could not be used for the purpose of acquiring or endowing an impartible estate.

In the case of an ordinary joint family estate, the income, equally with the corpus, forms part of the family property, and if the owner of the estate mixes his own monies with the monies of the family—as for example, by putting the whole into one account at the bank or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of joint family property. No such considerations necessarily apply to the income from impartible property.

(1) L. R. 43 I. A. 151: s. c. I. L. R. 43 Cal 1031; 20 C. W. N. 1085 (1916).
(2) L. R. 44 I. A. 159: s. c. I. L. R. 39 All. 496; 21 C. W. N. 986 (1917).

RANI JAGADAMBA KUMARI *v.* THAKUR WAZIR NARAIN SINGH.

Where the evidence was that the savings from the income of an impartible estate were utilised by the owner in giving loans and purchasing other properties and the monies lent and the income of the zemindaries purchased were treated by him as parts of the income of his estate:

Held—*That these facts did not establish a sufficient intention to treat the acquired properties—whether the mouzahs, mortgages or other personal estate—as part of the original Raj.*

Quære:—*Whether it is possible in any circumstances to treat moveable property as an accretion to a landed estate of this character.*

SARABJIT PARTAP BAHADUR SAHI *v.* INDARJIT PARTAP BAHADUR SAHI (3), SRIMATI RANI PARBATI KUMARI DIBI *v.* JAGADIS CHUNDER DHABAL (4), JANKI PERSHAD SINGH *v.* DWARKA PERSHAD SINGH (5) *and* MURTAZA HUSAIN KHAN *v.* MAHOMED YASIN ALI KHAN (6) *referred to.*

This was an appeal from a decree of the High Court at Patna, dated the 31st January 1917, modifying a decree of the Court of the Subordinate Judge of Hazâribagh, dated the 18th September 1911.

The suit was instituted by the predecessor in title of the Respondent to establish his claim to the estate of Raja Saroda Narain, the late Raja of Serampore.

The property in dispute consisted of (1) the impartible estate of Serampore, (2) immoveable properties acquired by the Raja, (3) moveable properties, particularly Government promissory notes, acquired by the Raja.

(3) I. L. R. 27 All 203 at p. 253 (1904).

(4) L. R. 29 I. A. 82: s. c. I. L. R 29 Cal. 433; 6 C. W. N. 490 (1902).

(5) L. R. 40 I. A. 170: s. c. I. L. R. 35 All. 391; 17 C. W. N. 1029 (1913).

(6) L. R. 43 I. A. 269, 281: s. c. 21 C. W. N. 410 (1916).

The parties were governed by the Mitakshara law.

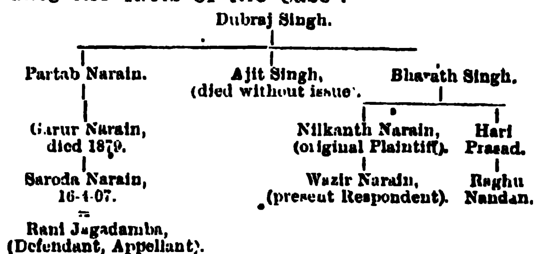
The Appellant was the widow of Raja Saroda Narain and on his death she took possession of the estate under the protection of the Court of Wards.

The Respondent alleged that he was entitled to succeed (1) by virtue of a custom under which females were excluded from the succession, and (2) by virtue of the rule that in such estates so long as the family remained united the order of succession was the same as if the estate had been partible.

The Appellant denied the custom and alleged that the Plaintiff had separated from the family and so the rule regulating succession to impartible estates no longer operated for his benefit.

She further contended that in any event only the ancestral Raj was joint property, and that all property acquired by the late Raja himself, on his death, passed to his widow.

The following pedigree serves to elucidate the facts of the case:—



Dubraj Singh granted the villages of Chowrah and Nawadih to Bharath Singh, a grant which the Plaintiff said was for *khorposh* or maintenance. The Plaintiff resided there and in consequence separated from the family in food. The defence alleged that there was a complete separation by Bharath Singh in food, worship and estate.

The Subordinate Judge held that there was no separation but that the custom

excluding females had been proved, and in regard to the property acquired by the late Raja, he decided that it was an accretion to the impartible estate, and he passed a decree accordingly.

On appeal, the High Court (Chapman and Roe, JJ.) held that the custom had not been proved, and that the defence had failed to prove a complete separation in interest.

With regard to most of the properties claimed to be accretions the learned Judges agreed with the Subordinate Judge, but they held that the Government promissory notes which the late Raja had bought had not been incorporated by him with the estate and to that extent they modified the decree of the Subordinate Court.

Messrs. L. DeGruyther, K. C., E. B. Raikes and *Palat* for the Appellant.—The High Court have decided the question of custom in my favour and I do not propose to deal with that. From the facts proved the proper inference is that Saroda Narain separated from the joint family. *Parbati* v. *Chaudhuri Naunihal Singh* (7).

There is no express declaration of intention either way, but the facts are sufficient to enable the Court to infer that there was an intention to separate. There was an undoubted separation in food and mess and the establishment of a separate idol and separate *purohit* shows a separation in worship.

[LORD BUCKMASTER.—The mere fact of going away and living separately is not sufficient to show an intention to separate, especially as there is evidence that the Respondent's family returned to the Raj on ceremonial occasions and lived there for months.]

It is not the law that a *khorposhdar* must renounce all claim to the Raj before he can determine to separate. He merely asks for a grant, leaves the joint family and sets up on his own.

Thakurain Tara Kumari v. *Chaturbuj Narain Singh* (8).

The facts there are similar to those in the present case. The Subordinate Judge has based his findings on the judgments of the High Court.

It is immaterial whether the estate is partible or impartible and *Laliteshwar Singh* v. *Rameshwar Singh* (9) was wrongly decided.

Reference was also made to *Rani Surtaj Kuari* v. *Rani Deoraj Kuari* (10), *Sri Raja Rao Venkata S. M. R. Krishna Rao* v. *Court of Wards* (11), *Girja Bai* v. *Sadashiv Dhundiraj* (1), *Kawal Nain* v. *Prabhu Lal* (2) and *Baijnath Prasad Singh* v. *Tej Bali Singh* (12) as to the properties acquired from the income of the estate.

The Respondent has failed to discharge the onus which is upon him of proving that accretions became part of the Raj. *Ekradeshwar Singh* v. *Janeshwari Bahuasin* (13).

The view expressed in *Sarabjit Partap* v. *Indarjit Partap* (3) that although you

(7) L. R. 36 I. A. 71, 76: s. c. I. L. R. 31 All. 412; 13 C. W. N. 983 (1909).

(1) L. R. 43 I. A. 151: s. c. I. L. R. 43 Cal. 1031; 20 C. W. N. 1085 (1916).

(2) L. R. 44 I. A. 159: s. c. I. L. R. 39 All. 496; 21 C. W. N. 986 (1917).

(3) I. L. R. 27 All. 203 at p 253 (1904).

(8) L. R. 42 I. A. 192: s. c. I. L. R. 42 Cal. 1179; 19 C. W. N. 1119 (1915).

(9) I. L. R 36 Cal. 481, 487: s. c. 13 C. W. N. 838 (1909).

(10) L. R 15 I. A. 51: s. c. I. L. R. 10 All. 272 (1888).

(11) L. R. 26 I. A. 83: s. c. I. L. R. 22 Mad. 383: 3 C. W. N. 415 (1899).

(12) L. R. 48 I. A. 195: s. c. 25 C. W. N. 564 (1921).

(13) L. R. 41 I. A. 275: s. c. 18 C. W. N. 1249 (1914).

RANI JAGADAMBA KUMARI *v.* THAKUR WAZIR NARAIN SINGH.

cannot create an impartible estate, yet you can add to it, was erroneous and was not accepted by the Judicial Committee in *Parbati Kumari Dibi* v. *Jagadis Chunder Dhabal* (4).

If it is contended that accretions become part of the Raj, there must be clear proof of the intention to incorporate.

Janki Pershad Singh v. *Dwarka Pershad Singh* (5) and *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (6).

Messrs. A. M. Dunne, K. C. and *Kenworthy Brown*, for the Respondent were asked to confine their argument to the question of accretion. It is clearly established that an impartible estate can be increased by the incorporation of acquired property, and both Indian Courts have found an intention so to incorporate, except as to the Government promissory notes.

The evidence is stronger than in *Parbati Kumari Dibi* v. *Jagadis Chunder Dhabal* (4).

There is evidence here that the moneys collected were entered in the estate accounts.

It is further significant that the owner died without making a Will from which it may be reasonably inferred that he never intended to separate the superfluous income from the property of the impartible Raj.

The same view prevails in the analogous case of purchases by a Hindu widow. *Isri Dut Koer* v. *Hansbutti Koerin* (14) and *Sheo Lochan Singh* v. *Saheb Babu Singh* (15).

Reference was also made to *Lal Bahadur* v. *Kanhya Lal* (16) and *Suraj Narain* v. *Ratan Lal* (17).

Mr. DeGruyther, K. C. in reply contended that the considerations applicable to a Hindu widow's estate were dissimilar and referred to Mayne's Hindu Law, para. 629.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—The Appellant in this case is the widow of Raja Saroda Narain. The Respondent is the nearest male agnate of the deceased, being the son of one Nilkantha Narain, the original Plaintiff in the suit, who was the son of Bharath Singh. The proceedings were instituted for the purpose of establishing the title of the Plaintiff to an estate known as the Serampore Raj or Gadi and certain moveable and immoveable property, cash and securities which had been purchased out of the income of that estate. The questions with regard to the estate and the monies and property representing the investments from this income are distinct, and need to be separately considered. They have both been decided adversely to the Appellant, with the exception of the claim to certain Government securities which will be more specially referred to hereafter. Serampore Raj or Gadi is impartible, and the family is governed by the Mitakshara law. If there had been no division of the family the property would have passed to the Plaintiff, but it is asserted that Bharath Singh separated from his father in his life-time, and that consequently neither he nor the Plaintiff was joint in estate with Raja Saroda Narain.

(4) L. R. 29 I. A. 82: s. c. I. L. R. 29 Cal. 433; 6 C. W. N. 490 (1902).

(5) L. R. 40 I. A. 170: s. c. I. L. R. 35 All. 391; 17 C. W. N. 1029 (1913).

(6) L. R. 43 I. A. 269, 281: s. c. 21 C. W. N. 490 (1916).

(14) L. R. 10 I. A. 151 (1883).

(15) L. R. 14 I. A. 63 (1887).

(16) L. R. 34 I. A. 65: s. c. 11 C. W. N. 417 (1907).

(17) L. R. 44 I. A. 201: s. c. 21 C. W. N. 1065 (1917).

Now, the facts upon which this alleged separation is based have been concurrently found by the two Courts, and are no longer the subject of dispute. The argument properly open to the Appellant is not upon the facts themselves, but that these facts, when accepted, do establish separation. The facts are these :—The village of Chowrah was granted, at a date not precisely ascertained but many years ago, by the then Raja to the Plaintiff's father Bharath Singh by way of maintenance on a *mokurari* grant at a nominal rent. The Plaintiff's father, who died in 1879, does not appear to have gone to reside at Chowrah, but the Plaintiff went there about 1885, when the then Raja was a minor and his estate was under the management of the Court of Wards. The effect of this change of residence necessarily effected a separation in food and mess. The High Court hold distinctly that there was no separation in religion, and the learned Subordinate Judge holds that there was no separation beyond the separate living in the maintenance village and the consequent separate messing.

The cases of *Girja Bai* v. *Sadashiv Dhundiraj* (1) and *Kawal Nain* v. *Prabhu Lal* (2) are clear decisions that it is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever, and this is also true with regard to an impartible estate; but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation.

The case of *Kawal Nain* v. *Prabhu Lal* (2) illustrates this. It was there found that the separation relied on was a complete separation in worship, in food, and in estate; and, further, there was good reason for the complete separation, and that consequently the requisite evidence was forthcoming. In this case these conditions are lacking, and their Lordships are unable to think that there has been any mis-application of the principles of law which regulate this question, and the findings of fact are sufficient to defeat the Appellant's claim. • •

The second question gives rise to greater difficulty. It appears that Raja Saroda Narain, when he inherited the estate, was a minor. The estate was then placed under the custody of the Court of Wards. On his obtaining majority the Raja entered into possession and appears to have managed the estate with care and skill. Towards the end of his life misfortune overtook him and he became insane. His estate was once more placed under the custody of the Court of Wards, and so remained until his death in 1907.

Originally the estate was in debt, and as there is no evidence of any acquisition of property from other sources, it follows that all the estate possessed by the Raja other than the impartible Raj was derived from the income of the Raj itself. In the end this income produced very considerable property. There were certain villages, certain mortgages—usufructuary and otherwise—sums due on bonds and decrees, Government promissory notes to the extent of two lacs, and other moveable and immoveable properties. With the exception of the Government promissory notes the whole of these have been awarded to the Plaintiff upon the ground

(1) L. R. 43 I. A. 151 : s. c. I. L. R. 43 Cal. 1031; 20 C. W. N. 1085 (1916).

(2) L. R. 44 I. A. 159 : s. c. I. L. R. 39 All. 496; 21 C. W. N. 986 (1917).

that they represented an accretion to the estate and descended with it. Their Lordships think that this conclusion is wrong, and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property. In fact, when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj. Nor could the monies have been used by him for the purpose of acquiring or endowing an impartible estate. It is, therefore, a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character.

It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the corpus, forms part of the family property, and if the owner of the estate mixes his own monies with the monies of the family—as, for example, by putting the whole into one account at the bank, or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of joint family property; but no such considerations necessarily apply to the income from impartible property. The whole of the evidence on the matter in the present case, as stated by the High Court, is as follows :—

"Some new properties were acquired out of the savings of Serampore Gadi. When there were savings in my hand I used to send the money to the Raja and take receipts from him. The money was utilised by the Raja by giving loans and purchasing other properties. On some occasions the Raja used to lend the money himself, and these sums are not entered in our books. When the loan was given through us, then we used to keep accounts of such money. I can't give the sums that passed through our hands or their probable amount. The moneys that passed through our hands were invested in loan and also in purchasing zemindaris. The incomes of zemindaris purchased were also entered in our books. It was treated as part of the income of the estate. Loans with interest repaid were also entered in our books. That money was also treated as part of the estate. All this was done at the instance of the Raja. Loans advanced by the Raja personally and not through our hands, and those that were not entered in the estate account at the time of the advance, the money when repaid used sometimes to come to our hands and sometimes paid to the Raja direct. Those that came to our hands were entered in our book. What was so entered into the estate account was considered as estate money with the Raja's consent. I can't say if the Raja purchased any landed estate out of the money advanced by him personally."

For the reasons already given such a statement is insufficient to affect the property with the character of impartibility. Whether it be possible in any circumstances to treat moveable property as an accretion to a landed estate of this character is a matter not arising for decision.

It is true that in *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (3), it was decided that moveable property could be so regarded, but as the point does not arise here their Lordships need only say that they must not be regarded as accepting the soundness of that decision. The facts here are not very different from those in *Srimati Rani Parbati*

(3) I. L. R. 27 All. 203 at p. 253 (1904).

RANI JAGADAMBA KUMARI v. THAKUR WAZIR NARAIN SINGH.

Kumari Dibi v. *Jagadis Chunder Dhabal* (4), where it was held that the evidence was inadequate to show that certain mouzahs bought out of the savings of the zemindar were attached to the zemindary. In both *Janki Pershad Singh* v. *Dwarka Pershad Singh* (5) and *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (6), the addition of family property to the original Raj is considered. Both these cases dealt with property other than moveable property. In the present case their Lordships can see no evidence in the facts stated of any sufficient intention to treat the acquired properties—whether the mouzahs, mortgages or other personal estate—as part of the original Raj. The consequence is that to that extent the Appellant succeeds, and the decree of the High Court must be varied by declaring that the decree for possession made in favour of the Respondent be further varied by providing that it shall not include items 2, 3, 5, 6, 7 and 9 in Sch. A to the plaint. The Respondent will pay the costs of the appeal.

They will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Pugh & Co.* for the Respondent.

G. D. M.

(4) L. R. 29 I. A. 82: s. c. I. L. R. 29 Cal. 433; 6 C. W. N. 490 (1902).

(5) L. R. 40 I. A. 170: s. c. I. L. R. 35 All 391; 17 C. W. N. 1029 (1913).

(6) L. R. 43 I. A. 269, 281: s. c. 21 C. W. N. 410 (1916).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 150 OF 1922.

SANDERSON, C. J. RICHARDSON, J. 1923, Heard, 11, 12 and 13, June. Judgment, 27, June.	BURN & CO., LTD., Defendants, Appellants, v. H. H. THAKUR SHAHEB SHREE LOKHDIRJEE, Plaintiff, Respondent.

Payment of instalment, time fixed for, when essence of contract — What amounts to refusal to perform contract entitling the other party to cancel —Indian Contract Act (IX of 1872), secs 39 and 55— Damages, obligation to minimise.

By a contract the Defendant Company undertook to manufacture and deliver fifty wagons to the Plaintiff. The terms of the payment were that the Plaintiff should advance one-third of the price with the order, one-third was to be paid when the wheels were attached to the under-frames, and the remaining one-third on receipt of the wagons. The Plaintiff paid the first instalment. On the 25th of October 1916, the Defendant Company demanded payment of the second instalment, representing that the under-frames were being wheeled. In February 1917, the Defendant Company delivered to the Plaintiff eight wagons, and again demanded payment of the second instalment as also of another sum in respect of the third instalment for the eight wagons delivered. Repeated demands were made by the Defendant Company for the payment of these two sums of which the Plaintiff took no notice. On the 4th of July 1917, the Defendant Company's solicitor intimated to the Plaintiff that "unless the full amount of the original contract price is paid" within ten days, "the undelivered wagons will be disposed of" by them:

Held, *per* curium.—*That in view of*

BURN & CO., LTD. v. H. H. THAKUR SHAHEB SREE LUKHDIRJEE.

the conduct of the Defendant Company in delivering the eight wagons, the time fixed for payment of the second instalment was not of the essence of the contract, nor did the Defendant Company give any notice to the Plaintiff demanding payment of the instalment within a reasonable time, thereby making time of the essence of the contract.

Held also—*That the Plaintiff's conduct did not amount to a refusal to perform the contract and that the Defendant Company were not entitled to cancel the same.*

FREETH v. BURR (1) *and* MERSEY STEEL & IRON CO. v. NAYLOR (2) *referred to.*

Per SANDERSON, C. J.—*The Plaintiff was not bound to minimise his damages by accepting the offer made in the Defendant Company's letter, dated the 4th of July 1917, inasmuch as on the pleadings their own case was that they did not cancel the contract till the 18th of July 1917 when the offer was no longer open to the Plaintiff.*

PAYZU, LTD. v. SAUNDERS (3) *distinguished.*

This was an appeal preferred on the 28th November 1922 against the judgment of Mr. Justice Rankin, dated the 25th April 1922, passed in the exercise of Original Civil Jurisdiction.

The facts are sufficiently stated in their Lordships' judgments.

Messrs. L. P. E. Pugh, N. N. Sircar, Page and *B. Bose* for the Defendants-Appellants.

The Advocate-General (Mr. S. R. Das), Sir B. C. Mitter and *Mr. Westmacott* for the Plaintiff-Respondent.

(1) L. R. 9 C. P. 208 (1874).
(2) 9 A. C. 434 at p. 438 (1884).
(3) [1919] 2 K. B. 581.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON C. J.—This is an appeal by the Defendants from the judgment of my learned brother Rankin, J., whereby he made a decree in favour of the Plaintiff for damages for breach of contract.

My learned brother, in the judgment which he is about to deliver, has set out the material facts, which in this case are to be gathered from the correspondence, and it is therefore not necessary for me to deal with them in detail.

By the contract the Defendants undertook to manufacture and deliver 50 wagons. The terms of payment were that the Plaintiff should advance ⅓ of the price with the order; ⅓ was to be paid when the wheels were attached to the under-frames and the remaining ⅓ on receipt of the wagons and after their erection.

In accordance with these terms a cheque for Rs. 30,833, representing the first instalment, was sent by the Plaintiff to the Defendants on the 20th February 1915.

By a letter, dated the 25th October 1916, the Defendants submitted a bill for Rs. 30,833, representing the second instalment under the contract "being ⅓ value due when under-frames are wheeled."

Inspite of many applications this sum was not paid by the Plaintiff. Amongst other things he alleged that he feared that the second instalment would remain locked up as the first and asked that he should be informed definitely when the wagons would be completed and despatched.

The Defendants explained that they could not give such definite information. War conditions were prevailing, and there was a difficulty in obtaining various

parts of the wagons, which had to be imported from England.

In February 1917 the Defendants despatched eight wagons to the Plaintiff.

After these eight wagons had been accepted by the Plaintiff, the Defendants again demanded the payment of the bill for the second instalment, *viz.*, Rs. 30,833 and they added a demand for Rs. 5,000 in respect of a further bill, which represented the amount due in respect of the third instalment for the eight wagons, which had been delivered.

On the 5th March 1917, the Defendants wrote a letter to the Plaintiff's manager, which is an important one, as follows :—

"5th March 1917"

"The Manager,
Morvi Railway,
Hill Buildings,
Morvi.

Dear Sir,

Regarding our Bill No. 5014W/7786 of 24th October 1916 for Rs. 30,833 we are in receipt of your telegrams of 19th and 28th ultimo informing us that you had referred our requests for payment to the proprietor of the Railway but we have to say that we are most dissatisfied with the delay in payment and with the treatment meted out to us, and have decided not to despatch any more wagons till your proprietor has paid the bill before mentioned and also that for Rs. 5,000 sent you with our letter of the 27th ultimo.

If it is a matter of finance and your proprietor cannot at the present time further finance this order we are willing to cancel it, and sell the remaining wagons as soon as we can secure a buyer, refunding the cash already paid or as much of it as may be realised by sale of the material and wagons thereafter.

Please state by return which course you propose to take and if you want us to proceed with the order send us a cheque for Rs. 35,833."

This letter contained a demand not only for the Rs. 30,833 which the Defendants were fully entitled to make, but also a demand for the Rs. 5,000 which ... judgment, they were not entitled to make. The Defendants stated that if the Plaintiff wanted them to proceed with the order he was to send a cheque for Rs. 35,833. The Rs. 5,000 was not payable until all the wagons, the subject-matter of the contract, had been completed in accordance with the terms of the contract.

No answer was received to this letter, and the Defendants wrote again on the 11th April 1917 as follows :—

"11th April 1917."

"The Manager,
Morvi Railway,
Hill Buildings,
Morvi.

Re : Wagons.

As we have neither received a cheque for the money due to us nor any reply to our letter, dated the 5th of March, we find it necessary to address you again upon this matter and we desire to point out to you that by not paying our bills when they become due for payment you have broken the contract and we shall therefore take whatever action appears to us to be necessary for our own interests if we do not receive a satisfactory reply to this letter before the date specified below.

The wagons could be delivered as soon as we could obtain trucks from the Railway to carry them but we regret we cannot now permit another of your wagons to leave our Works until you pay us in full for the whole order. Your action has put us to very considerable expense and very great inconvenience and at the present time your wagons are occupying

much valuable space in our Works. If we do not receive a satisfactory reply on or before April 20th we shall take whatever action appears to us to be necessary to prevent further loss to ourselves."

It is to be noted that in this letter the Defendants asserted that they would not permit another of the wagons to leave the Works until the Plaintiff paid the Defendants in full for the whole order. The reply to this was a telegram, dated 21st April 1917, as follows:—

"To Burn, Howrah.

Your letter though dated eleventh reached here yesterday matter referred to proprietor who now in Bombay.

Manager M. Ry."

On the 7th May 1917 the Defendants wrote:—

"7th May 1917."

"The Manager,
Morvi Railway, Hill Buildings,
Morvi.

We desire to call your special attention to our letter, dated the 11th ultimo, and to inform you that it is now imperative that we receive a satisfactory reply to this letter at once, otherwise we shall have no option but to settle the matter without further reference to you. Kindly favour us with a reply by return.

Yours faithfully,
Managing Agents."

The reply was to the effect that the Plaintiff had gone to a hill station for the hot weather, and that an answer would be sent when the Plaintiff's manager heard from him.

On the 4th July 1917, the Defendants' solicitors wrote:—

"4th July 1917."

"The Manager and Executive
Engineer, Morvi Railway, Hill
Buildings, Morvi.

Our clients Messrs. Burn & Co., Ld. have instructed us to address you with reference to the contract for the purchase by your Railway of 50 goods wagons from them. The terms of the contract were:—Payment as to ⅓ with the order, ⅓ when the under-frame was wheeled and the balance on delivery. The first instalment was duly paid but the second instalment has not yet been paid, inspite of repeated demands, and inspite of the fact that our clients have actually delivered eight wagons. In the existing circumstances of the trade, it is obvious that our clients cannot keep the undelivered balance of the wagons locked up indefinitely and, as you have failed to carry out your part of the contract the only course now open to them is to dispose of the wagons elsewhere as best they can but before doing so they are prepared to give you the opportunity of purchasing these wagons outright by paying the total amount of the original contract price outstanding and we are accordingly instructed to give you notice, as we hereby do, that unless the full amount of the original contract price is paid to our clients or to us as their Agents within 10 days from the date hereof the undelivered wagons will be disposed of by our clients as they may think fit.

Yours faithfully,
(Sd.) Orr, Dignam & Co."

Having received no reply to the letter the Defendants' solicitors wrote again on the 18th July 1917 as follows:—

"The Manager and Executive
Engineer,
Morvi Railway,
Hill Buildings, P. O. Morvi.

Sir,

As neither our clients nor ourselves have received any reply to our letter to you of the 4th instant our clients have now taken steps to dispose of the undeli-

vered wagons elsewhere and have made up an account showing the balance due to the Railway after deducting the costs of the wagons delivered from the deposit made to be Rs. 15,833. We enclose you herewith copy of this account together with our cheque for Rs. 15,833 and shall be obliged if you will let us have a formal receipt for this amount by return.

Yours faithfully,
Orr, Dignam & Co."

I should have thought that the Defendants' letters from the 5th March to the 4th July 1917 involved definite intimation that the Defendants were not prepared to carry out the contract according to the terms thereof. For in these letters they were making demands which were not justified by the terms of the contract and in the letter of the 4th July 1917 they stated that the only course then open to the Defendants was to dispose of the wagons elsewhere, but that before doing so they were willing to give the Plaintiff the opportunity of purchasing the wagons outright by paying the total amount of the contract price within 10 days, otherwise the wagons would be disposed of as the Defendants thought fit. This was obviously not in accordance with the terms of the contract.

The learned Advocate-General, however, for the Plaintiff argued that these letters were merely threats, and were not intended to put an end to the contract.

The terms of the letters seem to me to be plain and definite and I should not have been prepared to accept the learned Advocate-General's argument but for the fact that the Defendants themselves in para. 18 of the written statement stated that it was on or about the 18th July '17 that they put an end to the contract. [illegible]estion, therefore, which remains [illegible]se, is whether the Defendants were entitled to treat the contract as at an end on the 18th July 1917.

The learned Judge dealt with the case on the footing that one question only arose, *viz.*, whether the provision that the second instalment of the price should be paid when the under-frames were put on the wheels was a provision as to which time was of the essence of the contract. He held, with some difficulty, that it was not; and he held further that the Defendants did not at any time give a sufficient or adequate notice to pay the second instalment within a reasonable time, so as to make time of the essence of the contract.

But for the conduct of the Defendants, I should have thought that with regard to the payment of the second instalment, time was of the essence of the contract.

The Defendants were under contract to build 50 wagons. In my judgment they were not bound to proceed with the work, after the wheels were attached to under-frames, until the Plaintiff paid the second instalment. They surely could not be expected to keep the wagons, partly built, standing in their Works, for an indefinite time, or for so long as the Plaintiff chose to keep them waiting for the second instalment. Having regard to the terms of the contract and the nature of the work to be done by the Defendants, in my opinion, *primâ facie* time would be of the essence of the contract.

The Defendants, however, for some reason known to themselves, did not treat it as of the essence of the contract.

They actually delivered eight wagons in February 1917 although the second instalment which had been demanded in October 1916 had not been paid, and although as far as could be seen in February 1917 there was no immediate prospect of the second instalment being paid.

In the face of such conduct, it seems to me impossible to hold that the Defendants regarded time as of the essence of the contract with respect to the second instalment.

I agree with the learned Judge's further decision that no sufficient or adequate notice was given to make time the essence of the contract, and with the reasons which he gave for such decision.

There remains, however, a further question, which, to my mind, is a more difficult one.

The learned Counsel for the Defendants contended that the Plaintiff's repeated failure to pay the second instalment inspite of the Defendants' demands, showed that the Plaintiff never intended to perform his part of the contract, and that consequently under the provisions of sec. 39 of the Contract Act, the Defendants were entitled to put an end to the contract as they did on the 18th July 1917.

The question is whether the Plaintiff had refused to perform his promise in its entirety within the meaning of the section. As stated in *Freeth* v. *Burr* (1): "The true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract."

And as stated by Lord Selborne in *Mersey Steel & Iron Coy.* v. *Naylor* (2):

"You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

(1) L. R. 9 C. P. 208 (1874).

(2) 9 A. C. 434 at p. 438 (1884).

The letter of the 22nd July 1917, written on behalf of the Plaintiff, in my judgment, is not inconsistent with the Plaintiff's intention to carry out his part of the contract. I read it as a complaint about the delay and a proposal to vary the provisions as to the payment of the second instalment. The letter, however, concluded with a protest against the Defendants' alleged right to put an end to the contract, and stated that if the Defendants disposed of the wagons they would do so at their risk and responsibility as to the consequences.

Although written on the 22nd July 1917, the writer apparently was not dealing with the Defendants' solicitors' letter of the 18th July 1917, for that letter is dealt with in a subsequent letter of the 24th July 1917 in which the Plaintiff's representative refused to accept the cheque for Rs. 15,833.

The market-price of the wagons had increased considerably; there was no suggestion that the Plaintiff was in any difficulty as regards finance; it was alleged that the Plaintiff required the wagons; and on the 22nd September 1917 the Plaintiff's solicitors tendered a cheque for the second instalment, no doubt with a view to this suit being brought.

It is true that the Plaintiff was suggesting that he was entitled to compensation for the Defendants' delay, but it is not made clear in any of the letters written on behalf of the Plaintiff that he was insisting on compensation being paid as a condition of his performance of the contract. Although there was great delay on the part of the Plaintiff in paying the second instalment, in my judgment, the conduct of the Plaintiff was not such as amounted to an absolute refusal to per-

BURN & CO., LTD. v. H. H. THAKUR SHAHEB SREE LUKHDIRJEE.

form the contract. The Defendants were not, in my opinion, entitled to assume that the Plaintiff was not going to perform the contract, and consequently they were not entitled to put an end to the contract on the 18th July 1917.

The remaining question relates to the measure of damages.

The learned Counsel for the Defendants argued that the amount of damages awarded should be materially reduced. He urged that the Defendants had offered in April 1917 and again in the solicitors' letter of 4th July 1917 to let the Plaintiff have the wagons at the contract price provided he paid the total amount outstanding: that the Plaintiff should have accepted the offer, and that his damages should be limited to the amount of interest which he would have lost, by reason of his being obliged to pay the contract price at a date earlier than that provided by the contract, and reliance was placed on the case of *Payzu, Ld.* v. *Saunders* (3).

In my judgment the decision in that case is not applicable to the present case.

The offer, made in the letter of 4th July 1917, was by the terms thereof open to the Plaintiff for 10 days from that date: the Defendants' own case was that they did not put an end to the contract until the 18th July 1917.

The Defendants, having so pleaded, cannot now be allowed to say that the breach of the contract by them occurred at an earlier date, and the 18th July must be taken as the date when they definitely put an end to the contract. At that time the offer contained in the letter of 4th July 1917 was no longer open to the Plaintiff. The Plaintiff, it is true, was bound to take all reasonable steps to minimise the damages, but he was not bound to do so, until a breach of the contract had occurred. And having regard to the Defendants' pleading, to which I have already referred, it is not now open to them to say that the breach occurred before the 18th July 1917.

The learned Judge has found that after the 18th July 1917 the Defendants were no longer willing to let the Plaintiff have the wagons at the contract price on any terms.

In my opinion this finding by the learned Judge is correct having regard to the evidence in the case: the letter of the 26th July 1917 from the Defendants' solicitors is inconsistent with any other interpretation of the position after the 18th July 1917.

For these reasons, in my judgment, this appeal must be dismissed with costs.

RICHARDSON, J.—Under this contract, one-third of the price of the fifty railway wagons was to be paid with the order for their supply, one-third when the underframes were wheeled, and the remaining third on the receipt of the wagons. The official or formal order for the wagons was given either on the 7th February or on the 20th February 1915, when a cheque for Rs. 30,833 in payment of the first instalment was forwarded. In the course of the previous correspondence, the Defendants in their letter of 17th November 1914, had promised "delivery of the 50 wagons in six months from date of receipt of order."

The plans for the wagons were not finally approved till the 18th June 1915 when the Manager of the Railway telegraphed to the Defendants to "commence building of the wagons as per your original plans plus minor alterations suggested by our Loco-Superintendent." Meanwhile by letter, dated 28th April 1915, the Defendants had plainly inti-

(3) [1919] 2 K. B. 581.

Burn & Co., Ltd. v. H. H. Thakur Shaheb Sree Lukhdirjee.

mated to the Morvi Railway "that our promised delivery cannot now be adhered to."

In October 1915 the Morvi Railway began complaining of delay in delivery and suggesting a right to compensation. The Defendants' letter of 8th November 1915 attributed the delay in delivery partly to the delay in the approval of the plans but mainly to causes arising out of the War.

There was further correspondence on the subject in May 1916, closing for the time with the Defendants' letter of 27th May 1916, in which they referred to their letter of 28th April 1915.

By letter dated 25th October 1916, the Defendants forwarded their bill for the second instalment of the price on the footing, as to which no question arose, that the under-frames had been wheeled. In answer, the Morvi Railway on the 19th November, again complained of the delay in delivery. "We fear," they concluded, "the payment of second instalment will remain locked up as the first and shall therefore be glad to know definitely when the wagons will be completed and despatched."

The Defendants replied on the 23rd November stating that the delay was entirely due to conditions brought about by the War and regretting that information could not be given when delivery would be made.

On the 14th December 1916, and the 25th January and 14th February 1917, the Defendants reminded the Morvi Railway by letter or telegram of their bill for the second instalment. They were told by telegram, dated 19th February, that the matter had been referred to the proprietor of the Railway, that is, the present Plaintiff.

On the 20th February 1917, the Defendants wrote advising the despatching of eight completed high-sided wagons, which were accepted (subject to certain minor objections dealt with by the Defendants in their letter of 27th June 1917) without reference to delay in delivery.

On the 27th February the Defendants again telegraphed about the non-payment of their October bill. By letter of the same date they submitted a further bill claiming payment of Rs. 5,000 as the proportionate amount of the third or last instalment due in respect of the eight wagons (at Rs. 1,875 each). They thus imparted into the discussion an element of difficulty inasmuch as under the contract the last instalment was not due till all the wagons had been delivered.

To the telegram of the 27th the Morvi Railway replied, as they had done on the 19th February, that the matter had been referred to the proprietor.

We then come to the Defendants' letters of the 5th March and 11th April, on which the discussion before us has largely turned. The letters have already been read and I will not read them again. I will only observe, in favour to some extent of the Defendants, that the offer contained in the second paragraph of their letter of 5th March was apparently made before the Defendants got into touch on the 23rd March with the Mysore State Railways to whom the remaining 42 wagons were ultimately sold at a price considerably higher than that due under the contract with the Morvi Railway.

To the letter of 11th April the Morvi Railway gave the reply, by this time stereotyped, that the matter had been referred to the proprietor, who was then in Bombay.

On the 7th May the Defendants wrote again: "It is now imperative," they said, "that we receive a satisfactory

reply to this letter at once, otherwise we shall have no option but to settle the matter without further reference to you." To this the Morvi Railway answered that the proprietor had gone to a hill station and that the correspondence would be forwarded to him.

On the 4th July, the Defendants wrote through their solicitors, Messrs. Orr, Dignam & Co., that they were prepared to give the Morvi Railway "the opportunity of purchasing these wagons outright by paying the total amount of the original contract price outstanding." The solicitors concluded: "We are accordingly instructed to give you notice, as we hereby do, that unless the full amount of the original contract price is paid to our clients or to us as their agents within 10 days from the date hereof, the undelivered wagons will be disposed of by our clients as they may think fit."

No reply was received to this letter and on the 18th July the solicitors wrote enclosing a cheque for Rs. 15,833 the balance of the first instalment after deducting the price of the eight wagons and finally purporting to put an end to the contract.

Then came, first the long letter of the 22nd July written under the instructions of the proprietor by one of his officers, the letter of 24th July from the Morvi Railway returning the cheque for Rs. 15,833 and in reply to these two letters, the letter of the Defendants' solicitors, dated 26th July, stating that it was impossible for the Defendants to reconsider the matter. The Morvi Railway was subsequently advised to tender the second instalment. The tender, made by letter dated 22nd September, was refused, the goods having been meanwhile sold to the Mysore State Railways.

The sole point in the case is whether on the 18th July 1917, the Defendants were entitled to cancel the contract.

Now, as it seems to me, to ask whether the time fixed for the payment of the second instalment was in the circumstances of the essence of the contract, or whether the failure to pay the instalment when due went to the root of the contract, or whether the agreement of the Plaintiff to pay the instalment and the agreement of the Defendants to supply the wagons, were or were not interdependent agreements is to put the same question in different ways. The learned Judge, Rankin, J., who tried the suit, has found, as he says, with some difficulty that time was not of the essence. I agree with that conclusion which in my opinion is fortified by the consideration that the despatch of the eight wagons in February 1917 shows that the Defendants themselves did not treat the punctual payment of the second instalment as being of the essence of the contract.

Then, the learned Judge turned to the method of notice by which time, if not originally of the essence, might have been made of the essence. The position, he says, "was that if the Plaintiff did not pay promptly, the Defendants were entitled to give him a reasonable notice, fixing a time within which he must pay and warning him that unless he paid within that time they would rescind." Such notices are not expressly mentioned in sec. 55 of the Contract Act, but they are well known in relation to contracts between vendors and purchasers of land [*Stickney* v. *Keeble* (4)] and are no doubt equally available in relation to mercantile contracts. Under the Contract Act refusal by a party to comply with a reasonable notice would probably

(4) [1915] A. C. 386 at p. 418 (1914), per Lord Parker

be regarded as refusal to perform his contract in its entirety within the meaning of sec. 39. But, however that may be, I agree again with the learned Judge that the Defendants never gave the Plaintiff a proper notice demanding payment simply of the second instalment within a limited time and making time of the essence. From the 5th March onwards they suggested or demanded payment of an amount exceeding that then due and were themselves in fault.

It has, however, been further contended before us that under sec. 39 of the Act, apart from the question of notice making time of the essence, the conduct of the Plaintiff was such as to evince an intention not to be bound by the contract and amounted to a refusal to perform his promise in its entirety. The learned Advocate-General appearing for the Plaintiff says that this contention was not advanced before the learned Judge, but as it is open on the issues and turns entirely on the correspondence on the record, I shall deal with it.

For the principle involved we have been referred to the case of *Mersey Steel and Iron Co.* v. *Naylor* (2). I quite appreciate Mr. Pugh's argument that as an illustration of the principle this case must be treated with caution, because the facts there were of a very special character. The facts of the present case are doubtless very different. Nevertheless I am unable to say that the Plaintiff's conduct, however reprehensible his delay may have been, amounted in the words of Lord Selborne, L. C. "to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind," or in the words of Lord Blackburn, "to an absolute refusal to pay." Doubtless again there is a limiting point at which prolonged delay will amount to refusal. In my opinion, however, that point had not been reached at any time before the Defendants purported to cancel the contract on the 18th July.

As I apprehend, the Plaintiff considered, rightly or wrongly, that he was entitled to some compensation for delay in delivery. He wanted to parley but he did not want to break off the contract and he never made the payment of compensation a condition precedent to the payment of the second instalment. The Defendants, on the other hand, it may well be, were tired of dilatory methods resembling those of diplomacy rather than those ordinarily employed in business, and having found an opportunity to get rid of the remaining wagons at a profit, they took the risk of breaking off negotiations with the Plaintiff. As things had turned out, the contract with the Plaintiff was a losing one. The Defendants may well have been uncertain as to the legal consequences. They may have thought that they had the right to cancel. But, as I regard the matter, they accepted the risk of having to pay damages in preference to continuing an unsatisfactory contract, attended by troublesome correspondence.

The rise in the price of railway wagons between 1915 and 1917 makes it unlikely that the Plaintiff would not intend to fulfil the contract. Nor can such an intention be gathered from the Plaintiff's letter of 22nd July. The letter was written after the cancellation by the Defendants and is only relevant for the purpose of throwing light on the Plaintiff's intention. The letter does not import that the Plaintiff was absolutely refusing to carry out the contract.

The result is that I agree with the con-

(2) 9 A. C. 434; at p. 438 (1884).

clusion of the learned Judge that the Plaintiff is entitled to damages.

As to the quantum of damages, the learned Counsel for the Appellants has not satisfied me that the learned Judge is wrong in refusing to apply to the facts of the present case the principle of *Payzu, Ld.* v. *Saunders* (3).

Accordingly in my opinion the appeal should be dismissed.

Messrs. Orr, Dignam & Co., Solicitors for the Appellants.

Messrs. Eggar & Co., Solicitors for the Respondent.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 1032, 1137 AND 1138 OF 1920.

C. C. GHOSE, J.	SM. NAGENDRABALA
PANTON, J.	CHOWDHURANI,
1923,	Plaintiff, Appellant,
Heard, 12 and	v.
13, February.	BEJOY CHAND MAHATAB
Judgment,	BAHADUR, Defendant,
19, February.	Respondent.

Limitation Act (IX of 1908), Sch. I, Art. 144—Chaukidari chakran, *resumption and settlement of, with zemindar*—Putnidar's *suit to recover*—*Limitation*—*Adverse possession.*

A putnidar's *suit to recover* chaukidari chakran *land resumed by Government and settled with the zemindar is not barred unless for more than 12 years prior to the date of the institution of the suit, the possession of the zemindar had become adverse to the Plaintiff. The possession of the zemindar may become adverse to the* putnidar *in a variety of ways, e.g., when the lands are settled by the zemindar with tenants or when the* putnidar *after being invited to come and take the lands does nothing and the zemindar thereafter makes other arrangements whether for holding the lands in* khas *or for settling the same with* ijaradars *or the like. In each case the facts have to be investigated having regard to the language of Art. 144 of the Limitation Act.*

(3) [1919] 2 K. B. 581.

These were appeals preferred on the 27th of April 1920 against the decree of S. C. Mallik, Esq., District Judge of Zillah Hooghly, dated the 24th of January 1920, affirming the decree of Babu Hem Chandra Bose, Officiating Subordinate Judge, 2nd Court of that District, dated the 20th of September 1918.

The facts of the case will appear from the judgment.

Babu Mahendra Nath Roy, Dr. Jadu Nath Kanjilal and *Babu Benode Lal Mukherjee* for the Appellant.

Babu D. N. Chakravarty, Dr. D. N. Mitra, Babus Sarat Kumar Mitra and *Biraj Mohon Majumdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

These three appeals arise out of three suits for recovery of possession of certain *chaukidari chakran* lands after establishment of the Plaintiff's title thereto. It is alleged that the *putni mahal* known as lot Udaynarayanpore was originally held by one Ramnarayan Mookerjee under the zemindar, the Maharajadhiraj of Burdwan, and that the Plaintiff Srimati Nagendrabala Chowdhurani purchased on the 8th April 1905 the *putni* tenure in respect of the said lot Udaynarayanpore comprising 13 Mouzas at a sale held by a Receiver appointed by this Court on its Original Side in a suit for partition of certain joint properties among the representatives of the said Ramnarayan Mookerjee, and that thereafter the Plaintiff tried to obtain possession of certain *chaukidari chakran* lands comprised in the said Mouzas which had

SM. NAGENDRABALA CHOWDHURANI v. BEJOY CHAND MAHATAB BAHADUR.

been resumed by the Government under Bengal Act, VI of 1870, and which had been settled during the years 1896 to 1899 with the zemindar, the Maharajadhiraj of Burdwan. The main defence of the zemindar was that the suits were barred by limitation. As regards the Defendant, Provash Chandra Chatterjee, who was made a party in one of the said three suits and who, it appeared, had taken settlement of some of the said lands from the Maharajadhiraj of Burdwan, it was alleged on the latter's behalf that he was merely the *benamidar* of the Plaintiff Nagendrabala Chowdhurani. The three suits referred to above were suits Nos. 29, 30 and 54 of 1916. Suit No. 29 in which Provash Chandra Chatterjee was a Defendant related to the lands of six Mouzas comprised in the said *putni* and the two other suits related to the lands of three other Mouzas. The learned Subordinate Judge decided the question of limitation in favour of the Plaintiff and the question of *benami* in favour of the Defendant Maharajadhiraj of Burdwan. Accordingly on those findings, the Subordinate Judge gave a decree to the Plaintiff in all the three suits declaring her title to the said *chaukidari chakran* lands and directing that she should get *khas* possession of the same except the lands settled with Provash Chandra Chatterjee who was found to be the *benamidar* of the Plaintiff.

As regards the question of limitation, the learned District Judge, agreeing with the learned Subordinate Judge held that Art. 144 of the second schedule of the Limitation Act was the article applicable in the circumstances of these cases, but while the Subordinate Judge held that the Defendant zemindar had not succeeded in establishing that he had held the lands adversely to the Plaintiff for more than 12 years before the institution of these suits on the ground that the zemindar had not within a period of over 12 years prior to the suit taken direct possession of the land, after the resumption thereof under the Chaukidari Act and the settlement of the same with him by the Collector, the learned District Judge was of opinion that time ran against the *putnidar* from the date of the settlement of the lands by Government with the zemindar.

On behalf of the Plaintiff-Appellant it has been argued before us that having regard to the decisions of their Lordships of the Judicial Committee of the Privy Council in the cases of *Ranjit Singh Bahadur* v. *Kali Dasi Debi* (1) and *Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh* (2) respectively, there can arise no question now as to the right of the Plaintiff to the lands in question, nor can the recovery of possession of these lands by her be barred unless for more than 12 years prior to the dates of the institution of these suits, the possession of the zemindar had become adverse to the Plaintiff. This argument is no doubt correct; the real question is to ascertain when the possession of the zemindar in a case like this became adverse to the Plaintiff. Does the possession of the zemindar become adverse to the *putnidar* at the moment the lands are settled with the zemindar by the Government without more or does the possession of the zemindar become adverse only at the moment when some act is done by him indicative of a hostile attitude on his part towards the *putnidar*?

No doubt it has been held in the case of *Runglal Mandal* v. *Kamola Ranjan Roy* (3) that in cases of this description, time runs against the *putnidar* from the date of

(1) L. R. 44 I. A. 117; s. c. 21 C. W. N. 609 (1917).
(2) I. L. R. 48 Cal. 173; s. c. 23 C. W. N. 198 (1918).
(3) 30 C. L. J. 522 (1919).

SM. NAGENDRABALA CHOWDHURANI *v.* BEJOY CHAND MAHATAB BAHADUR.

the settlement of the lands with the zemindar by the Government. That decision may be reconcilable with the facts of that case and with the pleadings therein; we think, however, having regard to the language of Art. 144 of the second schedule of the Limitation Act, that, in each case, the Court must ascertain on the facts on record when the possession of the Defendant who is usually the zemindar, became adverse to the Plaintiff. The possession of the zemindar may become adverse to the *putnidar* in a variety of ways, *e.g.*, when the lands are settled by the zemindar with tenants or when the *putnidar* after being invited to come and take the lands does nothing and the zemindar thereafter makes other arrangements whether for holding the lands in *khas* or for settling the same with *ijaradars* or the like. In each case, the facts, in our opinion, have got to be investigated having regard to the language of Art. 144 of the Limitation Act. In the cases before us, there is no finding by the lower Appellate Court as to when on the facts in these cases the possession of the zemindar became adverse to the Plaintiff and we are therefore of opinion that the matter should go back to the lower Appellate Court for clear and specific findings on that point in the cases out of which these appeals from Appellate Decrees Nos. 1032, 1137 and 1138 have arisen in respect of all the lands other than the lands settled with Provash Chandra Chatterjee. Either party may adduce further evidence upon the question of possession and such evidence may be taken by the lower Appellate Court itself or under its direction by the Court of first instance. Costs of the Appeals Nos. 1032, 1137 and 1138 will abide by the decision of the lower Appellate Court on the point indicated above.

N. G.

[CIVIL REVISIONAL JURISDICTION]

REFERENCE UNDER THE COURT FEES ACT.

Re: S. . FILE No. 2540 OF 1922.

MOOKERJEE, J.
1923,
9, May.

SACHHIDANANDA THAKUR and ors.
v.
MOHESH CHANDRA DAS and ors.

Bengal Tenancy Act (VIII of 1885), sec. 105, sub-sec. (3), court-fees payable on applications under the section, under rules framed by the Governor-General in Council.

Four tenants of one tenancy joined in an application under sec. 105 of the Bengal Tenancy Act:

Held—*That on a proper construction of the rule framed by the Governor-General in Council, a stamp of eight annas only is to be levied in respect of each tenancy, not in respect of each tenant who may be one of a group of tenants holding a particular tenancy. The rule in question (No. 2254F published in the Gazette of India, dated the 10th August 1921) must be read with para. 63, cl. (4) of the rules framed by the Governor-General in Council on the 7th December 1914.*

UPADHYA THAKUR *v.* PERSIDH SINGH (1) *referred to.*

This was a Reference by the Taxing Officer (the Registrar of the Appellate Side) to the Hon'ble Chief Justice under sec. 5 of the Court Fees Act about the sufficiency of the court-fee of 8 as. paid on the memorandum of appeal in appeal from Appellate Decree File No. 2540 of 1922.

The material facts are set out in the Reference of the Taxing Officer, which was as follows :—

"In this case the Stamp Reporter reports that the court-fee is insufficient by

(1) I. L. R. 23 Cal. 723 (F. B.) (1896).

SACHHIDANANDA THAKUR v. MOHESH CHANDRA DAS.

Rs. 1-8. The appeal arises out of a proceeding under sec. 105 of the Bengal Tenancy Act. Under sec. 105 (3) of that Act, every application under sub-sec. (1) or sub-sec. (3), shall, notwithstanding anything contained in the Court Fees Act, 1870, bear such stamp as the Government of India may, from time to time, prescribe by notification in the Gazette of India. It appears that in the notification No. 2254F published in the Gazette of India, dated 10th August 1921, Pt. I, p. 1253, which superseded a previous notification No. 322 S. R., dated 19th January 1899, it was provided that a stamp of 8 as. should be paid for each tenant making, joining or joined in the application. As regards the application in question, four tenants have been joined. The vakil for the Appellants submits that these four tenants are tenants of one tenancy. Whether this be so or not, it seems to me that inasmuch as the rule framed by Government requires a stamp of 8 as. for each tenant, it is still necessary, on a literal construction of the rule framed by Government, for the vakil to put in deficit court-fee of Rs. 1-8. As, however, this is a matter of general importance, I submit the case to the Hon'ble the Chief Justice under sec. 5 of the Court Fees Act."

The matter was laid before the Hon'ble Mr. Justice Mookerjee by order of the Hon'ble Chief Justice.

Babu Atul Chandra Gupta for the Appellants.

Babus Dwarka Nath Chuckerbutty and *Surendra Nath Guha* for the Secretary of State for India in Council.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—The question which has been referred for decision under sec. 5 of the Court Fees Act, 1870, relates to the true construction of a rule framed by the Governor-General in Council with reference to sec. 105, sub-sec. (3) of the Bengal Tenancy Act, 1885. The rule directs that an application made under the section for a settlement of rent, during the preparation of a record-of-rights, in the Presidency of Bengal, under Chap. X of the Bengal Tenancy Act, shall bear a stamp of eight annas for each tenant making or joining or joined in the application. The Stamp Reporter has held that if the application relates to a single tenancy, which is held by a number of joint tenants, a stamp of eight annas must be levied in respect of each of such joint tenants. This novel interpretation of a rule which has been in existence for a quarter of a century is, in my opinion, clearly erroneous.

The rule in question must be read with para. 63, cl. (4) of the rules framed by the Governor-General in Council on the 7th December 1914. That rule is in these terms:—"With the consent of the Revenue Officer, any number of tenants occupying land under the same landlord, in the same village, may make a joint application for the settlement of rent, or may be joined as Defendants in the same proceeding or a similar application by the landlord, provided that, if at any time it appears to the Revenue Officer that the question between any two of the parties, of whom one is so joined with others, cannot conveniently be so jointly tried, he may order a separate trial to be held of that question, or he may pass such orders, in accordance with the Code of Civil Procedure, for the joint or separate disposal of the application, as he may think fit."

This rule leaves no room for controversy that the case contemplated is that

of joinder of matters relating to distinct tenancies in the same application; otherwise, no special permission would have been necessary, because if the application relates to one tenancy, which is held by a number of joint tenants, all the joint tenants would be necessary parties to the application. The history of this matter is set out in the judgment of a Full Bench of this Court in the case of *Upadhya Thakur* v. *Persidh Singh* (1). The rule for the levying of stamp duty which I have previously mentioned was framed with a view to modify the effect of the Full Bench decision. In my opinion, the only construction which can be legitimately put upon the rule is that a stamp of eight annas is to be levied in respect of each tenancy, not in respect of each tenant who may be one of a group of tenants holding a particular tenancy. The conclusion follows that adequate court-fees have been paid on the memorandum of appeal which must be registered accordingly.

J. N. R.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 164 OF 1922.

CUMING, J.
B. B. GHOSE, J.
1922,
11, December.

HAMID ALI, Complainant,
v.
SRI KISSEN GOSAIN and anr., Accused.

Criminal Procedure Code (Act V of 1898), sec. 342, examination of accused under, if can be dispensed with where the accused at an earlier stage made definite statements.

Where the accused made definite statements at an earlier stage and were not examined at the close of the prosecution case:

Held—*That where the terms of the Code are perfectly clear there is no excuse whatever for a deliberate disregard of them. The necessity for a strict observance of the Code of Criminal Procedure should be impressed on the Magistrates.*

(1) I. L. R. 23 Cal. 723 (F. B.) (1896).

This was a Reference under sec. 438, Code of Criminal Procedure, dated the 25th November 1922, from the Additional Sessions Judge of Sylhet (Mr. P. N. Roy Chowdhury), recommending that the order of Moulavi Md. Choudhuri, Extra Assistant Commissioner of Karimganj, dated the 30th August 1922, convicting the accused under sec. 342 of the Indian Penal Code and sentencing them each to pay a fine of rupees forty (Rs. 40) or, in default, one month's rigorous imprisonment, may be set aside for reasons set forth in the Letter of Reference.

The facts will fully appear from the Letter of Reference which was as follows :—

"On the evening of 7th Baisakh last while complainant Hamid Ali was passing by the Local Board road by the front of Chatradhari's house he was called there. He refused. The accused Sri Kissen and Gonesh Sonar with two others thereupon came up and seized and carried him to Chatradhari's house by force where he was horse-whipped and kicked by Chatradhari causing injuries. Complainant was, under Chatradhari's order, tied in the waist with a rope and kept confined in his bunglow for the whole night. On the following day at noon he was released by Udoy Chand Sarpanch and with Arif Choukidar he went to Patharkandi Police Station and lodged *ezahar*. The police, after enquiry, submitted charge-sheet and the Petitioners with two others were convicted for offence under sec. 342, I. P. C. and each sentenced to pay a fine of Rs. 40, in default one month's rigorous imprisonment.

The conviction and sentence by the

HAMID ALI v. SRI KISSEN GOSAIN.

trial Court have become vitiated and liable to be set aside inasmuch as requirements of sec. 342, Cr. P. C. have not been complied with. The trial Court after recording the deposition of prosecution witnesses Nos. 1 and 2 recorded the statements of the accused persons on 12th July 1922. Prosecution witnesses Nos. 3, 4, 5 and 6 were examined on the 27th July 1922 and charge framed on that date; but since then no further statements of the accused persons were recorded. It has been repeatedly ruled by the Hon'ble Judges of the High Court that this omission is an irregularity which cannot be cured by sec. 537 of the Code of Criminal Procedure. It is contrary to the provisions of sec. 342, Cr. P. C. and according to the recent ruling of the Calcutta High Court in revision case No. 569 of 1922 (Sylhet), it has been clearly laid down by Hon'ble Mr. Justice Walmsley and Justice Ghosh on the 31st of August last that all the proceedings after the statements of the accused persons had been recorded were vitiated in law and the case came on remand to be taken up after the examination-in-chief of these witnesses have been over. [The cases of *Mitrajit Singh* v. *King-Emperor* (1) and *Kishan Lal* v. *Emperor* (2) are also to the point.]

The provisions of sec. 342, Cr. P. C., are mandatory. The explanation of the trial Court that "the accused when examined made . . . . definite statements" cannot alter the plain words of the law [*Jyotish Chandra* v. *Emperor* (3) and *Queen* v. *Issur Raut* (4)]. This is an error in law which prejudiced the accused persons in the trial.

(1) 6 P. L. J. 644; [1922] Pat. 7 (1921).
(2) 62 Ind. Cas. 871 (1921).
(3) I. L. R. 36 Cal. 955: s. c. 14 C. W. N. 82 (1909).
(4) 8 W. R. (Cr.) 63 at p. 64 (1867).

I therefore consider that the convictions and sentences of the Petitioners cannot stand and should be set aside."

The JUDGMENT OF THE COURT was as follows:—

We have no alternative but to accept this Reference in view of the recent rulings of this Court.

The finding and sentence must therefore be set aside and the trial resumed from the point where the Court examined the accused person after the examination of the prosecution witnesses was concluded. We would impress on the learned Magistrates the necessity for a strict observation of the provisions of the Code of Criminal Procedure and where the terms of the Code are perfectly clear there is no excuse whatever for a deliberate disregard of them.

J. N. R. *Reference accepted; Case remanded.*

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 160 OF 1922.

CUMING, J. B. B. GHOSE, J. 1922, 4, December.	HARO NATH MALO, Complainant, v. SONAI MIA CHOWDHURY and ors., Accused.

Criminal Procedure Code (Act V of 1898), sec. 342, examination of accused at the close of the prosecution case, mandatory—Sec 360, reading over of depositions to witnesses, failure if vitiates trial.

In the trial of a warrant case the accused were not examined after the examination, cross-examination, etc., of the prosecution witnesses had been finished, and the depositions of witnesses were not read over as required by sec. 360:

Held—*That the omission to comply with the provisions of sec. 342 and sec. 360, Cr. P. C., is an illegality which is not curable by the provisions of sec. 537*

HARO NATH MALO *v.* SONAI MIA CHOWDHURY.

and the finding and sentence must therefore be set aside.

This was a Reference under sec. 438, Code of Criminal Procedure, dated the 21st November 1922, from the Additional Sessions Judge of Sylhet (Mr. P. N. Roy Chowdhry), recommending that the order of Babu Suresh Chandra Das, Sub-Divisional Magistrate of Sunamganj, dated the 8th August 1922, convicting the accused under sec. 147, I. P. C. and sentencing them each to pay a fine of Rs. 25, or, in default, to suffer rigorous imprisonment for three months each, may be set aside for the reasons set forth in his Letter of Reference.

The facts will fully appear from the Letter of Reference which was as follows :—

"On 4th February 1921 the complainant Haro Nath Malo went to fish in Sonakani Fishery. At that time the accused and some other people of Gouripur and Bhatipara assembled near the fishery and forbade him to fish. As the complainant did not listen, the accused broke down his houses with the help of an elephant and on his opposition assaulted him and looted his property. The case was reported by the police as one of mistake of law. It ultimately came to the trial Court and the three Petitioners were summoned under sec. 147, I. P. C. and they have been convicted and sentenced to a fine of Rs. 25 each, or, in default, rigorous imprisonment for three months each.

The conviction and sentence of the trial Court has become vitiated and liable to be set aside inasmuch as requirements of sec. 342, Cr. P. Code and of sec. 360, Cr. P. C. have not been complied with. The trial Court after recording the examination-in-chief of the prosecution witnesses on 28th April 1922 framed charge and on the same date recorded the statements of the accused persons. These witnesses have been cross-examined on 20th May 1922 but since then no further statements of the accused persons have been recorded. It has been repeatedly ruled by Hon'ble High Courts that, this omission is not an irregularity which can be cured by sec. 537 of the Code. It is contrary to the provisions of sec. 342, Cr. P. C. and according to recent ruling of the Calcutta High Court in Revision Case No. 569 of 1922 (Sylhet), it has been clearly laid down by Hon'ble Justice Walmsley and Justice Ghosh on 31st August last that all the proceedings after the statements of the accused have been recorded were vitiated in law and the case came on remand to be taken up after the examination-in-chief of these witnesses have been over. [The cases of *Mitrajit Singh* v. *King-Emperor* (1) and *Kishan Lal* v. *Emperor* (2) are also to the point.]

The trial in the lower Court also seems to have been vitiated inasmuch as requirements of sec. 360, Cr. P. C. have not been complied with with respect to any of the witnesses. In the explanation submitted by the Magistrate, the Magistrate seems to say that provisions of sec. 342, Cr. P. C. have not been complied with, but then what has been done in this case has been sufficient compliance with sec. 360, Cr. P. C. It seems from a slip that the trial Court referred the matter for information to his *peskar* and the *peskar* made a report to the following effect that 'it is not the practice to read out the depositions in all cases except sessions triable cases' and after some correspondence the trial Court admitted that *peskar's* report was correct In fact there is no

(1) 6 P. L. J. 644 : [1922] Pat. 7 (1921).
(2) 62 Ind. Cas. 871 (1921).

HARO NATH MALO *v.* SONAI MIA CHOWDHURY.

certificate appended to the depositions of any witnesses showing that the requirements of sec. 360, Cr. P. C. have been complied with. This is an error in law which prejudiced the accused persons in the trial and I consider that the provisions of both the secs. 342 and 360, Cr. P. C. are mandatory and no practice to the contrary can alter the plain words of the law [*Jyotish Chandra* v. *Emperor* (3) and *Queen* v. *Issur Raut* (4)].

The trial also seems to be bad in law inasmuch as the occurrence having taken place on 4th February 1921 the charge has been framed showing that the occurrence took place on 22nd February 1921.

I therefore consider that the conviction and sentence cannot stand for these defects and it should be set aside."

The JUDGMENT OF THE COURT was as follows :—

We must accept the Reference for the reasons given by the learned Sessions Judge. The omission to comply with the provisions of secs. 342 and 360, Cr. P. C. is an illegality which is not curable by the provisions of sec. 537. The finding and sentence must therefore be set aside. In the circumstances of the case we do not think any retrial is called for and the three accused persons, Ala Box, Shaik Bolai and Sonai Mia Chowdhury are therefore acquitted.

J. N. R. *Reference accepted; Conviction set aside.*

(3) I. L. R. 36 Cal. 955 : s. c. 14 C. W. N. 82 (1909).

(4) 8 W. R. (Cr.) 63 at p. 64 (1867).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SUMNER.
LORD CARSON.
MR. AMEER ALI.
1922,
Heard, 9 and 10, November.
Judgment, 20, December.

HAJI ABDUR RAHIM, Appellant,
v.
NARAYAN DAS AURORA, since deceased, and ors., Respondents.

Limitation Act (IX of 1908), Sch. I, Arts 134, 142, 144—Suit by mutwalli *to recover* wakf *property from mortgagee, from previous* mutwalli—Wakf *partially containing provision for settlor's family—Property whether wholly dedicated or only charged with trusts.*

Art. 134 of the 1st Schedule of the Limitation Act does not apply to a suit brought by a mutwalli *of a mosque to recover* wakf *property from persons in possession thereof under mortgages executed by his predecessor in office.*

Quære :—*If Art. 142 or 144 applies to such a suit.*

The property in respect of which a valid wakf *is created by the settlor is not merely charged with the several trusts he may declare while remaining his property and in his hands. It becomes God's property, and as such is inalienable except for the purposes of the* wakf; *and this is so even where there is in the* wakfnama *a provision intended to benefit the family of the settlor, as there may be without prejudice to the validity of the* wakf *if such provision is not the preponderating feature of the settlement.*

VIDYA VARUTHI THIRTHA *v.* BALUSAMI AYYAR (1) *and* MUJIBUNISSA *v.* ABDUL RAHIM (2) *referred to.*

This was an appeal against the decree

(1) L. R. 48 I. A. 302 : s. c. 26 C. W. N. 537 (1921).

(2) L. R. 28 I. A. 15 at p. 23 : s. c. 5 C. W. N. 177 (1900).

HAJI ABDUR RAHIM *v.* NARAYAN DAS AURORA.

of the High Court of Judicature at Fort William in Bengal, dated the 26th March 1920, which reversed the decree of the Subordinate Judge of Howrah, dated the 5th December 1918 and made in Suit No. 1 of 1918.

The suit was brought by the *mutwalli* of a *wakf* to recover possession of the lands described in the plaint which had passed into the possession of the Defendant under a decree obtained on a mortgage executed by a previous *mutwalli*. It was common ground that the mortgage was not executed for the purposes of the *wakf*. The Subordinate Judge passed a decree as prayed, but the suit was dismissed on appeal by the High Court as barred by limitation. The Plaintiff preferred the present appeal.

On the 5th February 1894, one Abdur Rahim executed and had registered a deed whereby he made a *wakf* of the property in question, constituting himself the first *mutwalli* and providing that in the events which happened his sister Naziran-nessa Bibi should succeed him as such. He began and on his death his said sister as *mutwalli* continued the administration of the proceeds of the land for the purposes of the *wakf*. But on the 7th February 1899 she and her surviving brother mortgaged the property by way of conditional sale to one Kedar Nath for purposes unconnected with the *wakf*. On the death of the mortgagee which took place soon afterwards, litigation arose as to who was entitled to his property. Ultimately Sheo Prasad was found to be entitled and in 1904 he brought a suit on the mortgage. On the 23rd January 1905 he obtained a preliminary decree for foreclosure and possession as prayed, and a final decree was passed in January 1906. Meanwhile, on the 4th February 1905 Sheo Prasad executed an assignment of the mortgage to the father of Narayan Das, the present first Respondent, to whom formal possession was delivered by the Court in March 1906. The first Respondent then endeavoured to collect rents from the tenants on the land and was met by opposition. Soon afterwards persons interested in the *wakf*, having procured the sanction of the Advocate-General, brought a suit under Civil Procedure Code, sec. 92, in the Court of the District Judge of Hooghly, for the removal of Nazirannessa Bibi from her office and for the appointment of a new *mutwalli*. The said suit resulted in a decree appointing the Appellant as *mutwalli* in her place.

On the 2nd May 1913, the Appellant instituted the suit which gave rise to this appeal praying for the relief stated above in para. 2, joining as Defendants besides the first Respondent Nazirannessa Bibi and her brother and others.

The said suit was defended by the present first Respondent only. He raised numerous pleas as to the validity of the *wakf* deed and the legality of the Plaintiff's appointment, etc., which were overruled, and also contended that the suit was barred by limitation.

The suit having come on for hearing before the Subordinate Judge he delivered judgment therein on the 3rd December 1918, and holding that the suit was not barred by limitation passed a decree as prayed by the Plaintiff. The argument as to limitation before the Subordinate Judge was founded on Art. 134 of the Limitation Act, 1908. In dealing with this argument the learned Judge analyses the evidence as to the attempts of Sheo Prasad, the first Respondent, to secure possession, and he decided "to accept the evidence on the Plaintiff's side that the mortgagee did not enter into possession and

that, at any rate, Nazirannessa had been in possession within twelve years of this suit which was instituted in May 1913." In view of the case, he thought the suit was not barred under Art. 134 of the Limitation Act and he held that this suit was within time. The findings on the other issues were likewise in favour of the Plaintiff.

Against the said decree an appeal was preferred by the present first Respondent and the same having come on for hearing judgment was delivered on the 26th March 1920 in pursuance of which a decree was passed allowing the appeal and dismissing the suit with costs.

The leading judgment was delivered by Mr. Justice Richardson who held that the suit was barred by limitation under Art. 134 being of opinion on the authorities cited by him that that article was applicable to the case and that the twelve years' period thereunder was to be computed from the date of the mortgage. But he concurred in the Subordinate Judge's finding as to possession quoted above, as to which he said :—

"Before concluding I ought to add that if it be relevant to consider at what point of time Kedar Nath or any person claiming under or through him first obtained possession, I see no good ground for differing on that issue of fact from the conclusion arrived at by the trial Court. There is no satisfactory evidence that either Kedar Nath or any successor of his entered into possession before possession was delivered by the Court to the assignee of the mortgage decree in March 1906. It is said that the probabilities are that Kedar Nath took possession under an instrument which entitled him to possession and purported to give him possession. But Kedar Nath died. His immediate successor was compelled to take legal proceedings to establish his title as such after which he foreclosed the mortgage by suit. As I have said I do not feel justified in differing from the Subordinate Judge's findings. That being so, the suit was brought within twelve years of the date on which possession was taken by the mortgagee from the trustee."

The other learned Judge, Mr. Justice Syed Shamsul Huda, differed on the last-mentioned question. He observed that there was no question of any *khas* possession being delivered to the mortgagee. The question of possession resolved itself into a question as to who was in receipt of the rents and profits. He did not, however, discuss the evidence bearing on this question, but said he considered the burden of proof was on the Plaintiff to negative the prescriptive title which the Defendants set up and that this burden had not been discharged.

Hence this appeal to His Majesty in Council.

Messrs. DeGruyther, K. C. and *Kenworthy Brown* for the Appellant.—The *wakf* property was mortgaged by a former *mutwalli* in 1899 and the mortgagee entered into possession in 1906.

The Appellant, the present *mutwalli*, in 1913 filed this suit to recover the properties. The High Court has held that the suit is barred by limitation under Art. 134 of the Limitation Act.

That finding is wrong in view of the later decision of this Board in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1), which decided that a transfer by a *mutwalli* does not fall within Art. 134.

The trial Judge and Richardson, J. in the High Court are agreed that the late *mutwalli* was in possession within 12 years of the suit, and that finding is sup-

(1) L. R. 48 I. A. 302: s. c. 26 C. W. N. 537 (1921).

ported by the evidence. Huda, J. in High Court held that the onus was on the Appellant to prove that the suit was within time, but the onus is really on the Defendant to prove that he had been in possession adversely. *Secretary of State* v. *Chelikani Rama Rao* (3) and *Krishnanrav* v. *Peringati Kunharankutty* (4).

Messrs. Dunne, K. C. and *E. B. Raikes* for the Respondents.—The Subordinate Judge found the issue of possession a necessary one under Art. 134 and decided it in the Appellant's favour.

Richardson, J. found the issue as to possession was immaterial.

It is admitted that Art. 134 cannot apply. The finding of Huda, J. on the issue of possession was that the onus lay on the Appellant.

The contention that in lieu of Art. 134 Art. 144 must apply is erroneous. The article applicable is Art. 142 and under that article the onus is on the Appellant. This was an ordinary suit in ejectment. The dedication was not a valid *wakf*. Part of it was admittedly *wakf* but the deed contained also secular interests of the mortgagor which the mortgagee is entitled to hold charged. The property is only charged with certain trusts in favour of the deity, the remainder being still for the benefit of the family and therefore invalid.

Mutu Ramanadan Chettiar v. *Vava Levvai Marakayar* (5).

In considering whether the settlement was charitable or not a determining factor is the consideration that no trusts were declared during the settlor's own life-time.

Md. Munawar Ali v. *Razia Bibi* (6) and *Md. Ahsanulla Chowdhury* v. *Amarchand Kundu* (7).

The secular interests are severable from the religious and they at any rate are subject to a charge.

Mr. DeGruyther, K. C., in reply.—The test is, was the dedication in substance charitable or not.

In *Mutu Ramanadan Chettiar* v. *Vava Levvai Marakayar* (5), the dedication was held to be charitable though in substance it only comprised one-third of the property.

The *wakf* is not severable; it is either wholly good or wholly bad.

All that the Appellant must show is possession of part of the property within 12 years of suit and that is established by the evidence.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—This was a suit brought by the *mutwalli* of a mosque to recover possession of property, alleged to have been settled as a valid *wakf*, from the Defendants, whose title arose under incumbrances created by his predecessors in that office.

The principal issue tried in India was whether or not the claim was statute-barred, and, relying on Art. 134 of the first Schedule of Act No. IX of 1908, the High Court gave judgment in favour of the Defendants. This was before the decision of their Lordships' Board in

(3) L. R. 43 I. A. 192, 204: s. c. I. L. R. 39 Mad. 617; 20 C. W. N. 1311 (1916).

(4) L. R. 48 I. A. 395, 403: s. c. 26 C. W. N. 666 (1921).

(5) L. R. 44 I. A. 21: s. c. I. L. R. 40 Mad. 116; 21 C. W. N. 521 (1916).

(5) L. R. 44 I. A. 21: s. c. I. L. R. 40 Mad. 116; 21 C. W. N. 521 (1916).

(6) L. R. 32 I. A. 86, 92: s. c. 9 C. W. N. 625 (1905).

(7) L. R. 17 I. A. 28: s. c. I. L. R. 17 Cal. 498 (1889).

Vidya Varuthi Thirtha v. *Balusami Ayyar* (1), which held that Art. 134 does not apply to a *wakf*, and accordingly their conclusion is admitted to be no longer sustainable. There has further been much discussion on the present appeal whether the case is governed by Art. 142 or by Art. 144, since Art. 134 is inapplicable; but again it is common ground that, if the Plaintiff's evidence established that his predecessor in office remained in possession of the property in question until after the year 1901, then his claim is not statute-barred. As to this, oral evidence, relating to the receipt of the rents and profits, was called on both sides. The learned trial Judge, after criticising adversely the evidence given on this point by the Defendants' witnesses, accepted the Plaintiff's case, and held that the mortgagors had remained in possession until less than twelve years before the present suit was begun. With this finding of fact one of the learned Judges in the High Court, Richardson, J., agreed. His colleague Syed Shamsul Huda, J., dissenting, drew attention to the burden of proof, which he said rested on the Plaintiff and had not been discharged, the probabilities being in favour of the Defendants. If the learned Judge meant, as his reference to the onus of proof seems to indicate, that the Plaintiff had given no evidence, that the mortgagee had not received possession at the time when the mortgage was executed and in accordance with its terms, he overlooked the fact that several of his witnesses gave positive and precise evidence on the subject, and so far as the burden of proof goes, there was enough to call for an answer. If, on the other hand, as his allusion to the probabilities of the case seems to show, he only meant that, weighing the Plaintiff's evidence against that of the Defendants', he rejected the former and accepted the latter, his opinion is not fortified by any detailed examination or comparison of the evidence, which the respective witnesses gave. Their Lordships do not think that under these circumstances the opinion of Syed Shamsul Huda, J., ought to prevail against the concurrent opinions of Richardson, J. and of the learned trial Judge; nor does their own examination of the evidence, which need not be set out in detail, lead them to discredit the Plaintiff's case in this respect.

The affirmation of the finding that the mortgagors retained possession down to a date, which defeats the plea of the Statute of Limitations, would dispose of this appeal, but for the following point. The original settlement was undoubtedly a valid creation of a *wakf*, for the provision intended to benefit the family of the settlor was not the preponderating feature of the settlement, nor was the provision made for the perpetuation of religious ceremonies and charitable gifts by any means, illusory or unsubstantial; but, equally undoubtedly, the two provisions—that for the upkeep of the mosque and celebration of worship there on the one hand, and that for the benefit of the settlor's family on the other—are, as a matter of drafting, separate and severable dispositions. Indeed, it could not have been otherwise. The new contention for the Respondents was that a mortgagee, who had parted with his money to the persons, members of the Plaintiff's and of the settlor's family, who were then in the position of *mutwalli*, ought not to lose his money altogether, and that too at the Plaintiff's instance, but was at least entitled to have a charge declared in his favour over the

(1) L. R. 48 I. A. 302: s. c. 26 C. W. N. 537 (1921).

portion of the property, which was settled for the benefit of the settlor's family.

This point was not taken below, or even in the Respondents' case, unless it can be brought within the third reason, "because the trusts created were not those of a valid *wakf*—at any rate as to the half of the property settled on the founder's heirs." Their Lordships would not in any event have declared that the Respondents were entitled to the suggested charge, for they are by no means sure that all necessary parties are before them or that all necessary matters have been proved, and the case would have to be remitted to India, even if the contention be sound.

In the present case there is a dedication, which has already taken effect, and it is so substantial that one half of the net income has to be devoted to specified pious purposes. It is impossible to say that this gift is only a veil to cover arrangements for the aggrandisement of the settlor's family and a device to make the property inalienable. There is nothing illusory about it. The most that can be said is that the provision for the settlor's family is considerable, for the mere provision itself is clearly permissible, as is the provision that the settlor's heirs shall be the *mutwallis* of the *wakf* in their order. In delivering the judgment of their Lordships' Board in *Mujibunissa* v. *Abdul Rahim* (2), Lord Robertson says, at p. 23: "It will be so" (that is, it will be a valid deed of *wakf*) "if the effect of the deed is to give the property in substance to charitable uses. It will not be so, if the effect is to give the property in substance to the testator's family." In view of the fact that this deed has been taken as creating a valid *wakf* in both Courts in India, and that effect has been given to it as creating a valid *wakf* in separate proceedings by the decree appointing the Appellant to be *mutwalli*, their Lordships think it needless to discuss further the genuine character of the *wakf*. Its dominating purpose is to make adequate provision for the pious uses mentioned.

In *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1), it was explained that the idea conveyed by the word "trust" is foreign to the religious conception involved in the word *wakf*:—

"'When once it is declared that a particular property is *wakf* or any such expression is used as implies *wakf* . . . . the right of the *wakif* is extinguished and the ownership is transferred to the Almighty,' says Mr. Ameer Ali in delivering judgment. 'The manager of the *wakf* is the *mutwalli*, the governor, superintendent, or curator.' In the case of *khankhas* the head is called a *sajjadanishin*. 'But neither the *sajjadanishin* nor the *mutwalli* has any right in the property belonging to the *wakf*; the property is not vested in him, and he is not a trustee in the technical sense. . . . The *wakfnama* does not transfer property to trustees. . . .' Under the Mohamedan Law the moment a *wakf* is created all rights of property pass out of the *wakif* and vest in God Almighty. 'The curator, whether called *mutwalli* or *sajjadanishin*, or by any other name, is merely a manager.'"

The principle of the Respondents' contention, accordingly, appears to their Lordships to be fallacious. The property, in respect of which a *wakf* is created by the settlor, is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed "God's acre," and this is the basis of the settled rule that such property as is held in *wakf* is in-

(2) L. R. 28 I. A. 15 at p. 23: s. c. 5 C. W. N. 177 (1900).

(1) L. R. 48 I. A. 302: s. c. 26 C. W. N. 537 (1921).

alienable, except for the purposes of the *wakf*. A similar view forms the basis of the inalienability of a Hindu *math* and, if the settlor declares himself, as he is entitled to do, to be the first *mutwalli* or the first *shebait*, that does not affect the fundamental principle, that the whole property is considered as having passed from him for the purposes which he has declared, and not merely such portion of it as will suffice to produce the part of the income which he has expressly dedicated to pious and charitable uses. From this it follows that where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the *wakf*, which is therefore as such unsustainable, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges, one declared for pious uses on one part of the property, and another and separate charge declared on another part for the uses of the mortgagor only. The property itself is not to be regarded as severable and chargeable according to the measure of the interest, which the settlor's family may have in the rents and profits of the whole. The contention now advanced is inconsistent with the character of a *wakf*, as fully explained in the above-mentioned and many other decisions of their Lordships' Board. Their Lordships are of opinion that, for an advance of money, otherwise than to satisfy the legitimate needs and purposes of the *wakf*, no part of the property held in *wakf* is chargeable either by the settlor or by the Court. In such a case any claim by the person who advances the money must be in the nature of a claim *in personam*, and cannot be secured by holding liable the *wakf* property itself. For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and the judgment of the High Court set aside and that of the trial Judge restored with costs here and below.

Solicitors: *Messrs. Pugh & Co.* for the Appellant.

Solicitors: *Messrs. Watkins & Hunter* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 151 OF 1923.

SANDERSON, C. J. RICHARDSON, J. 1923, 12, November.

S. N. HALDER, Appellant, v. S. N. MALLIK and anr., Respondents.

Elections to the Bengal Legislative Council—Returning officer's decision as to the validity of nomination papers of candidates—Specific Relief Act (I of 1877), sec. 45, Court's jurisdiction under, to interfere with such decision—Provisos (d), (e) *and* (h) *to sec. 45 considered—Bengal Electoral Rules and Regulations—R. 31, if takes away Civil Court's power to question elections.*

The nomination paper of S. H., a candidate for election to the Bengal Legislative Council, was rejected by the Returning Officer on the ground, that not being dated, it was not in the form prescribed in Sch. III of Bengal Electoral Rules and Regulations. The nomination paper of S. M., the rival candidate, was accepted by the Returning Officer, overruling S. H.'s objection that S. M., being a whole-time Government servant, was not eligible for election. S. H. applied under sec. 45 of the Specific Relief Act to the High Court for an order requiring the Returning Officer to accept his nomination paper and reject S. M.'s nomination paper. The High Court refused the application and, S. H. appealed. Pending the appeal, the Returning Officer declared S. M. to be duly elected under r. 14 (2) of the Bengal Electoral Rules:

S. N. HALDER *v.* S. N. MALLIK.

Held *by the Court of Appeal—That the jurisdiction which is given to the High Court under sec. 45 of the Specific Relief Act is a discretionary jurisdiction and that such jurisdiction is limited by the provisos* (d), (e) *and* (h).

Held also—*That it had no jurisdiction to interfere in the present case inasmuch as (1) the Court having no power to set aside S. M.'s election, any remedy which it might give under sec. 45 of the Specific Relief Act would be incomplete; (2) the Appellant had a specific and adequate legal remedy by an election petition; and (3) r. 31 of the Bengal Electoral Rules and Regulations provides that "no election shall be called in question except by an election petition in accordance with the provisions of this part."*

This was an appeal against an order of Mr. Justice Page, dated the 2nd November 1923, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case were as follows:— On the 8th of October 1923, the Appellant Mr. S. N. Halder presented three nomination papers to the Returning Officer of the Calcutta South Non-Mahomedan Constituency purporting to be in the form prescribed in Sch. III of the Bengal Electoral Rules. The Appellant in the presence of the Returning Officer signed the declaration at the foot of the nomination paper and the Returning Officer in the presence of Mr. Halder on the same day filled in and signed the certificate of delivery. On the 11th of October, being the date fixed for the scrutiny of the nomination papers, objection was made on behalf of the rival candidate, Mr. S. N. Mallik, to Mr. Halder's nomination paper on the ground that the date had not been inserted by Mr. Halder in the declaration. Objection was also taken by Mr. Halder to Mr. Mallik's nomination paper on the ground that Mr. Mallik being the Chairman of the Corporation of Calcutta, was a whole-time Government servant and was therefore ineligible for election to the Council. The Returning Officer rejected Mr. Halder's nomination paper on the grounds stated below.

"The Papers Nos. 4, 5, 6, are undated and therefore have not been completed in the form prescribed in Sch. III, *vide* r. 2 (3), Bengal Electoral Rules. This is admittedly a mere irregularity of a technical nature. They were in fact signed by the candidate in my presence on the 8th October 1923. But I interpret Rules strictly as is intended I think, *vide* Reg. XXI (*iii*)."

The Returning Officer overruled Mr. Halder's objection to Mr. Mallik's nomination paper and gave his reasons as follows: "Mr. Halder objects that Mr. Mallik is a whole-time Government servant. But this point does not come under Reg. XXI and is outside my province." On the 15th of October, the Appellant obtained a rule *nisi* in the following terms:—

"It is ordered that the said Surendra Nath Mallik and the said Returning Officer do this day forthwith show cause before this Court why the said Returning Officer should not accept the nomination paper of the said Surendra Nath Halder and include the name of the said Surendra Nath Halder in the list of valid nomination papers he is preparing and why he should not reject the nomination paper of the said Surendra Nath Mallik and exclude his name from the list of valid nominations . . . ." On the same day the hearing of the rule was adjourned until the 29th of October and an injunction was granted restraining the persons concerned from "reporting the result of the election . . . . to the Secretary to the Council

S. N. Halder v. S. N. Mallik.

or from taking any further steps in the matter of election of the said (South Non-Mahommedan) Constituency." On the 2nd of November, the rule *nisi* was heard by Mr. Justice Page who discharged the same as also the injunction. Immediately after judgment was given, the Returning Officer notified the Secretary to the Bengal Legislative Council that he had declared Mr. S. N. Mallik to be duly elected to the Council. Mr. Halder appealed and applied for an injunction pending appeal which was refused. A notice appeared in the *Calcutta Gazette* under date the 5th of November, relevant portions of which are as follows: It is hereby notified in pursuance of r. 14 (9) of the rules . . . . . that Mr. Surendra Nath Mallik has been declared elected under r. 11 (2) of the aforesaid rules . . . . to be a member of the Bengal Legislative Council."

Mr. S. C. Roy (with him *Mr. D. N. Sen*) for the Appellant.—The Court may make an order restoring the Appellant to his original position and he can execute it as a decree under sec. 48 of the Act.

The Advocate-General (*Mr. S. R. Das*) and *Mr. B. L. Mitter* for the Respondent, the Returning Officer.

Sir B. C. Mitter and *Messrs N. N. Sarkar* and *S. M. Bose* for the Respondent, Mr. S. N. Mallik.

The Judgment of the Court was as follows:—

Sanderson, C. J.—This is an appeal from a judgment of my learned brother Mr. Justice Page.

I need not deal with the first rule which was issued, because, as I understand, that was discharged by my learned brother Mr. Justice Cuming, who thereupon issued another rule. That rule was issued on the 15th of October 1923. The rule called upon Mr. S. N. Mallik and the Returning Officer to show cause why the Returning Officer should not accept the nomination paper of Surendra Nath Halder and include the name of the said Surendra Nath Halder in the list of valid nominations which he was preparing and why he should not reject the nomination paper of the said S. N. Mallik and exclude his name from the list of valid nominations and why they should not pay to the said Surendra Nath Halder his costs.

Mr. Justice Cuming, as we have been informed, made an *ad interim* injunction restraining the Returning Officer from preparing the list or from taking any further steps in the election.

The rule was heard by my learned brother Mr. Justice Page on the 29th of October. He reserved judgment and continued the *ad interim* injunction until the date of delivery of his judgment. On the 2nd of November by his judgment, he discharged the rule and set aside the *ad interim* injunction.

This is an appeal from that judgment. The facts which it is necessary for me to state for the purpose of my judgment are as follows: These two gentlemen Mr. S. N. Halder and Mr. S. N. Mallik desired to be candidates for a particular seat in the election for the Bengal Legislative Council. Mr. Halder presented his nomination paper on the 8th of October 1923. The nomination paper contains a paragraph which is to be filled in by the Returning Officer as follows: "This nomination paper was delivered to me in my office at (date and hour. . . . .)." The Returning Officer filled in the date and hour and signed his own name. In the presence of the Returning Officer Mr. Halder signed what is called "declaration by candidate" which runs as follows: "I hereby declare that I agree to this nomination." Mr. Halder signed that declaration on the 8th

of October last in the presence of the Returning Officer. He did not fill in the date upon which he signed the declaration. When the time came for investigating the validity of the nomination papers, namely, on the 11th of October 1923, a point was taken by or on behalf of Mr. Mallik that the nomination paper of Mr. Halder was not valid because the declaration signed by Mr. Halder did not bear a date, though, as I have said, he signed it on the 8th October actually in the presence of the Returning Officer. The Returning Officer decided that the ground that the declaration of Mr. Halder did not bear a date, was sufficient to invalidate the nomination paper and he rejected the nomination paper of Mr. Halder.

It is not necessary for me to express any opinion as to whether the Returning Officer's decision on this point was a correct decision or not and I express no opinion in respect thereof. The point has not been argued before us and it would not be right for me in any shape or form to express an opinion thereon.

Mr. Halder apparently took an objection to Mr. Mallik's nomination paper. The argument in respect of that objection has not been elaborated in this Court but I understand that the ground was that Mr. Mallik was a Government official. The Returning Officer, as I have been informed, came to the conclusion that he had no jurisdiction to decide that question and accepted Mr. Mallik's nomination paper.

After the judgment of my learned brother Mr. Justice Page was delivered on the 2nd of November by which, as I have already stated, he discharged the rule and dissolved the injunction, the Returning Officer under r. 14 (2) of the Bengal Electoral Rules declared Mr. Mallik to be elected. R. 14 (2) runs as follows: "If the number of such candidates is equal to the number of vacancies, all such candidates shall be declared to be duly elected." The result of the Returning Officer's rejecting Mr. Halder's nomination paper and accepting Mr. Mallik's nomination paper was that there was one vacancy and one candidate; and therefore on the 2nd November, after Mr. Justice Page's judgment had been delivered, he declared Mr. Mallik to be elected. Under date the 5th November this notice appears in the Gazette: "It is hereby notified in pursuance of r. 14 (9) of the rules for the election and nomination of members to the Bengal Legislative Council that Mr. Surendra Nath Mallik has been declared under r. 14 (2) of the aforesaid rules to have been duly elected by the Calcutta South (Non-Mahommedan) Constituency to be a member of the Bengal Legislative Council."

These are the facts which, in my judgment, it is necessary for me to state.

In my judgment this appeal must be dismissed on the following grounds:—

The application, upon which the rule was founded, was made under sec. 45 of the Specific Relief Act. It is not necessary for me to refer at any length to the provisions of that section as they are all well known and there have been many decisions in this Court in respect thereof. It is sufficient for me to say, in the first place, that the jurisdiction which is given to the Court under that section is a discretionary jurisdiction: and, in the second place, that jurisdiction is limited by the provisos and exemptions which are set out in the section. I desire to refer to three of these, *viz.*, (*d*), (*e*) and (*h*). The section provides that the Court may "make an order requiring any specific act to be done or forborne . . . . by any person holding a public office . . . . . provided (*d*) that the applicant has no other specific

S. N. HALDER *v.* S. N. MALLIK.

and adequate legal remedy and (*e*) that the remedy given by the order applied for will be complete" and one of the exemptions from such power is as follows :—

(*h*) "Nothing in this section shall be deemed to authorise any High Court to make any order which is otherwise expressly excluded by any law for the time being in force." It has been admitted by the learned Counsel, who argued this case, that it will be open to his client to present an election petition based upon the allegations upon which he now relies. It seems to me, therefore, that the applicant has another specific and adequate legal remedy.

Further, it seems to me that if we were to allow this appeal and make the order, which my learned brother was asked to make and direct that the Returning Officer should accept Mr. Halder's nomination paper, the remedy, which we should be able to give would not be complete because we have no power in these proceedings to set aside the election which has been declared and the result might be to reduce these proceedings to an absurdity inasmuch as we should be directing the Returning Officer to receive the nomination paper of Mr. Halder after he has declared Mr. Mallik to be duly elected—a declaration, with which this Court in these proceedings has no jurisdiction to interfere.

There is a further ground, namely, that by r. 31 of the Bengal Electoral Rules and Regulations it is provided that "no election shall be called in question except by an election petition presented in accordance with the provisions of this part." The learned Counsel has admitted that that rule may be said to be "a law for the time being in force" and one of the exemptions from the provisions of sec. 45 of the Specific Relief Act, as I have stated, is that "Nothing in this section shall be deemed to authorise any High Court to make any order which is otherwise expressly excluded by any law for the time being in force."

For these reasons, in my judgment, this appeal must be dismissed with costs.

RICHARDSON, J.—I am entirely of the same opinion.

Messrs. K. K. Dutt & Co., Solicitors for the Appellant.

Messrs. Kesteven Gooding & Co. and *Babu B. K. Basu*, Solicitors for the Respondents.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 181 OF 1922.

MOOKERJEE, J.	BHUBANMOHINI DASI
CHOTZNER, J.	and ors., Defendants,
1923,	Appellants,
Heard, 20 and	*v.*
21, August.	KUMUDBALA DASI and
Judgment,	ors., Plaintiffs,
28, August.	Respondents.

Hindu law—Property standing in the name of a Hindu female—Presumption of jointness—Burden of proof on person asserting that the apparent is not the real state of things—Quantum of evidence necessary to prove benami *in India—Criterion of payment of purchase money—Appeal, burden of proving incorrectness of judgment appealed against—Setting up inconsistent pleadings, effect of—New case, set up in Appellate Court, if allowable—Partition of a portion of the entire property—Order by preliminary decree for discovery of further joint property, legality of.*

There is no presumption that a property standing in the name of a Hindu female, who is a member of a joint Hindu family, belongs to the joint family and is not her stridhan *property. This rule must be coupled with the elementary principle that the burden of proof lies upon the person who asserts that the apparent is not the real state of things. The decision of the Court in this class of cases should rest*

BHUBANMOHINI DASI *v.* KUMUDBALA DASI.

not upon suspicion but upon legal grounds established by legal testimony.

DEWAN RAI BIJAY BAHADUR SINGH *v.* INDRAPAL (1), SETH MANIKLAL *v.* RAJA BIJOY SINGH (11), SREEMAN CHUNDER *v.* GOPAUL CHUNDER (12) *and several other cases referred to.*

As benami *transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose.*

UMA PARSHAD *v.* GANDHARP SINGH (14), MUHAMMAD MAHBUB ALI KHAN *v.* BHARAT INDU (15) *and other cases referred to.*

The most important test to be applied in these cases is the source whence the consideration came. In cases, however, where a husband, or a father pays the money and the purchase is taken in the name of a wife, or a child, there is under the general law in India, no presumption of an intended advancement in favour of wife or child as there is in England.

NRITYAMONI *v.* LAKHAN CHANDRA (22), BILAS KOER *v.* DEORAJ RANJIT SINGH (23), KERWICK *v.* KERWICK (15) *and other cases referred to.*

Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts, or with reference to the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property.

DALIP *v.* CHAUDHRIAN NAWUL KUNWAR (27) *and* UPENDRA NATH *v.* PURENDRA NATH (28) *referred to.*

The substance of the transaction as evidenced in the deeds of the parties should, however, be looked to, without permitting the real question to be obscured by the form of expression, the literal sense, or by exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument.

HANOOMAN PERSHAD *v.* BABOOE MUNRAJ (29), PROMODE KUMAR RAY *v.* MADAN MOHAN SAHA (31) *and other cases referred to.*

In appeals, the burden of showing that the judgment appealed from is wrong lies upon the Appellant, and the fact that the trial Court disbelieved his story, cannot altogether be ignored.

NABAKISOR MANDAL *v.* UPENDRAKISSOR MANDAL (36) *referred to.*

It may be conceded that the Civil Procedure Code does not prohibit inconsistent pleadings, and that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the

(1) L. R. 26 I. A. 226: s. c. I. L. R. 26 Cal. 871; 4 C. W. N. 1 (1899).
(11) 25 C. W. N. 409 (P. C.) (1920).
(12) 11 M. I. A. 29 (43); 7 W. R. P. C. 10 (1866).
(14) L. R. 14 I. A. 127: s. c. I. L. R. 15 Cal. 20 (1887).
(15) 23 C. W. N. 321 (P. C.) (1918).
(22) I. L. R. 43 Cal. 660: s. c. 20 C. W. N. 522; 24 C. L. J. 1 (1916).
(23) L. R. 42 I. A. 202: s. c. I. L. R. 37 All. 557; 19 C. W. N. 1207; 22 C. L. J. 516 (1915).
(45) L. R. 47 I. A. 275: s. c. 32 C. L. J. 490 (1920).
(27) L. R. 35 I. A. 104: s. c. I. L. R. 30 All. 258; 12 C. W. N. 609 (1908).
(28) 21 C. W. N. 280 (1915).
(29) 6 M. I. A. 393; 18 W. R. 81n (1856).
(31) 36 C. L. J. 366, 400 (1922).
(36) 26 C. W. N. 322: s. c. 35 C. L. J. 116 (P. C.) (1921).

Bhubanmohini Dasi v. Kumudbala Dasi.

alternative. But the litigant who avails himself of the right to press inconsistent cases before the Court and endeavours to establish both the alternatives by contradictory oral testimony, plainly places himself in peril and may find himself entangled in inextricable difficulty, for evidence adduced in support of two absolutely inconsistent cases, which are mutually destructive, can hardly be expected to secure confidence.

Narendra Nath v. Abhay Charan (37) *and other cases referred to.*

An Appellant cannot be allowed to put forward a case which was not urged in the trial Court and which his opponent had no opportunity to controvert.

Although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and although the entire property must be included in the partition, yet if, by mistake, fraud or like reason, or by consent of these co-owners acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is no reason why the Court should not subsequently grant a division of the remainder at the instance of one or more of the co-owners. But it is to the interest of all the parties that all the joint properties should be ascertained and included in a suit for partition.

The Court can, while passing a preliminary decree, order discovery of further joint property, for the Court has ample authority to direct successive trials of different issues and even to record interlocutory judgments thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case. It is therefore open to the Court to make a supplemental preliminary decree in respect of such additional joint properties as the parties may be compelled to discover in pursuance of its order.

Annapurna v. Golapmani (51) *and other cases referred to.*

This was an appeal from a judgment of Babu Nalinikanta Basu, Subordinate Judge , 24-Pergunahs, dated the 16th February 1922.

The facts of the case are briefly as follows :—One Nabin died leaving a widow Bhubanmohini, and six sons. One of them died leaving two sons and another died leaving a widow Kumudbala. The sons of Nabin formed a joint Hindu family governed by the Dayabhaga law. Kumudbala instituted the present suit for partition of the joint family estate, joining her mother-in-law Bhubanmohini as the first Defendant. Some of the properties stood in the name of Bhubanmohini, which, she maintained, were purchased with her private funds and accordingly formed her exclusive *stridhan*. Kumudbala, on the other hand, claimed them as belonging to the family estate in the *benami* of Bhubanmohini. The Subordinate Judge held that the properties were not self-acquisitions of Bhubanmohini. He decreed the suit and made a preliminary decree awarding Kumudbala a share and giving directions *inter alia* for discovery of further joint property. Against this decree the present appeal to the High Court was preferred.

Babu Harendra Kumar Sarbadhikari for the Appellants.

Babu Surendra Nath Basu for the Plaintiff-Respondent.

Babu Pares Nath Mookerjee for the Defendants-Respondents.

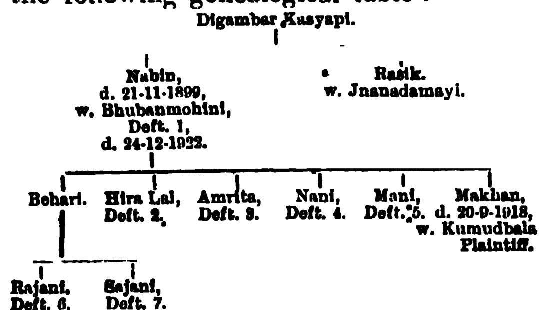
(37) I. L. R. 34 Cal. 51 : s. c. 11 C. W. N. 20; 4 C. L. J. 487 (F. B.) (1906).

(51) 35 C. L. J. 580 (1922)

BHUBANMOHINI DASI *v.* KUMUDBALA DASI.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the third, fourth and fifth Defendants in a suit for partition of joint family properties. The relationship of the parties may be gathered from the following genealogical table :—



The founder of the family, Digambar Kasyapi, left two sons, Nabin and Rasik. Nabin amassed a considerable fortune and died on the 21st November 1899. He left a widow Bhubanmohini and six sons. One of them, Behari, died leaving two sons, Rajani and Sajani. Another son, Makhan, died on the 20th September 1918, leaving a widow, Kumudbala, who had been married to him for thirty years. It is common ground that the sons of Nabin formed a joint Hindu family governed by the Dayabhaga law. On the 31st March 1919, Kumudbala, the widow of Makhan, instituted the present suit for partition of the joint family estate. Her mother-in-law Bhubanmohini was joined as the first Defendant; her surviving brothers-in-law were the next four Defendants; and the sons of her deceased brother-in-law were two other Defendants. The Subordinate Judge decreed the suit on the 16th February 1922 and made a preliminary decree, awarding the Plaintiff a share of specified properties and giving various incidental directions. The present appeal was lodged in this Court by three of the Defendants on the 7th June 1922. During the pendency of the appeal, the first Defendant Bhubanmohini died on the 24th December 1922. We have heard the appeal on the record and without a printed paper-book, because the parties found themselves in a position of considerable embarrassment, owing to the inability of the Receiver in charge of the estate to collect sufficient funds for the conduct of the litigation. The facts have been placed before us in detail by Mr. Sarbadhikari who has argued the case on behalf of the Appellants very fully and we have also looked into the record for ourselves.

The preliminary decree made by the Subordinate Judge has been assailed substantially on three grounds, namely, first, that the properties which stand in the name of Bhubanmohini should have been regarded as her self-acquisition and not as part of the family estate liable to be partitioned; secondly, that if the properties which stand in the name of Bhubanmohini are found to have been acquired, not from her own funds but with the money of her husband, they should have been regarded as given to her in absolute right; and, thirdly, that the Subordinate Judge should not have made an order on the Defendants for discovery of joint properties other than those included in the suit.

As regards the first point, reference has been made to eight conveyances, dated 26th January 1873 for Rs. 50, 1st May 1887 for Rs. 400, 5th November 1888 for Rs. 150, 15th September 1891 for Rs. 300, 9th November 1892 for Rs. 475, 27th July 1898 for Rs. 112, 14th August 1898 for Rs. 16 and 1st October 1898 for Rs. 200. The properties acquired under these documents are claimed by the Plaintiff as included in the family estate though they all stand in the name of Bhubanmohini. Bhubanmohini, on the other hand, main-

BHUBANMOHINI DASI *v.* KUMUDBALA DASI.

tained that the consideration in each instance was paid by her, and the properties formed her exclusive *stridhan*. In this, she was supported by three of her sons, the present Appellants. Another son, however, the second Defendant and the two grandsons, the sixth and seventh Defendants, disputed her allegation, and supported the Plaintiff. It may be observed in passing that originally one written statement was filed on behalf of all the Defendants jointly; but, later on, the second, sixth and seventh Defendants stated that they had no knowledge of the written statement and took up a position hostile to that maintained by the third, fourth and fifth Defendants. This dissension among the Defendants has undoubtedly tended to weaken their opposition to the claim put forward by the Plaintiff.

Before the evidence is examined, we may usefully recall that as pointed out by the Judicial Committee more than once, there is no presumption that a property standing in the name of a Hindu female, who is a member of a joint Hindu family, belongs to the joint family and is not her *stridhan* property; *Dewan Rai Bejay Bahadur Singh* v. *Indrapal* (1), *Dharanikant* v. *Krishtokumari* (2) reversing *Chaudhrani* v. *Tarini Kanth* (3), which had disapproved of *Bindu* v. *Peary* (4) and *Thakro* v. *Ganga Parsad* (5). The same principle will be found recognised and applied in *Narayana* v. *Krishna* (6), *Narasimma Ammal* v. *Srinivasaragava* (7), *Bai Mativahoo* v. *Purshottam Dayal* (8), *Durgaprasad* v. *Prankrishna* (9) and *Pratap Chandra* v. *Sarat Chandra* (10). The rule thus enunciated must be coupled with the elementary principle that the burden of proof lies upon the person who asserts that the apparent is not the real state of things. It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Seth Maniklal* v. *Raja Bijoy Singh* (11), the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord Westbury in *Sreeman Chunder* v. *Gopaul Chunder* (12) and by Sir Lawrence Jenkins in *Minakumari* v. *Bijay Singh* (13). But we are not unmindful that, in the words of Lord Hobhouse in *Uma Parshad* v. *Gandharp Singh* (14) and of Lord Shaw in *Muhammad Mahbub Ali Khan* v. *Bharat Indu* (15) as *benami* transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities, as Lord Buckmaster observed in *Irshad Ali* v. *Musstt. Kariman* (16). He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person, who claims

(1) L. R. 26 I. A. 226: s. c. I. L. R. 26 Cal. 871; 4 C. W. N. 1 (1899).
(2) L. R. 13 I. A. 70: s. c. I. L. R. 13 Cal. 181 (1886).
(3) I. L. R. 8 Cal. 545 (1882).
(4) 6 W. R. 312.
(5) L. R. 15 I. A. 29: s. c. I. L. R. 10 All. 197 (1887).
(6) I. L. R. 8 Mad. 214 (1884).
(7) I. L. R. 33 Mad. 112 (1909).
(8) I. L. R. 29 Bom. 306 (1904).
(9) 3 Pat. L. W. 341.
(10) 33 C. L. J. 201 (1920).
(11) 25 C. W. N. 409 (P. C.) (1920).
(12) 11 M. I. A. 29 (48); 7 W. R. P. C. 10 (1866).
(13) L. R. 44 I. A. 72: s. c. I. L. R. 44 Cal. 662; 21 C. W. N. 585; 25 C. L. J. 508 (1916).
(14) L. R. 14 I. A. 127: s. c. I. L. R. 15 Cal. 20 (1887).
(15) 23 C. W. N. 321 (P. C.) (1918).
(16) 22 C. W. N. 530 (P. C.) (1917).

BHUBANMOHINI DASI *v.* KUMUDBALA DASI.

contrary to the tenor of a deed and alleges that the apparent is not the real state of things: *Azimut Ali* v. *Hurdwaree Mull* (17), *Faez Buksh* v. *Fukeerooden* (18), *Suleiman Kader* v. *Mehdi Asfur Bahu* (19), *Nirmal* v. *Mahomed Siddiq* (20) and *Moti Lal* v. *Kundan Lal* (21). The most important test to be applied in these cases is, as observed by Mr. Ameer Ali in *Nrityamoni* v. *Lakhan Chandra* (22), the source whence the consideration came. Sir George Farwell formulated the same test in different language, when he observed in *Bilas Koer* v. *Deoraj Ranjit Singh* (23), that where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase money. To the same effect is the decision of the Judicial Committee in *Parbati* v. *Baikuntha* (24), which recalls the earlier pronouncements by Lord Campbell in *Dhurum Das* v. *Shama Soondari* (25) and by Knight Bruce, L. J., in *Gopeekristo* v. *Gungapersad* (26). Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when he observed in *Dalip* v. *Chaudhrian Nawul Kunwar* (27), that if the evidence on neither side is wholly convincing as to the fundamental criterion, namely, the source of the purchase money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property; see *Upendra Nath* v. *Purendra Nath* (28). We must further look to the substance of the transaction as evidenced in the deeds of the parties, not permitting the real question to be obscured by what Knight Bruce, L. J., calls in *Hanooman Pershad* v. *Baboee Munraj* (29), the form of expression, the literal sense, nor by what Lord Macnaghten describes in *Lal Achal Ram* v. *Raja Kazim Hossein* (30), as exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument; *Promode Kumar Ray* v. *Madan Mohan Saha* (31), *Lalit Mohan* v. *Monoranjan* (32) and *Jasoda Lal* v. *Balaram* (33). The same view was recently emphasised by Lord Atkinson in *Arab Ali* v. *Mahmud Ali* (34) and by Lord Phillimore in *Rai Radha-*

(17) 13 M. I. A. 395; 5 B L R 578; 14 W. R. P. C. 14 (1870).
(18) 14 M. I. A. 234; 9 B. L. R. 456 (1871).
(19) L. R. 25 I. A. 15: s. c. I. L. R 25 Cal. 473; 2 C. W. N. 186 (1897).
(20) L. R. 25 I. A. 225: s. c. I. L R 26 Cal. 11 (1898).
(21) 21 C. W. N. 929: s. c. 25 C. L. J 581 (P. C.) (1917).
(22) I. L. R. 43 Cal. 660: s. c. 20 C. W. N. 522; 24 C. L. J. 1 (1916).
(23) L. R. 42 I. A. 202: s. c. I. L. R. 37 All. 557; 19 C. W. N. 1207, 22 C. L. J. 516 (1915).
(24) 18 C. W. N. 428: s. c. 19 C. L. J. 129 (P. C.) (1913).
(25) 3 M. I. A. 229: 6 W. R. P. C. 43 (1843).
(26) 6 M. I. A. 53 (1854).
(27) L. R. 35 I. A. 104: s. c. I. L. R. 30 All. 258; 12 C. W. N. 609 (1908).
(28) 21 C. W. N. 280 (1915).
(29) 6 M. I. A. 393; 18 W. R. 81n (1856).
(30) L. R. 32 I. A. 113: s. c. I. L. R. 27 All. 271; 9 C. W. N. 477 (1905).
(31) 36 C. L. J. 396, 400 (1922).
(32) 36 C. L. J. 208, 211 (1922).
(33) 35 C. L. J. 589, 591 (1922).
(34) 35 C. L. J. 554 (P. C.) (1922).

BHUBANMOHINI DASI *v.* KUMUDBALA DASI.

krishna v. *Bisheswar Sahay* (35). In the case before us, it was asserted by Bhubanmohini that she had her own private funds which enabled her to purchase the disputed and other properties. She alleged that she had received Rs. 100 from her father and Rs. 500 from her maternal grand-mother and that she used to carry on a money-lending business. She was eighty years old when her deposition was taken in 1921. She could give no indication as to the time or occasion of the alleged gifts; nor were any accounts produced of the alleged money-lending business. No independent witness was brought forward to corroborate her story. On the other hand, witnesses for the Plaintiff asserted that neither the paternal nor the maternal relations of Bhubanmohini were well-to-do people who were likely to have made gifts of money to her; this much is plain that those families and their properties, if any, have completely disappeared. As against this, we have the undisputed fact that Nabin, the husband of Bhubanmohini, prospered in life and acquired considerable sums of money; and there is no question that during the period of acquisition of the disputed properties in the name of Bhubanmohini, the requisite funds could have been provided by her husband. On this state of the evidence, the Subordinate Judge declined to believe the story that Bhubanmohini possessed any *stridhan* obtained from her paternal and maternal relations and provided the requisite sum from such separate fund. The Subordinate Judge has also pointed out that on the 8th March 1910 and 2nd May 1917, the third Defendant, Amrita, who now supports the story of his mother, executed mortgages of the disputed properties on the allegation that they belonged to his father. This Defendant, at any rate, has not treated the property as the *stridhan* of his mother; although it is not clear that she was aware of these transactions. We may add that upon the question of possession, the evidence is ambiguous. The properties were managed by Nabin, and, after his death, by his sons. This, however, would not necessarily militate against the theory that they belonged to Bhubanmohini; for in the case of a *pardanashin* lady her estate might, in the normal course of events, be looked after by her husband or her sons. But it is important to bear in mind that there is no reliable evidence to show that the income was actually enjoyed by Bhubanmohini. On the whole, we are of opinion that the evidence as to the source of the consideration money and the treatment and possession of the disputed properties amply justifies the conclusion of the Subordinate Judge that they were not self-acquisitions of Bhubanmohini. In this connection, we may recall the observations of Lord Buckmaster in *Nabakisor Mandal* v. *Upendrakissor Mandal* (36): "In appeals, the burden of showing that the judgment appealed from is wrong lies upon the Appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment of either the one side or the other being right, he has not succeeded." It is not necessary to invoke this doctrine against the Appellant, because, for reasons that have already been stated, the case set up by them fails; nevertheless, the fact that the trial Judge has disbelieved the story narrated by the first Defendant, is a factor which cannot altogether be ignored. The first point urged by the Appellants must consequently fail.

(35) L. R. 49 I. A. 312; s. c. 27 C. W. N. 294 37 C. L. J. 430 (1922).

(36) 26 C. W N. 822: s. c. 35 C. L. J. 116 P.C. (1921.)

BHUBANMOHINI DASI v. KUMUDBALA DASI.

As regards the second point, the Plaintiff-Respondent has urged that the theory of advancement was not put forward in the trial Court and should not be entertained here. It cannot be seriously disputed that the alternative position taken up by the Appellants contradicts the case attempted to be established by evidence before the Subordinate Judge. The contesting Defendants have hitherto maintained that the disputed properties were purchased by the lady with her own money. They now turn round and contend that the properties were acquired by her husband with his own money but in her name, because he intended to make an absolute gift of them in her favour. It may be conceded that the Code of Civil Procedure does not prohibit inconsistent pleadings, and that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. A Plaintiff may rely upon several different rights alternatively, although they may be inconsistent; so, a Defendant may raise, by his statement of defence, without leave, as many distinct and separate, and, therefore, inconsistent, defences as he may think proper. This is fully established by the decision of the Full Bench in *Narendra Nath* v. *Abhay Charan* (37), and illustrations of the application of this doctrine to inconsistent claims by the Plaintiff may be found in *Matilal* v. *Judhistir* (38) and *Official Assignee* v. *Bidyasundari* (39) and to conflicting defences by the Defendant may be gathered from *Purnendu* v. *Dwijendra* (40) and *Rang Behari* v. *Rachia Lal* (41). But, as was emphasised in some of these cases, the litigant who avails himself of the right to press inconsistent cases before the Court and endeavours to establish both the alternatives by contradictory oral testimony, plainly places himself in peril and may find himself entangled in inextricable difficulty; for evidence adduced in support of two absolutely inconsistent cases, which are mutually destructive, can hardly be expected to secure confidence. Apart from this, there is no valid answer to the objection of the Plaintiff-Respondent that she cannot now be called upon to meet a case which was not put forward in the trial Court. Whether the husband of the first Defendant intended to make a gift of the properties to her or took the conveyances in her name so as to make her only the ostensible owner, is largely a question of intention. The facts relevant for the determination of this question of intention have not been explored. We cannot overlook that there are numerous instances of cases in the reports where purchases in the name of female members have led to controversies—whether the acquisition was for the benefit of the lady or of the person who found the money; see *Ramnarain* v. *Muhammad Hadi* (42), *Muhammad Mahbub* v. *Bharat Indu* (15), *Basar Khan* v. *Leakat Hossain* (43) and *Nrityamoni* v. *Lakhan Chandra* (22). In this connection, it is important to bear in mind that, as emphasised by Sir George Farwell in *Bilas Koer* v. *Deoraj Ranjit Singh* (23),

(37) I. L. R. 34 Cal. 51: s. c. 11 C. W. N 20; 4 C. L. J. 437 (F B) (1906).
(38) 22 C. L. J. 254 (1915).
(39) 30 C. L. J. 428 (1919).
(40) 8 C. L. J. 289 (1907).
(15) 23 C. W. N. 321 (P. C.) (1918).
(22) I. L R 43 Cal 660: s. c. 20 C. W. N. 522; 24 C. L. J. 1 (1916).
(23) L. R. 42 I. A. 202: s. c. I. L. R. 37 All. 557; 19 C. W. N. 1207; 22 C. L. J. 516 (1915).
(41) 15 C. L. J. 439 (1911).
(42) L. R. 26 I. A. 38: s. c. I. L. R. 26 Cal. 227; 3 C. W. N. 118 (1898).
(43) 23 C. W. N. 841 (P. C.) (1919).

BHUBANMOHINI DASI v. KUMUDBALA DASI.

the doctrine of advancement in favour of wife or child does not apply in India [*Gopeekristo* v. *Gungapersad* (26)], but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. This was apparently overlooked in *Abdul Rahim* v. *Mirathayar* (44). But, the true position was clearly recapitulated by Lord Atkinson in *Kerwick* v. *Kerwick* (45), where he observed as follows :—

"It has been established by the decisions in the cases of *Gopeekristo Gosain* v. *Gungapersad Gosain* (26) and *Moulvi Sayyud Uthur Ali* v. *Bebee Ultaf Fatima* (46), that owing to the wide-spread and persistent practice which prevails amongst the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of it *benami* for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England."

(26) 6 M. I A 53 (1854).

(44) I Mad. L. W. 451.

(45) L. R. 47 I. A. 275, s. c. 32 C. L. J. 490 (1920).

(46) 13 M. I. A. 232 (1869).

We are consequently of opinion Appellants cannot possibly succeed on second point, which was not urged in the trial Court and which the Plaintiff hitherto had no opportunity to controvert.

As regards the third point, there can be no doubt that the Subordinate Judge has properly made an order for discovery. All the joint properties, which belong to the family, must be included in the suit. The contesting Defendants can gain no permanent advantage by the exclusion of any of the joint properties from this litigation. It is well-established that although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and although the entire property must be included in the partition, yet if, by mistake, fraud or like reason, or by consent of the co-owners acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is no reason why the Court should not subsequently grant a division of the remainder at the instance of one or more of the co-owners. The substance of the matter is that the effect of a decree in a partition suit leaves untouched the joint title and possession of the parties in the remainder; *Jogendra Nath Ray* v. *Baldeo Das* (47). Consequently, it is to the interest of all parties concerned that all the joint properties should be ascertained and included in this suit, and any controversy as to whether a particular property alleged to be joint really possesses that character or not, must be determined before the preliminary decree is made. As was pointed out in *Upendra Nath* v. *Umes Chunder* (48), *Satyakumar* v. *Satyakripal* (49) and *Tincouri* v. *Satyadayal*

(47) I. L. R. 35 Cal. 961 : s. c. 12 C. W. N. 127 (1907).

(48) 12 C. L. J. 25 (1910).

(49) 10 C. L. J. 503 (1909).

(50), all questions involving the title of the parties and their right to any relief within the issues, are judicial in character, and must be determined by the Court, such determination to be made ordinarily by the Court and incorporated in the interlocutory decree before any partition is made or directed. From this standpoint, the order for discovery made by the Subordinate Judge may be open to the criticism that it should have been made and carried out before the preliminary decree was passed. Such an objection, if taken, must be deemed unsubstantial; because, as explained in *Annapurna* v. *Golapmani* (51), the Court has ample authority to direct successive trials of different issues and even to record interlocutory judgments thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case. There is thus no reason why we should not confirm the preliminary decree as made by the Subordinate Judge, and leave it open to him to make a supplemental preliminary decree in respect of such additional joint properties as the Defendants may be compelled to discover on oath in pursuance of his order. The third point, like the first and the second, must consequently fail.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at fifteen gold mohurs.

The Receiver now in charge of the estate will continue (until otherwise directed by the Subordinate Judge) till the final decree for partition has been made.

The question of distribution of money in the hands of the Receiver will be dealt with by the Subordinate Judge.

J. N. R. *Appeal dismissed.*

(50) 6 C. L. J. 105 (1889).
(51) 35 C. L. J. 530 (1922).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2290 OF 1920.

MOOKERJEE, J.
CHOTZNER, J.
1922,
Heard, 10, July
Judgment, 11, July.

BAIDYANATH CHATTOPADHYA, Defendant, Appellant,
v.
SM. PANCHANANI DASI, Plaintiff, Respondent.

Award, effect of, on a subsequent sale by a party who had become disentitled by the award.

A and B made a reference to arbitration in respect of certain property on 9th September. On the 24th the arbitrator made his award whereby the property was declared to be the property of A. On the 29th B conveyed the property to a third party on the basis of an alleged agreement made eight days earlier. The decree in accordance with the award was not made till the 24th December:

Held—*That as between the parties and their privies an award is entitled to that respect which is due to the judgment of a Court of last resort and an award which is on the face of it regular is binding. The effect of the award was to vest the title to the property in A. From that date B's title to the property was extinguished. The consequence was that on the date when B purported to transfer his interest in the property he had no interest to convey and the transferee did not acquire any title to the property by the conveyance taken from B.*

MUHAMMED NAWAZ KHAN v. ALAM KHAN (1) *and* BHAJAHARI SAHA BANIKYA v. BEHARYLAL BASAK (2) *referred to and discussed.*

This was an appeal preferred on the 30th August 1920 from a decision of Babu

(1) L. R. 18 I. A. 73: s. c. I. L. R. 18 Cal. 414 (1891).
(2) I. L. R. 33 Cal. 881: s. c. 4 C. L. J. 162 (1906)

BAIDYANATH CHATTOPADHYA *v.* SM. PANCHANANI DASI.

Lal Behari Chatterjee, Subordinate Judge of Zillah Hoogly, dated the 16th July 1920, modifying that of M. Lutfar Rahman, Munsif, 3rd Court, Serampore, dated the 18th July 1919.

The facts are briefly these:—On the 9th September 1916 the first two Defendants made a reference to arbitration in respect of the property in suit. On the 24th September 1916, the arbitrator made his award declaring the property to be the property of the first Defendant alone. On the 29th September 1916, the second Defendant conveyed the property to the Plaintiff on the basis of an alleged agreement made eight days earlier. The first Defendant thereafter applied to the Court to make a decree in accordance with the award, and the decree was made on the 16th December 1916. The Plaintiff brought the present action for recovery of possession of the property on establishment of title by purchase. The trial Court held that the Plaintiff had acquired no valid title by the purchase and dismissed the suit as against the first Defendant but made a decree for Rs. 175 against the second Defendant who had obtained that sum from the Plaintiff as consideration for the conveyance. On appeal, the Subordinate Judge held that title to the property was vested in the first two Defendants and consequently Plaintiff had acquired a good title to a moiety of the property. Against this judgment the present second appeal was preferred to the High Court.

Dr. Jadunath Kanjilal for the Appellant.

Babus Satindra Nath Mukerjee and *Narendra Kumar Das* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the first Defendant in a suit for recovery of possession of land on establishment of title by purchase. The case for the Plaintiff is that the property belonged to the second Defendant who conveyed it to her on the 29th September 1916 pursuant to an agreement made eight days earlier. The case for the first Defendant is that the claim is unfounded inasmuch as he had become entitled to the property by virtue of an award made on the 24th September 1916 in an arbitration proceeding between himself and his brother, the second Defendant. The Court of first instance held that the Plaintiff had acquired no valid title by her purchase from the second Defendant and dismissed the suit as against the first Defendant. The Court, however, made a decree for Rs. 175 against the second Defendant who, it was found, had obtained that sum from the Plaintiff as consideration for the conveyance. Upon appeal, the Subordinate Judge has held that the title to the property was vested in the first two Defendants, and that the Plaintiff had consequently acquired a good title to one-half share of the property. On this basis a decree has been made in favour of the Plaintiffs for one-half share of the property and also for mesne profits.

On the present appeal, the first Defendant has contended that the conveyance executed by the second Defendant in favour of the Plaintiff could not transfer a good title to the property inasmuch as the vendor had no title thereto. We are of opinion that this contention is well-founded.

It appears that on the 9th September 1916, the first two Defendants made a reference to arbitration in respect of this property. On the 24th September 1916, the arbitrator made his award whereby this property was declared to be the property of the first Defendant alone. On the 29th September 1916, that is, after the

award had been made, the second Defendant conveyed the property to the Plaintiff on the basis of the alleged agreement made eight days earlier. The first Defendant thereafter applied to the Court to make a decree in accordance with the award. That proceeding was instituted only against the second Defendant who was a party to the arbitration proceedings. The consequence was that a decree was made on the 16th December 1916. On these facts, it has been urged that as this decree was made long after the conveyance, the title of the Plaintiff was not affected thereby. In our opinion this view is manifestly erroneous.

The effect of the award of the arbitrator was to vest the title to the property in the first Defendant. From that date, the second Defendant could not set up a claim to that property. The consequence was that on the date when the second Defendant purported to transfer his interest in the property to the Plaintiff he had no interest to convey. The effect of an award was considered by the Judicial Committee in the case of *Muhammed Nawaz Khan* v. *Alam Khan* (1). In that case A and B had referred certain matter in difference between them to X. X made his award in favour of A. A made an application under sec. 525 of the Code of 1882 to file the award and it was dismissed. B then brought a suit to recover the property which had formed the subject-matter of arbitration. A set up the award in answer to the claim. The Judicial Committee held that the award was valid and was binding upon B; and that although the application under sec. 525 was refused, that merely left the award to have its ordinary legal validity. It could not be successfully contended that an award was not valid because the party in whose favour it was had never applied to have it filed in Court. The refusal to file an award or an application made to do so would not have the effect that the award could never be relied upon in any suit relating to the subject-matter dealt with by it. The Judicial Committee then examined the grounds upon which the validity of the award was sought to be impeached and found them to be unsustainable, with the consequence that the Plaintiff, who had asked for recovery of the property in contravention of the title created by the award, failed. It was pointed out by this Court in the case of *Bhajahari Saha Banikya* v. *Beharylal Basak* (2) that this decision of the Judicial Committee clearly shows that if an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure. This conclusion is based upon the elementary principle that, as between the parties and their privies an award is entitled to that respect, which is due to the judgment of a Court of last resort. The award is in fact a final adjudication by a Court of the parties' own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is binding. The position consequently is that on the 24th September 1916 the title of the second Defendant, if any, to the property in suit was extinguished and under the award the property vested finally in the first Defendant. The result follows that the Plaintiff did not acquire any title to the property by her conveyance taken from the second Defendant. In the present suit, no grounds have been made out to establish the invalidity of the award. We hold accordingly that the

(1) L. R. 18 I. A. 73: s. c. I. L. R. 18 Cal. 414 (1891).

(2) I. L. R. 33 Cal. 881: s. c. 4 C. L. J. 162 (1906).

BAIDYANATH CHATTOPADHYA *v.* SM. PANCHANANI DASI.

Plaintiff has failed to make out her alleged title to the property.

The result is that this appeal is allowed, the decree of the Court of Appeal below set aside and that of the Court of the first instance restored with costs both here and in the lower Appellate Court.

J. N. R. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1650 OF 1921.

WALMSLEY, J.
SUHRAWARDY, J.
1923,
Heard, 10, May.
Judgment, 29, May.

SASHI BHUSAN HAZRA, Plaintiff, Appellant,
v.
KAZI ABDULLA and ors, Defendants, Respondents.

Revenue Sale Law (Act XI of 1859), sec. 54—Onus of proof, in claims by a purchaser at a revenue sale, on whom lies - Lakheraj or mal.

A purchaser at a sale under the provisions of Act XI of 1859, B. C., sued for khas *possession of a tank which he proved to be included within the ambit of his estate but the Defendants claimed* lakheraj *right to it:*

Held—*That the onus is upon the landlord to prove both that the tank was geographically situated within the ambit of his estate and that it had been assessed, and that unless he proves these the onus is not shifted to the Defendants.*

HURRYHAR MOOKHOPADHYA *v.* MADUB CHUNDER BABOO (2) *and* JAGDEO NARAIN *v.* BALDEO SINGH (1) *relied on.*

This was an appeal preferred on the 1st of August 1921 against the decree of Babu Atul Chandra Banerjee, Subordinate Judge of Zilla Burdwan, dated the 22nd of April 1921, affirming the decree of Babu Hem Chandra Mitra, Munsif, 1st Court at that place, dated the 5th of April 1919.

The facts are these :—Plaintiff bought the residuary share of an estate at a sale under the provisions of Act XI, B. C., of 1859. Being prevented by the Defendants from taking possession of a tank, the Plaintiff brought the present suit to obtain *khas* possession of the tank. The Defendants pleaded that the tank did not appertain to the estate of the Plaintiff and that they had *lakheraj* right to it. Both the lower Courts dismissed the suit on the ground that the Plaintiff failed to prove that the tank formed part of the *mal* assets of his estate. The Plaintiff thereupon preferred the present second appeal to the High Court.

Babus Mohendra Nath Roy and *Gopendradas Das* for the Appellant.

Dr. Dwarka Nath Mitter and *Babus Binoyendra Nath Ganguly* and *Panchanan Choudhury* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal is preferred by the Plaintiff who has been unsuccessful in both Courts.

On 26th June 1914, he bought the residuary share of Estate No. 1273 of the Burdwan Collectorate at a sale held under the provisions of Act XI (B. C.) of 1859. After his purchase he says that he obtained possession of all the land in the estate, but he was prevented by the Defendants from taking possession of a tank known as the Rowta tank, and it was to obtain *khas* possession of this tank that the suit was instituted.

The Defendants pleaded that the suit was barred by limitation, and that it was bad for defect of parties, and on the merits

(1) L. R. 49 I. A. 399 : s. c. 27 C. W. N. 925 (1922).
(2) 14 M. I. A. 152 (1871).

that the tank did not appertain to the estate bought by the Plaintiff, and that they had a *lakheraj* right to it.

It was conceded in the first Court that the plea of limitation could not be sustained. On other points the learned Munsif found that the whole of the western bank and part of the northern bank were not included within the estate bought by the Plaintiff, and that therefore the persons who own the western bank were not necessary parties. The remainder of the tank and the other banks he found to be included within the ambit of the Plaintiff's estate. Then he came to the main question of the case, the question on which part lay the burden of proof, and he held that it lay upon the Plaintiff, and that he had failed to discharge it. This was the question which was argued on appeal, and the learned Subordinate Judge gave the same answer.

It has been urged before us on behalf of the Plaintiff that the Courts below are wrong and that the onus of proof really lay upon the Defendants.

There is no dispute now about the provision of Act XI which defines the Plaintiff's rights: it is sec. 54, and according to that section "the purchaser shall acquire the share, subject to all encumbrances and shall not acquire any rights which were not possessed by the previous owner or owners."

The question as to whether the onus lies on the Appellant Plaintiff or on the Defendants has been argued before us with reference to two decisions by their Lordships of the Privy Council.

For the Plaintiff it is urged that the decision in the case of *Jagdeo Narain* v. *Baldeo Singh* (1) shows that the burden lies upon the Defendants and attention is drawn in particular to the sentences: "In the present case, the lands in dispute lie within the ambit of the estate, which admittedly belongs to the Plaintiffs and the *pro formâ* Defendants and for which they pay the revenue assessed on the Mouza. In these circumstances it lies upon those who claim to hold the land free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation either by contract or by some old grant recognised by Government." Thus detached from their context the sentences seem to support the Appellant. But when the judgment as a whole is studied, it is clear that the Plaintiffs were not relieved of their obligation, for the earlier part was devoted to an exhaustive examination of the proceedings taken in 1838 under Reg. II of 1819. Particular stress was laid on the fact that at that time no one claimed the *malikanadari* right claimed by the Defendants, although there was an "investigation into the titles of all persons occupying lands on the allegation that they were not liable to the payment of rent." Then in referring to the presumption arising from the record-of-rights, their Lordships said just before the sentences quoted: "Once the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or mehal, the onus is shifted." It seems clear therefore that mere proof of geographical situation was not regarded as enough: the landlord had also to show that the land had been assessed, and it was only after he had done so that the burden was passed to the Defendants.

In my opinion, this decision does not help the Plaintiff: on the contrary, it supports the Defendants, and it is not in conflict with the decision on which their learned vakil relies, namely, the case of *Hurryhar*

(1) L. R. 49 I. A. 399; s. c. 27 C. W. N. 925 (1922).

SASHI BHUSAN HAZRA *v.* KAZI ABDULLA.

Mookhopadhya v. *Madub Chunder Baboo* (2). That decision reviews the legislation on the subject of invalid *lakheraj* grants, and touches on points with which we are not here concerned; towards the close it deals with the question of what the Plaintiff has to prove, and it lays down that he must prove not merely that the land is within the ambit of his estate but also that it formed part of the *mal* assets at the time of the decennial settlement. Not till he has proved both these points does the onus shift to the shoulders of the Defendants.

It has not been urged that the Judge is wrong in his conclusions if he is right in laying the onus upon the Plaintiff.

The result is that the appeal fails, and it is dismissed with costs.

SUHRAWARDY, J.—I agree.

J. N. R. *Appeal dismissed.*

PRIVY COUNCIL

[APPEAL FROM PATNA.]

LORD SUMNER
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
1923,
Heard, 12, 14 and 15, June.
Judgment, 25, July.

SRINATH RAI and ors., Appellants,
v.
PRATAP UDAI NATH SAHI DEO, Respondent.

Putra-poutradik—*Service jagir in Chota Nagpur—Resumability on failure of direct male line of grantee—"Resumption," meaning of—Zemindar bound to make new settlement with the consent of Government.*

Held, on the evidence—*That Pargana Bundu in Chota Nagpur was a service tenure defeasible on failure of the male line of the grantee and "resumable" by the Zemindar, the Maharaja of Chota Nagpur.*

"Resumption" in this connection does not mean that on failure of the direct male line, it "escheats" to the Zemindar and becomes what is called his sir *or* khas *property; the* jagir *retains its character, but the Zemindar becomes entitled to make a new settlement with the knowledge and sanction of the authorities.*

(2) 14 M. I. A. 152 (1871).

This was an appeal against a judgment and decree of the High Court of Judicature at Patna, dated the 29th March 1920, which reversed a decree of the Subordinate Judge of Ranchi, dated the 11th September 1916 and made in Suit No. 205 of 1908.

The suit was instituted by the Appellants, who were auction-purchasers of a valuable estate known as Pargana Bundu, for a declaration that the estate was not subject to resumption by the Respondent, the Maharaja of Chota Nagpur, on failure of heirs male of the original grantee.

The question for determination in this appeal was whether Pargana Bundu is an independent estate held subject to the sole condition of the annual payment of a fixed rent, or whether it is a "*putra putradik*" *jagir* granted as such to a predecessor-in-title of the Appellants, and resumable by the Respondent, on failure of heirs male of the body of the original grantee.

On the 2nd of August 1895, Tikait Jagannath Roy, the then Rajah of Bundu, mortgaged his "ancestral Zemindari with all rights and appurtenances in Pargana Bundu . . . ." to the first Appellant Srinath Roy, who with his brothers Appellant No. 2 and the father of Appellants Nos. 3 and 4 were members of a Hindu joint family and are hereinafter referred to as "the Roys."

Tikait Jagannath Roy defaulted in payment of the mortgage money, a decree was obtained by the mortgagee and the estate was sold in execution and was

purchased by the Roys on the 15th September 1899.

Two years later the Roys paid to the Respondent the sum of Rs. 26,000 to redeem a prior *zurpeshgi* lease of the estate and they entered into possession in 1902.

In 1903-4 survey and settlement operations were commenced in Pargana Bundu and the nature of its tenure became a subject of inquiry. On the 14th September 1904 the Settlement Officer (Mr. Lister) decided that the tenure was resumed by the Maharaja of Chota Nagpur on the death of a former Raja of Bundu (Haridas Rai) and that a fresh tenure was created in favour of Basdeo Rai who was a predecessor-in-title of Tikait Jagannath Rai. In his opinion the new tenure so created was a *jagir* resumable by the Maharaja on default of legitimate heirs male in the male line from Basdeo and he directed entries to be made in the record-of-rights accordingly.

An application by the Appellant for a review of this decision was unsuccessful and the findings of the Settlement Officer were confirmed on appeal by the Board of Revenue.

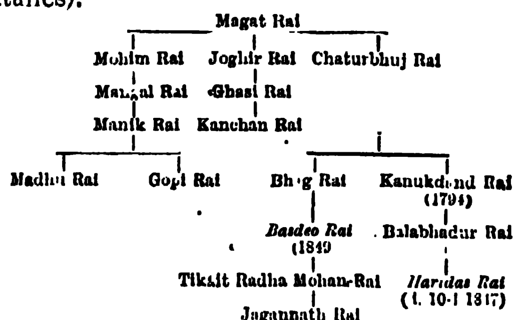
On the 20th July 1908 the Roys and the Appellant Ashutosh Dhur (who had purchased a half-share of their interest in 1905) instituted the present suit against the Maharaja of Chota Nagpur claiming the declarations above mentioned.

In their plaint they stated that Bundu with other neighbouring Parganas had originally been held by independent Rajas until conquered by the British and incorporated in Chota Nagpur by special treaty, that the revenue payable by these Rajas had been fixed by Major Crawford in 1793 and made payable through the Maharaja of Chota Nagpur, who had no rights over the Parganas other than to a contribution of revenue.

With regard to the alleged break in the succession and the new grant, they maintained that on the death of Raja Haridas Rai sonless, the succession devolved on Basdeo Rai as his uncle and nearest heir but that owing to his poverty the latter was unable to pay the customary "*Nazarana*" or fee on succession, to the Raj, and in lieu thereof he agreed to pay an enhanced rent and to accept a smaller estate but that the nature of the estate remained unaltered.

The Respondent by his written statement *inter alia* asserted that Bundu had from time immemorial formed a part of the Chota Nagpur Raj, that the Rajas or Tikaits of Bundu were *jagirdars* under it, their *jagir* being like all other *jagirs* in the estate resumable. That on the death of Haridas Rai without issue in 1848 the estate had been attached by the agent of the Governor-General and that the attachment had only been removed at the instigation of the then Maharaja of Chota Nagpur who filed a petition stating that he had made a grant to Basdeo Rai and that the said grant was a "*putra putradik*" tenure and resumable.

The pedigree of the family is set out below and from this it would appear that Basdeo Rai was the nearest male heir of Haridas Rai—(The names of these two persons are for convenience printed in italics).



SRINATH RAI *v.* PRATAP UDAI NATH SAHI DEO.

The suit was tried by the Subordinate Judge of Ranchi who decided in favour of the Plaintiffs but on appeal the High Court were of opinion that the judgment of the trial Court was of no assistance in deciding the main question of fact and on the 31st March 1915 they remanded the case under sec. 107 of the Civil Procedure Code for a complete re-trial on the issues of law as well as of fact.

The suit was thereupon re-heard by a different Subordinate Judge who framed the following issues :—

(1) Are the Plaintiffs entitled to a declaration that Pargana Bundu is not a resumable *jagir*?

(2) Whether Pargana Bundu was held as an independent estate by the ancestors of Tikait Jagannath Roy before the Permanent Settlement and was it incorporated in the Permanent Settlement with the Maharaja of Chota Nagpur as a "*Shikmi*" Taluk with its revenue payable through the Maharaja of Chota Nagpur?

(3) Whether the estate was created by a grant by the Maharaja of Chota Nagpur. If so, was the grant permanent or resumable on failure of heirs in the male line?

(4) Whether Plaintiffs' ancestors' predecessor Basdeo Rai was the heir to Raja Haridas Rai and holding as such and not under a fresh grant made to him in 1819. What was the nature of the tenure held by him?

(5) To what relief, if any, are the Plaintiffs entitled in this suit. Can they get the declarations prayed for from the Court in the exercise of its discretion?

The Subordinate Judge pointed out the difficulty, owing to lack of materials, of tracing the origin of Bundu but found that there could be no question that before the advent of the British the Rajas of Bundu were independent of the Maharaja of Chota Nagpur, that Pargana Bundu never formed part of the Chota Nagpur Raj estate and that the Raja of Bundu was never *jagirdar* under it. "There is," he said, "no evidence on the record to support the theory of grant by the ancestor of the Maharaja."

He next considered whether Bundu had lost its original character and become a resumable *jagir*. He found on the evidence that, subsequent to the conquest by the British, Major Farmer in 1793 compelled the rulers of Bundu to execute a *kabuliyat* in favour of the Maharaja but that "the Raja of Bundu did not lose his proprietary right merely by executing a *kabuliyat* and paying his quota of the Government revenue through the Raja of Chota Nagpur."

The actual *kabuliyat* was not produced by the Defendant and the Subordinate Judge, after considering the rest of the evidence adduced with regard to these tenures, was of opinion that, if produced, the *kabuliyat* would not have supported the Defendant's contention of a resumable grant and that it had been deliberately withheld.

In regard to the alleged resumption and re-grant of the Pargana in 1818 the Subordinate Judge stated :—"There is nothing in the record to warrant the conclusion that Pargana Bundu was ever resumed by Raja Jagarnath Sahi after the demise of Raja Haridas Rai of Bundu . . . . ." "I find that Raja Basdeo Rai inherited this property from Raja Haridas Rai as his nearest agnate and Bundu Raj's estate devolved on him by succession." In the event he decided that the Plaintiffs were the *maliks* of Pargana Bundu and rightful owners of the property, and he passed a decree in their favour and made the declarations prayed for.

It was the case of the Respondent that an actual re-grant was made to Basdeo

in 1849 and that the latter at that time executed another *kabuliyat* in favour of the then Maharaja of Chota Nagpur. This *kabuliyat* also was not produced at the trial and the Subordinate Judge held that the Defendant had failed to account for its non-production.

From the decree of the Subordinate Judge the Appellants appealed to the High Court of Patna and their appeal was heard by a Bench composed of the Chief Justice, Sir Dawson-Miller and Jwala Prosad, J. On the 29th March 1920 the judgment of the Court was delivered by the Chief Justice. He agreed with the Subordinate Judge that the origin of the estate was lost in obscurity, but he was of opinion that the onus was on the Plaintiffs to prove that since 1794 (the alleged date of the first *kabuliyat*) Bundu was a dependent Taluk paying revenue to Government through the Maharaja of Chota Nagpur and that that onus had not been discharged. He stated that: "In the documentary evidence produced in the case of a date antecedent to Basdeo's time (1847) there is little or nothing from which any definite conclusion can be arrived at as to the exact nature and incidents of the estate in dispute." But in his view the events subsequent to 1847 showed that a new grant was made to Basdeo of a service *jagir* resumable by the Maharaja. The learned Chief Justice thought that the inference of the Subordinate Judge that the *kabuliyat* of 1793-4 had been deliberately withheld by the Defendant was not legitimate; but although he refers in his judgment to the second *kabuliyat* of 1849 he makes no comment on its non-production by the Defendant. Jawala Prasad, J., agreed to the order proposed by the Chief Justice and the appeal was accordingly allowed and the decree of the lower Court set aside.

From this decree the Appellants (Plaintiffs) appealed to His Majesty in Council.

Sir Geo. Lowndes, K. C. and *Mr. G. Douglas McNair* for the Appellants.—Pargana Bundu was the absolute estate of Tikait Jagannath Roy the predecessor-in-title of the Appellant. From earliest times the records show Bundu as an independent Raj owing no fealty and it was out of the 5 Parganas excluded from the settlements with Chota Nagpur until 1794.

There is no evidence of rent paid by Bundu or of services rendered between 1773 and 1794, a period during which there was no Government compulsion.

The Respondent has failed to produce the *kabuliyats* of 1793 and 1849 which if his contention is correct would show that the tenure was "*putra putradik*."

The Respondent must show that the tenure was *putra putradik* either by grant or by custom. No grant has been produced and there is no secondary evidence of its terms.

The old Revenue Reports in each case show that the 5 Parganas, of which Bundu was one, were non-resumable.

[They referred to Hunter's Statistical Account of Bengal, Vol. XVI, p. 362 and foll. *Ram Narayan Singh* v. *Ram Saran Lal* (1) and *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh* (2).]

Messrs. A. M. Dunne, K. C. and *Ramsay* for the Respondent.—The Settlement Officer has decided that the tenure is "*putra putradik*" and has made an entry in the *khewat* accordingly, the onus is therefore on the Respondent to show that the entry is erroneous, Bengal Tenancy Act, sec. 103 (*b*) and to prove the affirmative title that he sets up.

(1) L. R. 46 I. A. 88: s. c. I. L. R. 46 Cal. 683; 23 C. W. N. 866 (1918).

(2) L. R. 22 I. A. 60, 64, 65: s. c. I. L. R. 22 Cal. 533 (1894).

SRINATH RAI v. PRATAP UDAI NATH SAHI DEO.

There is evidence that his rent has been raised and that negatives his claim to be a dependent Talukdar. Even if the origin of Bundu is veiled in obscurity the evidence is clear that it was in fact resumed in 1847-1849 and then re-granted on a *putra putradik* tenure.

Some of the settlement reports show that in modern times Bundu did form part of the Chota Nagpur Raj, even though originally independent.

Sir G. Lowndes, K. C. in reply.—The Raja of Bundu was a dependent Talukdar only as regards payment of revenue, not according to the definition in Reg. VIII of 1793.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The suit which has given rise to this appeal was brought by the Plaintiffs on the 28th July 1908, in the Court of the Subordinate Judge of Ranchi under the following circumstances. The Plaintiff Srinath Roy purchased on the 15th September 1899, in execution of a mortgage decree, Pargana Bundu, a property lying within the estate of Chota Nagpur. The second and third Plaintiffs are Srinath Roy's brothers and interested in the purchase whilst the fourth is an assignee of a share in the property in question. It appears that in 1895 the first three Plaintiffs advanced a large sum of money to one Tikait Jagannath Roy, since deceased, who was then in possession of the property, on a mortgage of the same. The document of mortgage bears date the 2nd of August 1895. In default of payment a suit was brought, and a decree obtained upon it in October 1898.

The sale proclamation was issued on the 20th of July 1899, and the sale held, as already stated, on the 15th of September 1899. The Plaintiff Srinath Roy obtained the sale certificate on the 20th of January 1900. He claims that Pargana Bundu was the absolute estate of his mortgagor and that he is entitled to it by virtue of his purchase.

The Defendant is the Zemindar of the Chota Nagpur estate, and his contention is that the property in question was a *jagir* tenure held by Jagannath defeasible on failure of the lineal male line of the grantee, and the Plaintiffs' mortgagor having died without leaving any male issue, he has resumed the same, as he was lawfully entitled to do.

In 1903 the Bengal Government directed, under Chap. X of the Bengal Tenancy Act, the preparation of a record-of-rights in respect of the Chota Nagpur estate. The Settlement Officer, Mr. Lister, in pursuance of the instructions of the Government, and in accordance with the provisions of the Tenancy Act, instituted a careful and minute enquiry relating to the tenures and other subordinate tenancies within the Chota Nagpur estate. Sec. 102, cl. X, requires the Settlement Officer to include among other particulars "the special conditions and incidents, if any, of the tenancy" regarding which the enquiry is being held. Mr. Lister, accordingly, made in the Register of tenancies, technically called the *Khewat*, the following entry against Pargana Bundu:—

"Col. 4.—Nature of rights—Jagir Khidmat (that is, service tenure resumable).

"Col. 5—Resumable or not—Kabil-zabti.

"Col. 11.—Remarks—'Yeh Jagir Tekait Basdeo Rai, hasil kiya is shart par ke Putra Putradik bhog kare.'

"The entry in the column of remarks is intended to mean that the tenure is Putra Putradik and derived from Basdeo Rai."

Basdeo was the grandfather of the mortgagor. It is to be noted that the words *Putra Putradik* denote descent in

the direct male line. The entry rendered into English runs thus:—"This *jagir* was obtained by Tekait Basdeo Rai on condition of enjoyment in the direct male line."

Sec. 103 (*b*) of the Tenancy Act provided that:—

"A certificate, signed by the Revenue Officer, stating that a record-of-rights has been finally published under this chapter, shall be conclusive evidence of such publication; and every entry in a record-of-rights so published shall be presumed to be correct until the contrary is proved."

The Plaintiff accordingly brought this suit in the Court of the Subordinate Judge of Ranchi to set aside the order of the Settlement Officer referred to above, and to obtain a declaration that Pargana Bundu was held as an independent estate by the ancestors of his mortgagor from a time previous to the Permanent Settlement made by the Government with the Maharaja of Chota Nagpur, that it was incorporated as a *Shikmi* or dependent Taluk in such settlement with the Maharaja merely for the payment of the revenue through him, that the subsequent grant made by the Maharaja to Basdeo Roy referred to in the Settlement Officer's entry was not consequent upon a resumption or fresh settlement but was a mere continuance of the old status. The Defendant, the Maharaja, pleaded that Pargana Bundu was never an independent estate; that it was a mere *jagir* or tenure resumable on failure of the direct male line, and that the last holder in the direct line having died in 1817 without leaving any male issue, he (the Maharaja) made a new grant to Basdeo Roy, by which Basdeo clearly acknowledged that the tenure was resumable on failure of the lineal male line of the grantee.

A number of issues were framed by the Subordinate Judge, all of which relate to the nature of the property in suit, *viz.*, whether it was a resumable *jagir*, or was an independent estate held by the ancestors of the Plaintiffs' mortgagor and was incorporated in the Zemindari of the Maharaja of Chota Nagpur as a *Shikmi* or dependent taluk, with its revenue payable through the Maharaja. The fourth issue related to the character of the grant made to Basdeo Roy. The judgment of the Subordinate Judge who first tried the case was reversed on appeal by the High Court and the case was remanded for a fresh trial. The Subordinate Judge before whom the case came for hearing the second time rests his judgment almost entirely on the non-production by the Defendant of the *kabuliyat*, which it was alleged was executed in 1791 by the holder of the *jagir* at the time. The Subordinate Judge held that Pargana Bundu was the absolute estate of the *jagirdar* when it was incorporated in the Maharaja's estate, and that since its incorporation its revenue only is payable to Government through the Zemindar. Had it been otherwise, says the learned Judge, the Maharaja would have produced the *kabuliyat* given to him by the *jagirdar*. He also accepted the contention of the Plaintiffs that the grant made by the Maharaja to Basdeo in 1819 was not a new settlement but only a continuance of the old *jagir*. He accordingly decreed the Plaintiffs' claim.

The following passage in the Subordinate Judge's judgment shows the trend of his mind in dealing with the case. He says:—

"Taking the broad facts of this case, it appears that the Bundu Raj Estate existed from time before the accession of the British Government. This estate was gained by conquest and the Raja was made to execute *kabuliyat* in favour of the Maharaja of Chota Nagpur agreeing to pay Government

Revenue through him. This estate is heritable as well as transferable. The Plaintiffs obtained this property by mortgage and afterwards at a sale purchased it in execution of the decree obtained on this bond. The origin of the Bundu Estate is unknown. The Defendant has not produced the *kabuliyat* executed by these Rajas in favour of his ancestors. Under these circumstances, it is not unreasonable to hold that the Bundu Raj Estate is a permanent tenure and is not resumable. The Maharaja has failed to prove that he ever had any right or title to this Pargana. I therefore find Issues Nos. 2, 3 and 4 in Plaintiffs' favour. I find that Bundu Raj Estate is not a resumable tenure.

And in the decree he declared as follows :--

"Pargana Bundu was held as an independent estate by the ancestors of Raja Haridas Roy prior to the Permanent Settlement, and that Raja Basudeo Roy succeeded Raja Haridas Roy as his nearest heir and agnate and that the status of Bundu Raj Estate was not affected by the Permanent Settlement."

The Defendant appealed to the High Court of Patna, which, on the 29th March 1920, reversing the decree of the Subordinate Judge, dismissed the Plaintiffs' suit. The learned Judges of the Appellate Court remarked, not without reason, that the trial Judge in his treatment of the case had placed on the Defendant the burden of showing that the entry in the record-of-rights was correct, whereas it lay on the Plaintiffs to show that it was erroneous. And after a close and detailed examination of the respective contentions and of the evidence they came to the conclusion that the Plaintiffs had failed to establish that the entry made by the Settlement Officer in the record-of-rights was wrong. They further held that the grant by the Zemindar in 1849 was not a continuation of the old tenure, which came to an end on the death of Haridas Roy in 1847 without leaving any male issue, and that the subsequent grant to Basdeo Roy was a new settlement and that the tenure was a resumable tenure. They accordingly, as already stated, allowed the appeal and dismissed the suit.

The present appeal to His Majesty in Council is by the Plaintiffs. The contentions on their behalf have proceeded on the same lines as those which found acceptance with the Subordinate Judge. It is contended in the first place that the *jagirdar* or Raja of Bundu was an independent chief; and that although on its conquest by the British, Bundu was incorporated with the Zemindary of Chota Nagpur and its revenue was made payable through the Zemindar, it never lost its character of an independent estate, and that it has always retained that character. Consequently, it is urged, the Maharaja of Chota Nagpur has no right to resume it and that the Plaintiffs are entitled to a decree by setting aside the revenue entry.

It is impossible to ascertain at this distance of time with any approach to precision the status of the chiefs of Bundu in relation to the Maharajas of Chota Nagpur before the establishment of British rule. The Chota Nagpur estate appears from the evidence on the record to extend over an area of several thousand square miles, situated in a tract of country more or less covered with jungle. It further appears from the evidence of Mr. Peppe, the Manager of the Chota Nagpur Estate, that within the ambit of this vast estate there lie some 1,000 *jagirs*. Beyond the statements contained in the Report of Mr. Webster, who was at one time in charge, on behalf of Government of the Chota Nagpur Estate, and in other reports made by other officers in the course of their official duties, there is no record of the earlier history of these

SRINATH RAI *v.* PRATAP UDAI NATH SAHI DEO.

jagirs, when or how they came into existence and in what relation they stood to the Maharajas. In 1765, with the grant of the Dewani by the Emperor of Delhi to the East India Company, Chota Nagpur, as a part of Behar, came into British hands. It appears that in 1771 or 1772 a temporary settlement of revenue was made by the East India Company with the Zemindar of Chota Nagpur. The last settlement with him was contemporaneous with the well-known Decennial Settlement in 1789, and this settlement, under the provisions of Bengal Reg. VIII of 1793, was made permanent. The Maharaja's Zemindary is now, accordingly, a permanently settled estate. About this time Chota Nagpur appears to have been in a very disturbed condition; whether the *jagirdars* were refractory subordinates of the Maharaja or rebellious independent chiefs, it is beyond dispute that the holder of Pargana Bundu, along with other pargana chiefs, was reduced to subjection by British forces and his *jagir* was incorporated with the Zemindary of Chota Nagpur, and he was made liable to pay his rent to the Chota Nagpur Zemindar. This is said to have happened in 1791, and this rent, which appears to have been slightly increased in later times, has been regularly paid to the Zemindar.

It is urged on behalf of the Plaintiffs that as the *jagirdar* of Pargana Bundu never paid revenue to the Maharaja before its incorporation in his Zemindary, his contribution towards the revenue cannot be treated as rent. And it has been strenuously contended before the Board that his status was that of an independent Talukdar under sec. 5 of the Bengal Reg. VIII of 1793. This contention seems to be based upon a clear misapprehension of the provisions of the Regulation. Sec. 5 describes the classes of Talukdars who were entitled, under its provisions, to obtain separation of their *jama* from the Zemindary *jama*. The Regulation defined the procedure for the purpose of obtaining the separation. All independent Talukdars occupying the position described in cls. 1 to 5, sec. 5, who had been heretofore paying their quota of the Government dues through the Zemindar, became entitled to obtain a separation of their *jama* by adopting the procedure laid down in the Regulation. There is not an iota of evidence to show that the *jagirdar* of Pargana Bundu ever took any step for the separation of his *jama*. Had he been paying revenue, making use only of the Zemindar's serishta for its transmission to the Government Treasury, or had he occupied the status which is claimed for him, there would have been an undoubted record of the fact in the Government Revenue Register.

The Plaintiffs in their plaint had claimed to be only "dependent Talukdars." The Regulation draws a wide distinction between "independent Talukdars" and "dependent Talukdars." The former come within the category of "actual proprietors of land," whereas the latter do not; "they are considered as lease-holders only" (sec. 7). It was evidently owing to the difficulty presented by sec. 7 that the contention advanced in the first Court has been abandoned before the Board, and the Plaintiffs have taken their stand on sec. 5.

It is contended that when Major Farmer brought the *jagirdar* of Bundu into subjection he made him execute a *kabuliyat* in favour of the Zemindar of Chota Nagpur, and it has been vehemently urged, both by the Subordinate Judge and learned Counsel on behalf of the Plaintiffs, that that *kabuliyat*, if produced, would disprove the Defendant's case, and that it has been deliberately withheld by the Maharaja because

SRINATH RAI v. PRATAP UDAI NATH SAHI DEO.

it would have supported the Plaintiffs' contention. There are two clear answers to this argument. In the first place, a *kabuliyat* predicates a patta. A patta is granted by the Zemindar as a title-deed to the tenant. The *kabuliyat*, as its name implies, is a mere acknowledgment, an engagement by the tenant to carry out the terms of the patta. If the *jagirdar* of Bundu entered into a *kabuliyat* it may be inferred with certainty that there was also a patta; and that patta, as the title-deed of the grantee, would be in the hands of the grantee's heirs and successors, and would, it may safely be presumed, come into the hands of the mortgagee, who derives his title from the mortgagor. On behalf of the Plaintiffs it has been urged that he was on bad terms with the mortgagor and could not consequently obtain the necessary documents from him. Considering the nature of the *jungle-mahal* and the uncertainty of title in those Districts, it is somewhat remarkable that the mortgagee should not have endeavoured to obtain from the mortgagor, who at the time of the mortgage was in possession of Bundu, documents of title relating thereto. Much criticism has been passed by the Subordinate Judge, which has to a certain extent been adopted by Plaintiffs' Counsel before the Board, on the non-production by the Zemindar of the *kabuliyat*. The explanation given by the Defendant for its non-production has been accepted by the High Court, and their Lordships do not find sufficient reason to take a different view. The Defendant's manager, Mr. Peppe, who has been in that office from 1900 to the date he gave his evidence in August 1916, states :—

"I searched for copy of Bundu Pottah. I could not find out any copy of Bundu Pottah. All the ancient records of the Maharaja are not in existence. These documents were kept in the custody of Gunpat Ray, who was Maharaja's Record-keeper. He was called upon to make over all these records to the Maharaja. He did not choose to do so. Thereupon he was convicted."

[It is in evidence that this Gunpat Ray was subsequently hanged for mutiny.] In cross-examination Mr. Peppe states as follows :—

"There is practically no paper in the record room prior to the time when the Court of Wards took over charge."

The Court of Wards were in charge of the Zemindary of Chota Nagpur from 1868 or 1869 to 1887. Apparently, it was then that an effort was made to overhaul the record room of the Maharaja and obtain copies of the pattas that had been given to the various *jagirdars*. The numerous documents that were forthcoming in the earlier proceedings lend support to the story that important papers were purloined or abstracted from the Zemindar's record room about the time of the mutiny.

In 1826 Mr. Cuthbert, who was appointed by the Government to make a report on the Chota Nagpur District, submitted a report on the 21st of April and 14th of June 1827, in which occurs the following passage on which considerable reliance has been placed on behalf of the Plaintiffs :—

In para. 20 he states :—

"Six subordinate Parganas are incorporated with Chota Nagpur, *viz.*, Tamar, Buroda, Raie, Boondoo, Silee and Burwa. How or when these Parganas became dependent on the Raja of Chota Nagpur I cannot ascertain, but it would appear that for a long time the dependence was little more than nominal. It was not until the country came into our possession that these Rajas were permanently and actually incorporated with Chota Nagpur."

And continuing, he adds in the same paragraph :—

"These Rajas may be considered in the

SRINATH RAI *v.* PRATAP UDAI NATH SAHI DEO.

light of Talukdars. The Rajas, however, still acknowledge the Rajas of Chota Nagpur as their feudal chief, and on the death of a Raja his successor waits on the Raja of Nagpur, pays homage and presents a considerable Nazar—generally 1,000 rupees—and receives the Tilluc (*sic*) from him."

What follows, however, is important :—

24. "Although from the nature of these feudal tenures Jageers were originally granted solely in consideration of military services, yet services of a civil and religious nature were afterwards similarly rewarded at the pleasure of the superior."

25 "The number of larger Jageers is 16, consisting of about 2538 villages *These Jageers have invariably descended from father to son, and both the custom of the Pargana and the practice of the courts hold them as hereditary in the direct male line. On a Jageerdar dying without male issue his Jageer generally reverts to the Raja, as females in this country do not succeed to real property.*"

The italics are their Lordships'.

Mr. Cuthbert's statement in this paragraph clearly goes to support the Defendant's contention that the Bundu Jagir was, like others, descendible in the direct male line resumable on failure of such line.

To this report Mr. Cuthbert attached a list of Parganas prepared in 1827. It is headed thus :—

"List of Parganas of Nagpur, being the Zemirdari of Maharaja Jagarnath Sahi Deo *on condition of rendering service.*"

And then comes :—

"Ghatwals Jagirdars on condition of rendering service"

One of the Jagirdars there mentioned is "Bundu—Raja Balamdar Rai."

Pargana Bundu thus remained in the hands of the lineal descendants of Kanukdand Rai, who was found to be in possession in 1791, until it devolved on Haridas Rai. He is stated to have died on the 10th January 1817. On his death his widows applied for possession of the jagir; at the same time two of his collaterals (Kanchan Lal and Basdeo Rai) advanced a claim in respect to the succession. At this time Jagannath Sahi Deo was the Maharaja and Zemindar of Chota Nagpur. Arrears of rent had fallen due in respect of Bundu, and he appears to have instituted proceedings in the Collectorate for recovery of his rent. In the course of these proceedings a *sazawal* or curator was appointed to take charge of the property. The order relating to the attachment of Pargana Bundu and the appointment of the Tahsildar as curator bears date of the 23rd of August 1847.

On the 26th July 1848, Kanchan Lal applied to the Civil Court presided over by the Agent of the Governor-General, complaining that the *sazawal* had ousted the Petitioner from some lands granted by a former jagirdar of Bundu for maintenance. The order of the Civil Court on this petition is important. It shows the exact nature of Pargana Bundu in relation to the Zemindar :—

"The Rajah of Pargana Bundu died without issue; and now a *sazawal* is appointed by Government in the said Pargana and it is not known what settlement the Maharaja of Palkot [Chota Nagpur] has made with respect to Pargana Bundu; because in accordance with the Sanad and Pottah of the said Maharaja, the Maharaja can make over the Pargana to any body who may be found entitled after the death of Rajah Haridas Ray, Zemindar of Bundu, and with respect thereto the Maharaja has power to resume the said Pargana if he finds no body entitled to Pargana Bundu, upon giving notice, and with the sanction of the Assistant Agent at Lohardaga. Thereafter any person who may think himself entitled is at liberty to institute a civil suit. Therefore it is ordered that a Parwana be issued to Maharaja Jagannath Sahi Deo, Zemindar of the Parganas of Chota Nagpur, containing the matters above-mentioned, with a request to forward a receipt of the Parwana to His Honour and a copy of this proceeding be forwarded for information to the Personal Assistant of District Lohardaga."

SRINATH RAI *v.* PRATAP UDAI NATH SAHI DEO.

Three years earlier, in a proceeding of the 26th of December 1845, the Agent to the Governor-General, acting as the Civil Court, had, in connection with Pargana Rahi, pointed out that the Maharaja "could resume the jagir by giving information to and receiving permission from the authorities in the event of the lessee dying without issue." The adoption of this procedure was re-affirmed on the 26th July 1848. The Zemindar was debarred from acting capriciously or arbitrarily; he could only exercise his right with the knowledge and sanction of the authorities. And Jagannath Sahi appears to have adhered to the procedure prescribed by the Government officers.

Out of the two claimants, who had come forward for the possession of Pargana Bundu, he selected Basdeo, and installed him as Raja or jagirdar. To mark Basdeo's installation the Maharaja affixed the *Tilak* on his forehead. This was the undisputed right of the over-lord.

On the 28th of February 1849, Basdeo reported to the District Officers the fact of his installation and of receiving the *Tilak*.

On the 29th of May 1849, the Maharaja filed by his mukhtars (agents) an application in the Court of the Extra Assistant Commissioner for the discharge of the *sazawal* and the issue of the usual *Parwana* (warrant) to Basdeo to take possession of the jagir.

This document, Ex. I, is headed thus:—Application for issue of *Parwana* to Raja Basudev Ray.

After stating that Raja Haridas Ray, "Elaqadar of the villages of Bundu," had died

"without leaving any male issue and leaving him surviving his widows,"

it proceeds thus:—

"Your Petitioner's client [meaning the Maharaja] wanted, in accordance with the custom and practice in his Zemindari, to resume direct possession of the villages of the deceased Raja. Then unexpectedly the Ranis of the deceased Raja reported to the Agent to the Governor-General and to the Commissioner and the former Assistant Agent of District Lohardaga and to your Petitioner's client that the senior Rani was pregnant, and prayed that in expectation of a child being born the property might be left in their possession. In accordance with their prayer, the settlement of the Pargana, possessed by the deceased Raja, was kept in abeyance in expectation of the birth of a child of the said Rani"

It then mentions the fact of attachment and the appointment of the *sazawal* and gives the substance of the *Parwana* to the Maharaja issued by the Agent to the Governor-General enquiring as to what settlement he had made

"in respect of the said pargana because in accordance with your Sanad and Patta if after the death of Raja Haridas Ray, Zemindar of Bundu, the title devolves on no one, you can resume direct possession thereof."

It then goes on to state that although Basdeo had no title,

"'in accordance with Patta and the usage of the Zemindari,' still your Petitioner's client being pleased with the service of the said Lal, with a view to promote cultivation and happiness of the people, on approving the application of the said Lal for the grant of Tilak of Raj of the entire Pargana Bundu, excluding four Mauzas, *viz.*, Kanchi. etc., retained by him for Khalsa Bhandar, granted the rest of the Mauzas of the said Pargana, fixing an annual rent of cash Rs. 1,000 exclusive of Abwabs, *subject to service*, and then gave him the Rajgi Tilak of the said Pargana, and after taking Kabuliat Ekrarnama for the maintenance of the Ranis which the said Raja has undertaken, and then a Patta of Jagir, *conditional upon service*, was granted to him by your Petitioner's client."

The Maharaja's application then continues:—

"as it is not now necessary for the

sazawal to remain in Pargana Bundu, because the said Raja will from 1906 Sambat, under the terms of the Kabuliat and Ekrarnama, render services, pay the fixed rent and maintain the Ranis, it is prayed that in accordance with the proceedings of the Agent to the Governor-General and of the Commissioner, dated the 26th July, 1848, an order may be passed for the removal of the *sazawal*; in view of the order of release, a Parwana may be issued to Basdeo Rai, directing him to proceed to the villages."

As already stated, the petition on behalf of the Maharaja was presented on the 29th of May 1849. On the 6th of June 1849, Basdeo's agent filed a similar petition stating that he (Basdeo) had obtained a settlement from the Maharaja and received from him the *Tilak* of installation. It then goes on to state that the Maharaja :—

"upon fixing a rent of Co.'s Rs. 1,000 per annum, granted to him a Nagbast Patta conferring upon him the title of Raja, on the 11th Phagun, 1905 Sambat, and granted to him Patta and Amalnama, which are forthcoming. At present Pargana Bundu, being attached on account of arrears of rent due, the Maharaja Saheb collections are made therefrom through the Government *sazawal*. Whereas the Maharaja Saheb's rent has been wholly and fully paid, and so a petition on the part of the Maharaja has been submitted to Your Honour praying for the discharge of the *sazawal* and for the release of Pargana Bundu, attached on account of rent, and stating that he had invested (my client) with the Rajgi Tilak."

He also prayed for the release of the Pargana from attachment.

The settlement with Basdeo shows that the rent was increased from Rs. 735 to Rs. 1,000, four villages were taken out of the Pargana and set apart for the maintenance of Haridas' widows and a new patta was granted to him by the Maharaja and a new *Parwana* was issued to him at the Zemindar's instance for possession of the jagir. In face of these facts it is idle to contend that the settlement with Basdeo was a continuance of the old tenure. Had Basdeo succeeded to the jagir by right of inheritance the maintenance of the Ranis, the widows, would have devolved exclusively on him, and the superior landlord would have had no concern with it or the right to take away any part of the property to provide for their maintenance. The Maharaja's interference on behalf of the widows is explainable only on one hypothesis, *viz.*, that he was making a new arrangement by virtue of a right recognised by the authorities. And the grant of the *Parwana* to Basdeo, together with the withdrawal of the attachment, signified their approval; nor was any exception taken to the increase of the *jama*.

One more remark on this part of the case seems necessary. In the grant to Basdeo the jagir is specifically mentioned as a "service tenure," involving the performance of police and other duties. They could hardly have been newly imposed, as they would at once have attracted the notice of the Governor-General's Agent when the pottah was produced before him and would have led to investigation and comment. It is abundantly clear, therefore, that the jagir, *minus* four villages, was settled with Basdeo in 1849 on an increased rental.

There seems to be some confusion as to the meaning of the word "resumption" in connection with these tenures. It does not mean that on failure of the direct male line it "escheats" to the Zemindar and becomes what is called his *sir* or *khas* property: the jagir retains its character, but the Zemindar becomes entitled to make a new settlement with the knowledge and sanction of the authorities.

In the record-of-rights proceedings the Settlement Officer scrupulously and care-

SRINATH RAI *v.* PRATAP UDAI NATH SAHI DEO.

fully analysed the evidence in the presence of the Plaintiffs, and came to the conclusion embodied in the entry impugned in this suit as erroneous. Under sec. 104 of the Bengal Tenancy Act the Plaintiffs appealed to the Board of Revenue against Mr. Lister's decision. The Board of Revenue, after a remand for the purpose of taking further evidence, in a remarkably well-balanced, judgment, held that the Plaintiffs had utterly failed to establish their contentions. In the present suit the High Court, on appeal from the Subordinate Judge, examined the evidence with great care and came to a conclusion adverse to them.

Their Lordships have given every attention to the arguments of Counsel for the Appellants; they find absolutely no ground for interfering with the decree of the High Court. They consider that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The Respondent will be entitled to the costs of this appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Indermaur & Brown* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2068 OF 1920.

CHATTERJEA, J.
CUMING, J.
1923,
Heard,
15, February.
Judgment,
16, February.

PITAMBAR GAIN,
Defendant, Appellant,
v.
RAM CHARAN MORAL
and ors., Plaintiffs,
Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 49, notice upon one of the tenants, when in a **so'enama *the agreement was for executing lease to two tenants—Lease, not executed—Part performance, doctrine of—Previous possession.***

a solenama *filed in a suit the landlord agreed to grant a lease to two persons already in possession, and the latter sued for specific performance of the contract, upon which a decree was passed ordering execution of the lease by the Court if the landlord did not do it within a specified time. The lease was executed in favour of one of the persons only but was not registered, nor did the proposed lessees take any steps and the execution case was struck off. The landlord then served a notice under sec. 49, Bengal Tenancy Act, upon one of the persons and brought a suit for ejectment:*

Held—*That if there is an agreement to lease and the intended lessee takes possession thereunder, though the requisite legal dosument has not been executed and registered the parties are in the same position as if the document had been executed provided specific performance can be enforced.*

WALSH *v.* LONSDALE (1) *and* SHYAMKISORE *v.* UMESH CHUNDER (2) *referred to.*

That where the tenant is in possession at the date of the parole agreement, and continues in possession after the agreement has been entered into but with unequivocal reference to the agreement such possession may be considered as part performance.

That in the present case a suit for specific performance of the contract having already been brought and a decree obtained, the matter did not thenceforth rest with the parties nor could any question of equities arise from the acts or conduct of the parties after the decree. The matter came into the hands of the

(1) 21 Ch. Div. 9 (1882).

(2) 24 C. W. N. 463: s. c. 31 C. L. J. 75 (1919).

PITAMBAR GAIN *v.* RAM CHARAN MORAL.

Court and if the Plaintiffs did not take proper steps for executing the decree, it cannot be said that there was a tenancy created in favour of both the persons. So there was a tenancy in favour of one of the persons in whose name the lease was executed, and such tenancy could be determined by the notice on him alone.

SHAFIKUL HUQ CHOWDHURY *v.* KRISHNA GOBINDA DUTT (3) *referred to.*

This was an appeal preferred on the 13th of August 1920 against the decree of Babu Tej Chandra Mitra, Subordinate Judge of Zillah Khulna, dated the 30th of June 1920, reversing the decree of Babu Nagendra Nath Bhattacharjya, Munsif, 2nd Court at that place, dated the 30th of April 1919.

The facts are sufficiently stated in the judgment.

Babu Rupendra Kumar Mitter for the Appellant.

Dr. Jadu Nath Kanjilal for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for ejectment of the Defendant who is the Appellant before us after service of notice to quit.

It appears that in 1901, the Plaintiffs' father brought a suit for ejectment against the Appellant Pitambar and his brother Digambar from the disputed land and obtained a decree for *khas* possession upon a *solenama*. In 1904, Pitambar and his brother Digambar instituted a suit against the Plaintiffs for specific performance of the contract, alleging that at the time of the *solenama* there was an agreement between the parties that the Plaintiffs would grant a lease of the lands to them. The suit was decreed and the Plaintiffs in the present case were given two months' time to execute a registered lease and make it over to the Defendants and it was directed that in default thereof, the lands would be measured on the Defendant's application for the purpose and that a patta on the terms mentioned in the judgment would be prepared and executed by the Court on the Defendant's depositing the necessary stamp and costs of registration. In execution of the decree, the land was measured and the rent also was fixed but the lease was not executed. It is stated that a patta was drawn up in favour of Pitambar alone but it was not registered. The Defendant or his brother did not take any further steps in the matter and the execution case was struck off.

The Plaintiffs served a notice under sec. 49 of the Bengal Tenancy Act upon Pitambar alone and then brought this suit for ejectment.

The defence *inter alia* was that there was a tenancy in favour of both Pitambar and Digambar, that the notice to quit having been served upon Pitambar alone was not sufficient in law to determine the tenancy and that the Plaintiffs' suit must therefore fail.

The Court of first instance dismissed the suit. On appeal that decree was reversed and the Defendant has appealed to this Court.

Now, Pitambar was the only tenant recognised by the Plaintiffs. Although no patta has been executed in his favour nor any rent received from him, he was treated as a tenant in the notice to quit that was served upon him. The notice to quit (if he was the sole tenant) was a good one and was properly served. That being so, and the interest of Pitambar being only that of an under-*raiyat*, the

(3) 28 C. W. N. 285 (1918).

PITAMBAR GAIN v. RAM CHARAN MORAL.

Plaintiffs are entitled to a decree for ejectment.

The ground, however, upon which the right of the Plaintiffs to eject is contested by the Defendant is that there was a tenancy created not only in favour of Pitambar but also in favour of his brother Digambar, and that tenancy could not be said to have been determined by a notice to quit served on Pitambar alone.

The Plaintiffs alleged that after the decree for specific performance had been passed, Digambar left the village and was residing in a different place and that in fact he abandoned the land.

The Court of first instance was of opinion that there was no abandonment.

The learned Subordinate Judge on appeal found "Digambar went to live elsewhere and consequently the Plaintiffs' predecessor could only execute a patta in favour of the Defendant. But the execution case having been dismissed in the meantime, the patta was not delivered to the Defendant."

The learned Subordinate Judge has not clearly found that there was an abandonment by Digambar, and it is accordingly contended on behalf of the Appellant that the fact that there was an agreement coupled with the fact that Pitambar and Digambar were in possession shows that there was a tenancy created and that on the principle of the case of *Walsh* v. *Lonsdale* (1), the Plaintiffs are precluded from saying that both the brothers were tenants. The principle is that, if there is an agreement to grant a lease and the intended lessee takes possession thereunder, though the requisite legal document has not been executed and registered, the parties are in the same position as if the document has been executed provided specific performance can be obtained between the parties to the agreement. The principle has been followed in a large number of cases in this country, which are noticed in the case of *Shyamkisore Dey* v. *Umesh Chunder Bhattacharyya* (2).

In the present case, there is no doubt that there was an agreement to grant a lease and that the Defendants were in possession from before the agreement. It is contended that the fact that they were allowed to continue in possession was sufficient to show that there was part performance: and there are some decided cases in which the principle was applied when the lessee was in possession from before the agreement.

It is pointed out in Redman's "Law of Landlord and Tenant," 7th Ed., p. 211, that ordinarily, when the tenant is in possession at the date of the parole agreement, merely continuing in possession does not of itself amount to part performance. But where the possession commences before the agreement but continues after the agreement has been entered into but with unequivocal reference to the agreement, such possession might be considered as part performance.

In the two cases, *viz.*, *Shafikul Huq Chowdhury* v. *Krishna Gobinda Dutt* (3) and *Shyamkisore Dey* v. *Umesh Chunder Bhattacharyya* (2), the party who relied upon the doctrine of part performance was allowed to continue in possession; and after he had been for several years in possession, the other party brought a suit for possession on the ground that there was no deed of transfer. Although at the time when the suit was brought, any suit for specific performance by the party in possession would have been barred, the

(1) 21 Ch. Div. 9 (1882).

(2) 24 C. W. N. 463; s. c. 31 C. L. J. 75 (1919).

(3) 23 C. W. N. 285 (1918).

PITAMBAR GAIN *v.* RAM CHARAN MORAL.

learned Judges held that having lulled the party into security or partial security who might otherwise have at any time claimed specific performance of the agreement, the Opposite Party should not be allowed to raise the question of limitation.

In other cases also, the question of limitation was got over on the ground that in cases where no definite period for specific performance of the contract had been fixed, the period of limitation would run from the date when the performance was refused and that therefore in such cases the suit would be in time even if instituted after a long period so long as the Defendants were in possession. We think, however, that these principles cannot apply to the facts of the present case.

Here, a suit for specific performance was instituted. It was decreed and in execution some of the matters were settled. The principle upon which the case of *Walsh* v. *Lonsdale* (1) and the cases which followed it were decided, is that the party in possession could have got specific performance of the contract if he had sued upon the agreement. As stated above an exception was made in cases where no definite period was fixed for performance of the agreement, or where the party had been lulled into security. But in the present case a suit for specific performance of the contract had already been brought and a decree obtained. The matter therefore did not thenceforth rest with the parties nor could any question of equities arise from the acts or conduct of the parties. After the decree, the matter came into the hands of the Court and if the Plaintiff did not take proper steps for executing the decree, he cannot rely upon the principle of the cases cited above. The execution of the decree was barred by limitation at

(1) 21 Ch. Div. 9 (1882).

the date of the present suit. That being so, it cannot be held that there was a tenancy created in favour of both Pitambar and Digambar: and if there was a tenancy in favour of Pitambar alone, such tenancy was determined by the notice to quit.

In these circumstances, the appeal must be dismissed with costs.

J. N. R. *Appeal dismissed.*

[CRIMINAL APPELLATE JURISDICTION.]

GOVT. APPS. NOS. 4 AND 5 OF 1922.

RICHARDSON, J.
SUHRAWARDY, J.
1923,
Heard, 9 and 10, August.
Judgment, 21, August.

SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL, Appellant,
v.
MANMATHA BHUSAN CHATTERJEE and ors., Respondents.

Indian Penal Code (Act XLV of 1860), sec. 420—Taking of wagons to a colliery siding for loading by the colliery, if amounts to delivery of property to the colliery to constitute cheating—Sec 415, cheating by causing damage, if involves fraud or dishonesty—"Cause damage," if presupposes wilful deceit on the part of the accused or that the damage should be direct result of the deceit—Unauthorised or dishonest allotment of excess wagons by a subordinate clerk, if causes or is likely to cause any appreciable damage to a Railway Company's reputation—Charge of conspiracy based on suspicion, propriety of.

Certain clerks of the E. I. Ry. by false manipulation of the ledgers and by making unauthorised entries in other documents, procured the supply to a particular colliery of more wagons than the colliery was entitled to under the letters of authorization issued by the Government Coal Transport Officer under the Defence of India Act and Regulations, and were convicted on charges under sec. 420, I. P. C. for cheating the East India Railway by fraudulently and dishonestly inducing the Company to deliver more wagons to the colliery sid-

ing for carriage of coal, and under sec. 417, I. P. C. for cheating the Company by intentionally inducing the Company to supply more wagons than the colliery was entitled to and thereby causing damage to the reputation of the Company:

Held—*That the taking of the wagons to the colliery siding in order that they might be loaded by the colliery with coal was not a delivery of property to the colliery within the definition of cheating, as the sidings belonged to the Railway Company and therefore the wagons never left the Railway land. Property is delivered when something in the ownership or possession of one man is delivered into the ownership or possession of another, and the amount of control exercised by the colliery in loading the wagons is of a very limited character.*

R. v. Kilham (2) *and* R. v. Chapman (3) *referred to.*

Held, further—*That regarding cheating committed by causing damage, the offence does not necessarily involve fraud or dishonesty. It does not appear to be necessary that the resulting damage or likelihood of damage should be within the actual contemplation of the accused when the deceit is practised, but the person deceived must have acted under the influence of the deceit, the facts must establish damage or likelihood of the damage complained of, and the damage must not be too remote. The word "cause" doubtless excludes damage occurring as a mere fortuitous sequence, unconnected with the act induced by the deceit, except as every event is connected with preceding events in an unending chain. The definition, however, is wide enough to include all damage resulting or likely to result as a natural consequence of the induced act.*

Ramanath v. King-Emperor (4), Milton v. Sherman (5), Baburam Rai v. Emperor (6), Mojey v. Queen-Empress (7), Kishori Lal Chatterji v. Emperor (8) *and* Mahadev v. Dhonraj (9) *referred to.*

But the allotment of the excess wagons to one colliery did not cause or was not likely to cause any appreciable damage to the Railway Company's 'reputation.' *The damage here complained of was too remote and was indirect and ulterior rather than direct, natural or probable consequence of the action which the Company was deceived into taking. In a case of the present description it was rather in the region of property than in that of mind and reputation that the natural and probable consequence should be looked for. In this case there was no more reason to say that the Company's reputation for impartiality suffered than to say that their reputation for efficiency of supervision suffered. In the case of a great Railway Company no reasonable person would suppose that the Company or the head officers or managers of the Company were parties to or connived at the special favour shown to one colliery. Error of this kind may occur in all business which is done on a large scale and a margin would be allowed for in judging of the conduct of the business.*

The charge of conspiracy in so far as it was based mainly on suspicion of bribery was unsustainable as bribery had to be proved, and the charge should not rest on suspicion only.

This was an appeal preferred against the order of P. E. Campniade, Esq., Sessions Judge of Zilla Burdwan, dated the 7th June 1922.

(2) L. R. 1 C. C. R. 261 (1870).
(3) 4 Cr. App. Rep. 276 (1910).
(4) 2 C. L. J. 524 (1905).
(5) 22 C. W. N. 1001 (1918).
(6) I. L. R. 32 Cal. 775 (1905).
(7) I. L. R. 17 Cal. 606 (1890).
(8) 9 C. W. N. 764 (1905).
(9) 12 C. W. N. 750 (1908).

SUPDT. & REMBR. OF LEGAL AFFAIRS, BENGAL *v.* MANMATHA BHUSAN CHATTERJEE.

The facts will fully appear from the judgment.

The Advocate-General (Mr. S. R. Das), Mr. Camel and *Babu Ambikapada Chowdhury* for the Crown.

Babus Dasarathi Sanyal and *Lalit Mohon Sanyal* for the Defendant No. 1 in App. No. 4 and Defendant No. 3 in App. No. 5.

Babu Manmathanath Mukherjee for the Defendant No. 2 in App. No. 4.

Babus Dasarathi Sanyal, Debendra Narayan Bhattacharjee, Lalit Mohon Sanyal and *Subodh Ch. Lahiri* for the Defendants Nos. 1, 2 and 4 in App. No. 5.

The JUDGMENT OF THE COURT was as follows:—

RICHARDSON, J.—The four accused were tried by the Magistrate of Asansol on two charges imputing criminal conspiracy to cheat the East Indian Railway Co. The charges were laid under sec. 420 read with sec. 120B and under sec. 417 read with sec. 120B of the Penal Code. That is to say, on the same evidence the accused were charged with conspiring to cheat the East Indian Railway Co. in each of the two ways defined in sec. 415. The Magistrate convicted the accused on both charges but passed sentence only under the charge which refers to sec. 420B. He sentenced all the accused to imprisonment till the rising of the Court. In addition he imposed on the accused Biseswar and Manmatha a fine of Rs 300 each and on Ramdin Lal and Hriday Narain a fine of Rs. 500 each.

On appeal to the Sessions Judge of Burdwan, the convictions and sentences were set aside and the accused were acquitted.

We have now to deal with an appeal by the Local Government from the Sessions Judge's judgment of acquittal.

The charges relate to the period between February and May 1920, during which the supply of Railway wagons for the transport of coal was strictly controlled and regulated by Government under the Defence of India Act and Regulations. The number of wagons to which a colliery was entitled for the supply of coal to a particular consignee was fixed by a Government Officer, known as the Coal Transport Officer (C. T. O.), and under the Regulations no colliery could obtain and the Railway could not supply to any colliery more wagons than the number so fixed. The distribution of wagons depended in the first instance on a division of the purposes for which coal was required into five classes in order of preference as follows:—

1. R. I. B., for the Royal Indian Marine.

2. Loco., for Railway purposes.

3. Super X, for essential industries.

4. X, for the more favoured mills and factories.

5. Public, for private consumption and the smaller industries.

The demands for wagons was dealt with on the principle that the needs of a superior class must be met in priority to those of any inferior class. While, therefore, Government control nominally extended only to the first four classes, it was not till the wagons required for those classes had been provided that the Railway could make any wagons available for the public class. In the present case we are mainly concerned with wagons required for the purposes denominated X.

In order to understand the charges, some account, as brief as possible, is necessary of the complicated machinery by which control was maintained.

A consumer, having contracted with a colliery for the purchase of coal, had to apply to the C. T. O. for the requisite number of wagons, stating the purpose for

which the coal was required and the name of the colliery. The C. T. O. might refuse the application or sanction the supply of such number of wagons as he thought fit. The number might be fixed once for all, say six wagons, or it might be so many wagons periodically, as one daily or 4 weekly. If wagons were sanctioned, a copy of the sanction was sent to the Coal Manager of the East Indian Railway in Calcutta and a copy also to the Manager of the colliery and to the consumer. The Coal Manager then intimated the sanction to the District Traffic Superintendent (D. T. S.) at Asansol by a letter, called the letter of authorization, of which again a copy was forwarded to the colliery.

In the office of the D. T. S., there were clerks called "checkers" who dealt with different areas or sections served by the Railway. On the receipt of a letter of authorization it was the duty of the checker concerned to enter such details as the following in a "special ledger," the date of the entry, the class (*e.g.*, X), the number of wagons sanctioned, the name of the colliery, and the date and number of the letter of authorization.

On the strength of their copy of the letter of authorization the colliery became entitled to indent on the D. T. S. for the number of wagons sanctioned. On receipt of the indent it was the checker's duty to compare it with the entries in the "special ledger." If he found the indent in order he made a note upon it himself showing how many wagons the indentor was entitled to.

It was the daily duty of the D. T. S. to distribute the available wagons between the different classes. This he did by an order fixing the percentage of the demand for an inferior class which could be complied with. If he allowed, say 50 per cent. of the demand for X class, each indentor for wagons for that class would receive half his sanctioned number, of course, omitting fractions.

Thus, when the indent from the colliery which we are trying to follow, passed from the checker to another clerk called the "poster," it was the latter's duty—a purely mechanical one—to enter in a form called the Indent Allotment Sheet the number of wagons to be allotted in full or partial compliance with the indent, as the case might be, according to the percentage order of the D. T. S. This sheet might of course show the allotments made to more than one colliery.

From the Allotment Sheet other documents were prepared—

(1) the Pilot Guard's Memo. by one clerk,

(2) the Wagon Chalan for each colliery by another clerk, and

(3) the Special Supply Statement by a third clerk.

The Pilot Guard's Memo. and the Wagon Chalans were both made over to the Pilot Guard. The Wagon Chalans which showed the number of wagons allotted and the class were made over by the Pilot Guard to the named collieries when the wagons were taken to the colliery sidings. In the result, therefore, the Wagon Chalan corresponding to any particular indent became the authority which entitled the colliery to load the allotted wagons with coal.

The Special Supply Statement went first to the weigh bridge X clerk who entered upon it the identification numbers of the wagons to be supplied to each colliery. Having done so the statement went to the checker in the office of the D. T. S., who then entered in his Special Ledger the actual number of wagons supplied to each colliery in his section. It was the checker's duty to keep count of the balance,

if any, still due under the relative letter of authorization and so to check subsequent indents referring to that letter. The colliery, as I gather, might go on indenting till the full number authorized had been supplied.

The whole process of allotment would seem generally to have been carried out on the day the indents were received, the wagons being taken to the sidings on the following day.

Having outlined the course of business, I return to the accused. Manmatha and Biseswar were checkers in the office of the D. T. S. at Asansol. Manmatha was in charge of the down Asansol Pilot section and Biseswar of another section. Ram Din Lal was the Manager of the B. P. Singh Colliery within Manmatha's section. Hriday Narain was a broker or intermediary standing between the colliery and consumers.

So far there is no dispute but I now come to the controversial part of the case. At the trial evidence was led to show the part which each of the accused played in the alleged criminal conspiracy. On that evidence the Courts below came to substantially the same conclusions of fact. They differed as to the result. The learned Sessions Judge, overruling the learned Magistrate, held that the facts found did not disclose the offences charged. The accused make no admissions as to the facts and the appeal before us has so far been argued with reference only to the questions, mainly, questions of law, arising out of the difference of opinion between the two Courts. For the purposes of the present discussion, therefore, we assume, without deciding that the facts have been correctly found by those Courts.

To simplify matters, I will deal mainly with the cases of Manmatha and Ram Din Lal. As against Manmatha, it is found that in various ways, by manipulating his Special Ledger, or by making unauthorized entries in other documents, he procured the supply to the B. P. Singh Colliery of more wagons than the colliery was entitled to under three letters of authorization issued by the C. T. O. to three different consumers. Without entering into unnecessary details it is found that in one or more instances Manmatha

(1) altered the original entries in his ledger relating to a letter of authorization so as to increase the supply authorized by the C. T. O., *e.g.*, by substituting two wagons daily for two weekly, the number actually authorized,

(2) altered the original entries as in (1) and supported the alteration by adding a reference to a fictitious or non-existent letter of authorization, to which a false number and date were assigned,

(3) passed an indent for wagons in excess of the number actually authorized,

(4) interpolated in the Allotment Sheet, with which he had no business to meddle, an entry showing wagons allotted to the colliery which had not in fact been allotted,

(5) altered the class for which the supply of wagons was authorized by changing X into super X,

(6) omitted to post in his Special Ledger wagons actually allotted and supplied.

It is found that Ram Din Lal, the Manager of the colliery, must have been in league with Manmatha, or otherwise he would not have submitted indents for wagons in excess of the number specified in the letters of authorization of which in the ordinary course he had received copies.

As regards the checker Biseswar, it is found that in several instances he cooperated with Manmatha in procuring unauthorized wagons for the colliery. It is

also found that the broker Hriday Narain was a party to the conspiracy.

On these findings it is contended for the Crown that the accused, more especially Manmatha and Ram Din Lal, were rightly convicted by the Magistrate under both the charges.

The charges run as follows :—

(1) "That you . . . . conspired with each other and other persons unknown to cheat the East Indian Railway by deceiving the said Railway and by fraudulently and dishonestly inducing the same Company to deliver through the office of the D. T. S., Asansol to B. P. Singh Kalipahari Colliery for the carriage of coal or soft coke a larger number of wagons the property of the E. I. R. than the said colliery was entitled to receive and thereby committed an offence punishable under secs. 420/120B of the Indian Penal Code."

(2) "That you . . . . . conspired with each other and other persons unknown to cheat the E. I. R. Co. by deceiving the said Railway and so intentionally inducing the same Company to supply through the office of the D. T. S., Asansol to B. P. Singh Kalipahari Colliery for the carriage of coal and soft coke a larger number of wagons than the said colliery was entitled to receive and which the said Railway would not do (*sic*) if not so deceived and which would cause or was likely to cause damage or harm to the said Railway in its reputation and thereby committed an offence punishable under secs. 417/120B of the Indian Penal Code."

There is no doubt about the existence of a criminal conspiracy as defined in sec. 120A of the Code provided the overt acts committed by the two checkers amount to cheating. But before considering the definition of that offence in sec. 415, there are one or two preliminary observations to be made.

In the first place, I have no doubt that this prosecution was launched because the authorities of the East Indian Railway Co. strongly suspect that the checkers, Manmatha and Biseswar, were bribed by the colliery. If the facts have been correctly found, I sympathize largely both with this suspicion and with the desire that the parties concerned should be brought to book. Bribery and corruption and underhand practices of all kinds are constant enemies to civil progress. But it has still to be stated that bribery is not proved. It is conceded for the Crown that there is no tangible evidence of money passing from the colliery to the checkers and that so far the case rests on suspicion only. The observation, it is hardly necessary to add, does not excuse the accused if their proved acts constitute an offence under the Code.

Secondly, it is not suggested that the conduct of the accused caused any loss of money to the East Indian Railway Company. The colliery paid for the use of the wagons supplied to them at the usual rates. The Railway Company therefore was not defrauded. But a fraud was committed upon the Defence of India Act and Regulations and it was also argued for the Crown that the conduct of the checkers was dishonest in the sense that they intended to procure some wrongful gain or advantage for the B. P. Singh Colliery at the expense of other collieries. No point was made for the defence in this connection and for the purpose of the first charge, I will take it that on the facts found the checkers acted fraudulently or dishonestly or both fraudulently and dishonestly as those words are used in the Code.

Thirdly, as to the frame of the charges,

so far as they speak of the East Indian Railway being cheated, Mr. Sanyal for the defence took the exception that an inanimate object cannot be cheated or have reputation. But the charges also refer to the Company and, however loose the language may be, no one could have supposed that the expression "East Indian Railway" meant the lines of rail and not the Company. Further, we were told, and I will assume that there is evidence on the record, which, if accepted, shows that responsible officers of the Company in its Asansol Office were deceived and induced either to allot wagons to the B. P. Singh Colliery which would not otherwise have been allotted or to make out Wagon Chalans for the colliery which would not otherwise have been made out. If that be so, the evidence is sufficient to support the allegations in the charges that the Railway Company was by reason of deceit induced to act in a certain way. A corporation, such as a Railway Company, is an artificial person, and its acts are those of the agents who act for it and in its name. It would, however, have been more regular if the charges had been specific in this respect. [See *Billinghurst* v. *Blackburn* (1)].

I come now to the two forms of cheating defined in sec. 415. They are as follows :—

(1) "Whoever by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person . . . . . is said to cheat."

(2) "Whoever by deceiving any person . . . . intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he was not so deceived, and which act or omission causes, or is likely to cause, damage or harm to that person in body, mind, reputation or property, is said to cheat."

In the first of these forms cheating is punishable under sec. 420 which says: "Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person . . . . shall be punished with imprisonment, etc."

In the second form the offence is punishable under the more general sec. 417—"whoever cheats shall be punished with imprisonment, etc."

As to the charge which assigns cheating in the first form, the question principally discussed was whether the taking of the wagons to the colliery siding in order that they might be loaded by the colliery with coal was a delivery of property to the colliery within the meaning of the definition.

As to the colliery siding, there is no evidence that it belongs to the colliery; on the contrary the evidence is that several collieries may use the same siding. In that state of the record we must, I think, assume that the colliery sidings belong to the Railway Company and not to the collieries. It follows that the wagons never leave railway land.

Property, as it appears to me, is delivered when something in the ownership or possession of one man is delivered into the ownership or possession of another. Railway wagons are no doubt "property." They are the property of the Railway Company. In my opinion, however, they are not as property delivered to a colliery merely by being taken to the colliery siding. No doubt the colliery is entitled to load the wagons but the amount of control exercised for that purpose seems to be of a very limited character. It is said that collieries

(1) 27 C. W. N. 821 at p. 845 (1923).

sometimes exchange wagons but the evidence on this point is unsatisfactory and it is certainly not shown that the practice if it exists at all is authorised. On the materials available, I am unable to say that the wagons ever go out of the possession and control of the Railway Company.

Though some reference was made in the argument to *R.* v. *Kilham* (2), [cf. *R.* v. *Chapman* (3)] we have not considered whether the delivery of the Wagon Chalans to the colliery amounted to a delivery of property within the meaning of the section. The case against the accused has not been put or investigated in the Courts below on that basis. The charge says that wagons, the property of the Railway Company, were delivered to the colliery. In my opinion the charge so framed is not substantiated and the accused are entitled to an acquittal upon it.

There remains the charge of cheating in the second form. In that form the offence does not necessarily involve fraud or dishonesty. The words of the definition are undoubtedly wide and if pushed to the full limit of their meaning might embrace acts which the man in the street would hardly regard as criminal offences. That observation, however, raises a question of the appropriate punishment in the particular case rather than of construction.

Cl. 392 of Lord Macaulay's draft corresponds to the first part of sec. 415. The second part would appear to have been added at some later date after the Code had left his hands and the hands of the Indian Law Commissioners. The illustrations throw no light on what is meant by damage or harm in body, mind or reputation and so far as such damage is concerned the offence is not very appropriately placed in the chapter of the Code relating to offences against property. The essence of the offence would seem to lie in the possibility of damage or harm being caused in the said respects or in property. Generally speaking, a criminal offence consists of an act done by the accused with a specific criminal intent or state of mind, constituting the *mens rea.* Difficulties connected with the notion of causation, common enough in other branches of the law, such as tort, seldom arise. It is true that negligence is sometimes punishable as an offence because it causes or is likely to cause hurt or injury to another (cf. secs. 279 and 280 and 284-289 of the Code). But cheating in the second form has this additional peculiarity. The damage is to be caused by the person deceived to himself. Indirectly it may be, the damage is to result from the deceit, but immediately it is to result from the induced act of the person deceived. This no doubt explains why the word "injury," defined in sec. 44 of the Code as "any harm whatever illegally caused to any person in body, mind, reputation or property," was not employed in sec. 415.

It does not appear to be necessary that the resulting damage or likelihood of damage should have been within the actual contemplation of the accused when the deceit was practised. But authorities in this Court lay down—

(1) that the person deceived must have acted under the influence of the deceit, *Ramanath* v. *King-Emperor* (4) and *Milton* v. *Sherman* (5);

(2) that the facts must establish damage or likelihood of damage, *Baburam Rai* v. *Emperor* (6);

(2) L. R. 1 C. C. R. 261 (1870).
(3) 4 Cr. App. Rep. 276 (1910).
(4) 2 C. L. J. 524 (1905).
(5) 22 C. W. N. 1001 (1918).
(6) I. L. R. 32 Cal. 775 (1905).

and, (3) that the damage must not be too remote, *Mojey* v. *Queen-Empress* (7), *Kishori Lal Chatterji* v. *Emperor* (8) and *Mahadev* v. *Dhonraj* (9).

On the point of remoteness of damage, there seems no sound reason why a definition which presupposes wilful deceit on the part of the accused should be too narrowly interpreted. The word "cause" doubtless excludes damage occurring as a mere fortuitous sequence, unconnected with the act induced by the deceit, except as every event is connected with preceding events in an unending chain. On the other hand, the definition, as it stands, is wide enough to include all damage resulting or likely to result as a natural consequence of the induced act. In *Mojey's* case (7), however, the learned Judges said:—"We think that the damage or harm must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom." I take it that these expressions mean at their lowest that the damage must be the direct, natural or probable consequence of the induced act.

In the present case, there is no question on the facts found that the act of the Railway Company in allotting an excessive or disproportionate number of wagons to the B. P. Singh Colliery was induced by the deceit practised by the accused or some of them. The difficulty is as to the element of damage.

A corporation cannot well suffer damage in mind or body and the charge maintains that the Railway Company suffered damage not in property but in reputation. I will concede that an incorporated Company may have a reputation for the good conduct of the business or undertaking of the Company and that the Company's reputation may be quite distinct from that of any of its officers, however highly placed. Under the definition, however, it is clearly not sufficient to say that the mal-practices of the two checkers brought or tended to bring the administration of the Company into discredit. The question is whether the allotment of the excess wagons to one colliery caused or was likely to cause, within the meaning of the definition, damage to the Company in reputation. It was argued very plausibly for the Crown that under the Indian Railways Act, 1890, sec. 42 (2), "a Railway administration shall not make or give any undue or unreasonable preference to, or in favour of, any particular person," that the East Indian Railway Company sets great store on its reputation for impartiality and that this reputation was affected or endangered by the allotment of the wagons. I will not say positively that the Railway Company suffered no damage to its reputation but in view of the authorities I am disposed to conclude that this damage was too remote. It appears to me that the damage here complained of is indirect and ulterior rather than the direct, natural or probable consequence of the action which the Company was deceived into taking. The direct consequence of one colliery getting more than their fair share of wagons is that other collieries must suffer the disadvantage of getting less than their fair share. If it be said that a suit might have been brought against the Company for damages for undue preference, such a possibility under sec. 415 would come under the head of damage or likelihood of damage to property and not of damage to reputation. A charge alleging damage or

(7) I. L. R. 17 Cal. 606 (1890).
(8) 9 C. W. N. 764 (1905).
(9) 12 C. W. N 750 (1908).

likelihood of damage to property would, I think, have been easier to support than the charge framed. For in my opinion in a case of the present description it is rather in the region of property than in that of mind and reputation that the natural and probable consequences should be looked for.

There is another aspect of the matter which ought not to be neglected. We are dealing with a criminal charge and the evidence adduced and the circumstances disclosed should be sufficient to satisfy the Court or a Jury that the damage complained of was caused or was likely to be caused. In this case is there any more reason to say that the Company's reputation for impartiality suffered than to say that their reputation for efficiency of supervision suffered? We are dealing with a great Railway Company. Would any reasonable person suppose that the Company or the head officers or managers of the Company in Calcutta were parties to or connived at the special favour shown to the B. P. Singh Colliery? The general feeling would, I think, be that if a complaint were made to the Company, the Company would do its best to mend matters. The act of the Company would be attributed to mistake due to carelessness or pressure of business or, as the allegation here is, to the Company being misled by its subordinate staff. Error of this kind may occur in all business which is done on a large scale and a margin would be allowed for in judging of the conduct of the business.

Our attention was directed at any rate to some part of the evidence adduced bearing on the alleged injury to the Company's reputation. We were told that two articles appeared in the newspaper "Commerce" but they were not placed before us. We were shown an anonymous letter received in the Calcutta Office. The oral evidence consisting of the opinions of certain witnesses on the subject is of more than doubtful admissibility. Without some further examination of the materials on the record and further argument, I should hesitate to assert that the allotment of the excess wagons to the B. P. Singh Colliery caused or was likely to cause any appreciable damage to the Company's reputation.

On the whole I come to the conclusion that the Sessions Judge was right in acquitting the accused on both charges.

It was said in argument that it was difficult to make dishonest clerks account for their actions. If a state of things exists which imperils the due administration of the Railway Company, it would not, I think, be beyond the resources of the legislature to devise a remedy. [Cf. *Sage* v. *Eicholz* (10) and sec. 477A of the Penal Code.]

In the result I am of opinion that this appeal should be dismissed.

Appeal No. 4 is governed by similar consideration and must also be dismissed.

SUHRAWARDY, J.—I agree.

J. N. R. *Appeals dismissed.*

(10) L. R. [1919] 2 K. B. 171.

[FULL BENCH REFERENCE.]

MOOKERJEE, J.
RICHARDSON, J.
C. C. GHOSE, J.
CUMING, J.
PAGE, J.
1923,
Heard, 5, 6, 7, 10 & 11, September.
Judgment, 26, September.

THE KING-EMPEROR
v.
BARENDRA KUMAR GHOSE.

Judge's directions to jury—Accused charged under secs. 302 and 394, Indian Penal Code (Act XLV of 1860)—Sec. 34, "criminal act done by several persons," meaning of—Secs. 33, 35, 37, 38, 107, 108, 109, 120A, 114 and 149 considered—Judge's duty to put accused's case before jury, limitations of—Non-direction, when amounts to mis-direction—Calcutta High Court's Letters Patent, 1865, cl. 26, powers of Full Bench under—Duty of Advocate-General to consult prosecution and defence lawyers before granting certificate under cl. 26—Duty of defence counsel when he believes accused guilty—Propriety of consulting trial Judge—Shorthand notes of proceedings at Sessions trials, desirability of—Judge's statement as to what happened in Court, if may be questioned.

Accused was tried at the High Court, Criminal Sessions, Calcutta, by a Judge and a special jury on a charge of offences punishable under secs. 302 and 394 of the Indian Penal Code. He pleaded "guilty" to the charge under sec. 394 and not guilty to the charge under sec. 302. The jury brought a verdict of "guilty" of murder with the result that he was convicted and sentenced under sec. 302. The Advocate-General granted a certificate under cl. 26 of the Letters Patent. It was contended at the hearing of the reference under cl. 26 that the trial Judge had misdirected the jury on a point of law and had also misdirected them in so far as he had omitted to draw their attention to the defence of the accused save and except a mere reference to the statement made by him. The material portions of the Judge's charge were as follows:—

"Therefore in this case if these persons went to that place with a common intention to rob the Post Master, and if necessary, to kill him, and if death resulted, each of them is liable, whichever of the three fired the fatal shot.

"If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob, and if necessary, to kill, and if death resulted from their act, if that be so, you are bound to find a verdict of guilty.

"I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied on the other hand that the shot was fired by one of those persons in furtherance of this common intention, if that be so, then it is your duty to find a verdict of guilty:"

Held, *per* CURIUM—*That there was no misdirection and that the balance of authority and reason is against the limited interpretation placed on sec. 34 of the Indian Penal Code in* EMPEROR *v.* NIRMAL KANTA ROY (9).

Sec. 34 and related provisions of the Penal Code discussed.

EMPEROR *v.* PROFULLA KUMAR MAZUMDER (48) *distinguished.*

Held also—*After reviewing the evidence given by the prosecution witnesses as also the evidence elicited in their cross-examination and the suggestions made by Counsel for the accused in the course of such cross-examination, that the trial Judge had not failed to bring to the jury the case for the accused and that accord-*

(9) I. L. R. 44 Cal. 1072: s. c. 18 C. W. N. 728 (1914).
(48) I. L. R. 44 Cal. 1025; s. c. 21 C. W. N. 1016 (1917).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

ingly there was no non-direction amounting to misdirection.

According to the accepted interpretation of cl. 26 of the Letters Patent, the Court may consider the question of alteration of sentence passed by the trial Court only when the point of law reserved by the trial Court under cl. 25 of the Letters Patent or certified by the Advocate-General under cl. 26, has been decided in favour of the accused.

Per MOOKERJEE AND RICHARDSON, JJ.—*The certificate of the Advocate-General should be granted after he has heard representatives of the prisoner and of the Crown.*

Per MOOKERJEE, J.—*The accuracy of the material placed before the Advocate-General upon an application for a certificate should be verified by Counsel or other responsible persons.*

Propriety of Counsel for accused consulting the trial Judge as to whether he should advise client to plead guilty discussed by MOOKERJEE, J.

The desirability of having full and accurate shorthand notes of proceedings at Sessions Trials adverted to by MOOKERJEE and PAGE, JJ.

This is an application for review under cl. 26 of the Letters Patent.

The facts of the case and the arguments will appear from the judgment.

Messrs. B. C. Chatterjee, H. M. Bose, Arabindu Ray, S. C. Ray, A. C. Mookerjee and *N. R. Das Gupta* for the Accused.

Messrs. B. L. Mitter, S. Roy and *A. K. Bose* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an application for review of a criminal case on the certificate of the Advocate-General under cl. 26 of the Letters Patent. The Petitioner Barendra Kumar Ghose was tried on the 16th and 17th August at the fourth Criminal Sessions of this year by Mr. Justice Page and a Special Jury, on a charge of offences punishable under secs. 302 and 394 of the Indian Penal Code. He pleaded not guilty to the first count and guilty to the second count. The Jury returned a unanimous verdict of guilty of murder, with the result that the accused was convicted and sentenced to death under sec. 302. On the 22nd August an application was made on his behalf to the Advocate-General for a certificate under cl. 26 of the Letters Patent. On the 27th August, the Advocate-General heard Counsel for the prisoner in support of the application. On the 29th August, the Advocate-General granted a certificate in the following terms :

"Certificate of the Advocate-General of Bengal under cl. 26 of the Letters Patent of 1865.

1. Whereas the accused above-named was on the 16th August 1923, charged at the Criminal Sessions holden in this Hon'ble Court in its Criminal Jurisdiction before the Hon'ble Mr. Justice Page and a Special Jury on an indictment as follows :—

First—That he, the said Barendra Kumar Ghose together with certain of the other persons on or about the 3rd day of August in the year of our Lord 1923 in Calcutta aforesaid committed murder by causing the death of one Amrita Lal Roy and thereby he, the said Barendra Kumar Ghose, committed an offence punishable under sec. 302 of the Indian Penal Code.

Second—That the said Barendra Kumar Ghose together with certain other persons at or about the time and in the place aforesaid were jointly concerned in attempting to commit robbery on the said

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

Amrita Lal Roy and that at the time of committing such robbery voluntarily caused hurt to the said Amrita Lal Roy and thereby he, the said Barendra Kumar Ghose, committed an offence punishable under sec. 394 of the Indian Penal Code.

II. Whereas it has been represented to me that the accused pleaded "guilty" to the aforesaid charge under sec. 394, I. P. C., with the reservation that he did not cause hurt to the Postmaster and pleaded "not guilty" to the charge under sec. 302, I. P. C., and the trial was proceeded with thereafter in respect of the latter charge.

III. Whereas it has been represented to me that the case for the prosecution as opened by the learned Standing Counsel and as disclosed in the evidence of the prosecution was as follows:

That the accused and three other persons made their appearance at the Sankaritolla Post Office at about 3-30 P.M., on the 3rd of August 1923 armed with fire-arms, that three of them including the accused entered the Post Office through its south-eastern door while the fourth man remained outside, that of the three who came inside, the accused stood in the middle and the masked man on his left and the other man on his right, that they stood within less than two yards of the Post Master of whom all the three demanded money with the words "Post Master *Rupey deo*," that the Post Master asked "*kiser taka*," whereupon all the three levelled their weapons and fired at the Post Master's right palm and another struck him on the right side under the right arm-pit whereupon he fell down with a cry, that a clerk named Sham Dulal Das who was working in the same room at that time ran to the Post Master's aid whilst Hari Prasad Das, the Post Office Packer, ran after the three men who were immediately escaping along with the fourth man who was outside, that the chase was taken up by two other men named Sita Ram and Khapasram, employees of one Promotho Lal Sircar residing at 15, Mohendra Sircar's Lane opposite the Post Office, that as they got to the turning of Mohendra Sircar's Lane and Sankaritolla East Lane, the accused ran down the latter lane firing his pistol from time to time whilst the other three ran by Mohendra Sircar's Lane to Creek Row, that the accused was followed by the Packer and the two others whose number was swelled by other pursuers who all kept following him until he was arrested in front of St. James Square and brought back to the Post Office along with his pistol which the accused had thrown away near the said Square but had been picked up by a small boy who gave it to the Packer.

That the prosecution case further was the Post Master had expired within a short interval of being shot, that one bullet was found inside his body which on being extracted fitted into the empty cartridge case picked up inside the room of the Post Office which in its turn was found to be of the same bore as that of the automatic pistol carried by the accused, that the dent of the bullet was found on the wall of 15, Mohendra Sircar's Lane fronting the Post Office, that no other empty cartridge was found inside the same room, that no trace of the third bullet was available in or out of it, and lastly that two revolvers and three daggers were found at premises No. 181, Harrison Road, a Chemist Shop, where the accused was employed.

IV. Whereas it has been further represented to me that the case for the defence as disclosed in the evidence was as follows:—

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

(*a*) That the case for the defence was embodied in the statement made by the accused in Court which according to him was identical with the statement he had previously made to Inspector Bonbehari Mukherji; a copy of the accused's statement in Court is hereto annexed and marked "A."

(*b*) That the main points in the accused's version were as follows: —

(1) Three and not four persons went to the Post Office, that the accused went there with the assured feeling that no life would be taken by any one, that the accused stayed outside whilst the other two went in, and that only two shots were fired inside and not three.

(2) That the accused was so taken by surprise on account of the shooting of the Post Master that he was temporarily robbed of locomotion and self-control and remained back, whilst his two companions ran away, that he recovered himself later on hearing the cry "*chor chor,*" that he was running by himself, that he for the first time tried to fire his revolver in course of being pursued, that his pistol did not go off when he pulled the trigger, that he thereupon remembered his instructions to pull out a portion of the pistol and as he did so, a live cartridge fell out

(3) That the accused kept on firing in the air as he ran along and deliberately refrained from shooting the Packer and others who followed him at close quarter.

V. Whereas it has been further represented to me that the learned Judge charged the Jury and in such charge which was taken down in shorthand completely said as follows:—

"Therefore in this case if these three persons went to that place with a common intention to rob the Post Master and if necessary to kill him and if death resulted, each of them is liable whichever of the three fired the fatal shot."

"If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob and if necessary to kill and death resulted from their act, if that be so, you are bound to find a verdict of guilty,"

"I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied on the other hand that the shot was fired by one of those persons in furtherance of the common intention. if that be so then it is your duty to find a verdict of guilty."

VI. Whereas it has been further represented to me that the learned Judge omitted to draw the attention of the jury to the defence of the accused save and except a mere reference to the statement made by the accused.

VII. And whereas the facts hereinbefore set out have been certified to me by Counsel for the accused as appears from the Certificate hereunder written.

Now, I, Satish Ranjan Das, Advocate-General of Bengal, do under and by virtue of the powers entrusted to me by the Letters Patent for the High Court of Judicature at Fort William in Bengal bearing date the 28th September 1865 certify that in my judgment whether the alleged direction and the alleged omission to direct the Jury do not in law amount to a misdirection should be further considered by the said High Court.

Sd. S. R. Das."

"We the undersigned defended the above accused at his trial by the Hon'ble Mr. Justice Page at the last Criminal Sessions of the High Court on the 16th and 17th instants and were present at his trial throughout and we certify that the facts hereinbefore set out have been cor-

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

rectly stated to the best of our recollections and belief.

Sd. B. C. CHATTERJEE.
Sd. S. K. SEN.
Sd. N. R. DAS GUPTA.
Counsel for the accused."

Thereupon on that very date, Counsel for the prisoner applied to the Chief Justice to appoint a Bench to hear the application for review; and the present Bench was constituted by the Chief Justice under cl. 26 of the Letters Patent read with sec. 108 (2) of the Government of India Act, 1915.

When the case was taken up for disposal Mr. B. L. Mitter, Standing Counsel, informed the Court that the statements of facts as given in the certificate of the Advocate-General (which has been granted *ex parte*) were not all accurate, and he submitted that the certificate was in one respect at least incompetent and misconceived. In this connection, it may be observed that cl. 26 of the Letters Patent does not indicate the procedure to be followed by the Advocate-General when he is called upon to grant a certificate. But it is clear, on the language of cl. 26, that, as emphasised by Jenkins, C. J., in *Emperor* v. *Upendra Nath Das* (1) the Letters Patent requires that the certificate should reflect the judgment of the Advocate-General and is presumably granted in the interests of justice after a careful consideration of all available materials. If, that judgment is founded on incomplete materials or inaccurate allegations, its weight is obviously diminished in a corresponding degree. It was from this standpoint that Jenkins, C. J., in the case just mentioned, hesitated to accept the assertion of Counsel that no note of the evidence had been read by

Master's ... W. N. 653: s. c. 21 C. L. J. 377
Post Office F

or to the Advocate-General before he granted his certificate. In a case where the error ascribed to the Judge depends on the evidence adduced at the trial, it is plainly desirable that the notes of the evidence, as recorded by the Judge, should be laid before the Advocate-General when he is asked to grant the certificate. The requisite materials can always be obtained on application to the Judge. But not only should this be secured, there should also be no departure from what we gather has been the salutary practice, uniformly followed, up till now, in this class of cases.

We were assured by Mr. Mitter that on previous occasions the Advocate-General concerned made it a point to hear, not merely Counsel for the prisoner, but also Counsel for the Crown before he granted the certificate. This statement was made on the authority of Mr. William Jackson who has been an Advocate of this Court since 1866 and of Lord Sinha who became an Advocate of this Court in 1886 and successively held the offices of Standing Counsel and Advocate-General. In my opinion, there is no room for controversy that what is thus stated to have been the established practice is the proper course to follow. This does not imply that when the Advocate-General is asked to grant a certificate under cl. 26, he should be guided by the views of the Crown; but he should be aware, before he forms his judgment, that the version of what took place at the trial, as given on behalf of the accused, is disputed by the prosecution. I am further of opinion that the allegations embodied in the petition to the Advocate-General should be verified by Counsel present at the trial or by other responsible person. In the case before us, no certificate of any description was attached to the application made to the Ad-

vocate-General. The result was that the Advocate-General formed his judgment upon materials, the accuracy whereof was not certified. Counsel for the accused was heard by him, and a draft of a certificate was then prepared; this incorporated some only of the allegations contained in the unverified petition. A certificate was next appended by Counsel present at the trial, to the effect that the facts "hereinbefore" set out (that is, set out in the certificate of the Advocate-General) had been correctly stated to the best of their re-collection and belief. This obviously did not ensure that the judgment of the Advocate-General was formed solely on certified materials. That judgment might have been influenced by the unverified statements contained in the petition which were not reproduced in the certificate. That the danger is, by no means, imaginary, may be illustrated by reference to two of the paragraphs of the unverified petition presented to the Advocate-General in this case. In para. 3, it is stated that the accused pleaded guilty to the charge under sec. 394 with the reservation that he did not cause hurt to the Post Master. The Court minutes show on the other hand that the accused pleaded guilty to the charge under sec. 394, and no note of the alleged reservation can be traced. In para. 7, it is stated that the case for the defence as made in the statement under sec. 342 of the Criminal Procedure Code was identical with a statement previously made by him to Inspector Bonbehari Mukherji. There is no evidence on the record to establish the alleged identity of the two statements. It is needless to enquire whether these unverified assertions were made under a misapprehension. The fact remains that statements were made in the petition presented to the Advocate-General, which are either inaccurate or are not supported by evidence on the record; and it is distinctly unfortunate that both these statements are reproduced in the certificate granted by the Advocate-General, to which Counsel appended a certificate that the facts set out therein had been correctly stated to the best of their recollection and belief. In my view, the certificate of the Advocate-General, which reflects his judgment and is naturally entitled to respect, should be granted after he has heard representatives of the prisoner and of the Crown and has carefully considered all the available materials whose accuracy had been verified by Counsel or other responsible persons. If this course had been pursued in the present case before the certificate was granted, there would have been no occasion for an unseemly dispute as to the weight to be attached to the certificate.

But whatever may have been left undone which might and should have been done, the fact remains that the certificate has been granted, and the Court must consequently deal with the case under cl. 26 of the Letters Patent.

The facts material for the appreciation of the questions which have emerged for consideration, may now be conveniently narrated. On the 3rd August last, several persons— it is a matter for controversy whether their number was three or four— armed with fire arms entered the Sankaritola Post Office in this city at about 3-30 P.M. The case for the prosecution is that the gang consisted of four persons, and included the accused. Three of these persons—one of whom was the accused—entered the Post Office, through the south-eastern door, while the fourth remained outside. Of the three who went inside, the accused stood in the middle; he had a *khaddar* coat on and a

shirt beneath. The man on his left had a mask on his face, the man on the right had a shirt on with black stripes. Inside the room, there were three officers at three different tables, namely, the Post Master Amrita Lal Roy, the packer Haraprasad Das and the Money Order Clerk Shamdulal Das. The Post Master was facing west, the packer east and the Money Order Clerk north. The three men who entered the room said to the Post Master "*Rupia Deo.*" The Post Master stood up and said "what money." On this, all the three men fired. The Post Master was mortally wounded and death was practically instantaneous. The aggressors cleared out and were pursued. They at first proceeded for a short distance eastwards. Three of them then escaped by a lane towards the south. The accused took a turn towards the north and was chased by the packer. He had a pistol in hand which he fired no less than four times during his flight before he was arrested in St. James Square. He was brought back to the Post Office with his pistol which he had thrown down and was subsequently sent up for trial. On the same day, at 7 P.M., the Police, upon information received, conducted a search of premises No. 181, Harrison Road where the accused lived and worked as Manager of a dispensary. In an almirah, of which one key was kept by the prisoner, was discovered a bundle; this when opened, was found to contain two revolvers and three daggers. The case against the accused was heard in the first instance by the Chief Presidency Magistrate who committed him to the Sessions for trial on charges under secs. 302, 304, 393 read with 398, 394, 307 and 308 of the Indian Penal Code. The charge under sec. 398 was struck out by order of Court and the charges under secs. 307 and 308 were withdrawn with leave of Court; consequently the accused was tried on the charge under secs. 302 and 394. The trend of his defence may be gathered from the following statement made by him in Court under advice of his Counsel and in explanation of the evidence which had been adduced against him.

"On August 3, Friday, I was reclining on a couch and reading a book after having had my mid-day meal when a gentleman whom I knew to be a God-fearing man and a man of learning came in with a bundle in his hand. I asked him to take his seat on the couch. As soon as he took his seat he wanted me to keep the bundle in my almirah. I asked him why I should keep it in my almirah as it did not appertain to my private business. He said he wanted it kept in the almirah. Then I opened the almirah and he placed the bundle inside it. I locked the almirah and tucked the key into my waist cloth. He then said to me "You will have to go with me to a certain place." I said that my compounder and men had not come in and so I could not go. He said "come with me to my house, you will have to be away for only one hour, I have got to tell you something very important." Then one of the men belonging to the dispensary came after taking his meal. I told my man that I was going to this gentleman's house and wanted a man to stay in the dispensary. Then the gentleman took me to his house and I was made to wait in his drawing room. There I found two young men seated; I knew one of them but did not know the other. The gentleman then said to me "you will have to go with me to a certain place and commit dacoity." I was very much frightened. I said "what is the dacoity." He took me to a room next to

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

the drawing room away from the two boys. This room was a dark room with all the doors and windows shut. There he began to encourage me saying I would have nothing to do but only to accompany these two boys. He said "these two boys will do everything, you will go there as a mere show." I told him why should I commit dacoity, I am newly married, I am not in need of money. Instead of replying he looked at me in the face for some little time. I was sitting quiet when he called one of the boys into the room. He asked the boy to get the four pistols. The boy went out and in quarter of an hour came back with a bundle in his hand. He opened the bundle and produced four pistols and handed them to me. In a bag there were a number of cartridges. He began to put the cartridges into the revolvers. He then said to me "you go with these men, they will do everything, you will have to do nothing." Then I said "I am a newly married man, why I shall commit dacoity." I told him, "my brothers are in responsible employment under Government and they draw handsome pay and the money I earn is quite sufficient for my purpose, why shall I go and commit dacoity." Then I could not speak to him. The gentleman asked the second boy to take this bag (points out bag on Counsel's table) and asked him to place the money in it. The gentleman told the first boy, "you know everything, be very careful." He gave each of us a revolver. I asked the gentleman what I was to do with the revolver. He said, "you will simply have to stand with the revolver in your hand." I said that I would not be able to use the revolver and refused to be a party to any act of murder or dacoity. He assured me solemnly no murder would be committed and I was to stand there merely by way of show. I was then not in a position to argue. On the way I asked the boys if there would be any murder or assassination. When the gentleman gave me the revolver he pointed out how it was to be used; he then came to the pharmacy near the Sealdah corner. There we engaged a third class Thicca Gharry; the third man gave the driver a rupee saying you will have to go up to Sankaritola corner. When we came near Sankaritola corner the first boy put on a mask. When we came to the Sankaritola Post Office the two boys first got out and I followed. The two boys went inside the Post Office. I was standing in courtyard; after a minute or so I heard two sounds like *dum dum*. I got confused and began to perspire freely and could not see anything. Shortly after that sound I heard cries of *chor chor*. Not finding these men here, I began to run away. I was running very fast but my legs were trembling and could not carry me, for I was followed by a large number of men with great noise. I then drew out my revolver to make a sound; when I pulled the trigger the first time there was no sound. I then recollected, for the gentleman told me that a portion was to be pulled out first and then the trigger was to be pulled. As soon as I drew out a portion of the pistol a cartridge came out and fell on the ground, when I next attempted to fire a shot to the sky. After going some little distance I fired another shot. When I came to St. James Square I could not run further and sat down on the ground and threw away the pistol. I was then arrested by three or four men, taken back to the Post Office and handed over to the Police. I heard one witness depose in Court that I fired at him; I can swear before God that I did not intend to fire at

him. If I wanted to kill men I could have done so. I have never in my life assaulted any body or caused any blood-shed. This is my first offence, I will not keep bad company any longer. I throw myself on the mercy of the Court, I was married only three months ago and I pray that I may be saved. The period that I was with these men was only an hour. I am prepared to abide by any sentence that your Lordship metes out. I do not wish to mention the names of the other men here, but I have already given them to the Police."

It is necessary at this stage to mention an event of an extraordinary character which took place prior to the commencement of the trial at the Sessions. This can be best described in the words of Mr. Justice Page himself as contained in a memorandum prepared by him for his colleagues:

"Two or three days before the hearing, B. C. Chatterjee and S. K. Sen, Counsel on behalf of the accused, applied to see me in my private room. They then informed me that after careful consideration they were satisfied that there was no defence to the charges and that the accused was guilty. They asked me, if the accused pleaded guilty to murder, whether I would treat him leniently. I told them that I could give them no information as to what I should do at the trial, but if they were satisfied that the accused was guilty, while it was their duty by cross-examination to test the accuracy of the witnesses for the Crown, that they were not entitled to set up any substantive defence in opposition to the case for the Crown."

This incident appeared to be so unusual that we considered it desirable to let the Counsel concerned know what had been intimated to us by Mr. Justice Page. Consequently, after the case had been called on and the Standing Counsel had taken the preliminary objection already mentioned, the extract from the memorandum prepared by Mr. Justice Page as set out above was read out in open Court, and Mr. Chatterjee, who appeared on behalf of the accused, was asked to consider whether, in view of what was stated, he should conduct the case or whether the accused should have an opportunity of being represented by other Counsel. Mr. Chatterjee did not ask for time to enable him to consider the situation, but forthwith made the following statement from his place at the Bar presumably without consultation with his colleague Mr. Sen who was not present in Court:

"With the greatest respect for His Lordship Mr. Justice Page, I feel bound in duty to state that there must have been a misunderstanding between the learned Judge on the one hand and Mr. S. K. Sen and myself on the other side. We did go to see his Lordship Mr. Justice Page; we went into his Lordship's chambers and saw him prior to any consultation with the accused, prior to our having seen the accused; and what I remember having said to him along with Mr. Sen was this that we had gone through the brief very carefully ourselves and we thought it was a very difficult case. I am not pretending to give a verbatim report of what I said, but I am giving the sense of what I remember having said—and that if we could feel that a plea of guilty on the part of the accused under sec. 394 were acceptable to the Court, subject to what the accused had to say to us in the interview we were going to have with him, we would advise him to plead guilty under sec. 394; I would appeal to Mr. Justice Page to remember in this connection; but as far as my recollection

THE KING-EMPEROR v. BARENDRA KUMAR GHOSH.

serves me, his Lordship Mr. Justice Page told us that in a case like this, he could not accept a plea of guilty on any account lesser than murder, not even on culpable homicide not amounting to murder. After that we saw the accused, and he told us all that he had to say about the facts of the case; and upon full instructions by him, we came to the conclusion that we should be right, in the circumstances of the case, to advise him to plead guilty under sec. 394 and that he should be defended on the charge of murder under sec. 302. This is the recollection I have of this matter, and it is unfortunate that my learned friend Mr. Sen is not here, because in that case I am sure he would have repeated the same statement as to what happened. There was a misunderstanding between the learned Judge and ourselves with regard to the section we thought he should be advised to plead guilty. On the other hand, on the instructions received, both Mr. Sen and I and the learned juniors who appeared with us felt very strongly convinced that the accused's case embodied in the instructions he gave us was a true one, that in this case he was not guilty of murder, and that he had not gone inside the Post Office or fired as was represented by the prosecution, and on that basis we defended him. His defence is that he had gone there, but stayed outside, while the other two men had gone inside and fired at the Post Master. It was on that identical basis that we defended him."

After Mr. Chatterjee had made this statement, the Court adjourned in order to enable him to communicate with the prisoner. He subsequently appeared before the Court and made the following statement :—

"Pursuant to your Lordship's suggestion, I and my friends appearing with me went to the Alipur Jail accompanied by the Clerk of the Crown and my attorney. The attorney spoke to the accused in the presence of the Clerk of the Crown and ourselves and the accused stated that he wished me to represent him and to argue this case before your Lordships."

The case was thereafter argued for five days and the hearing terminated on the 11th September last. At the close of the arguments, Mr. Chatterjee intimated that he would submit a statement signed by himself and Mr. Sen as to what had happened at the interview with Mr. Justice Page. The statement was handed over to the Clerk of the Crown on the next day and was in the following terms :—

"We were briefed by Messrs. K. K. Dutt & Co. in this case. We went through our brief independently, and came to the conclusion that the case was a difficult one for the defence.

We were discussing the different aspects of the case when we came to learn from Mr. A. C. Mukherjee, a fellow member of our Bar, that Mr. Justice Page had in a previous case (Postal Fraud case) called Mr. Mukherjee and Mr. S. C. Bose, Counsel for the defence and Mr. A. K. Basu, Counsel for the prosecution, into his chamber and said to learned Counsel for the defence that without in any way wishing to hold out any inducement, he, the learned Judge, thought that if the accused were to plead guilty to the minor charge, the prosecution should not press the major charge, and ought, in his opinion, to withdraw it. Mr. Basu, we were further told, thereupon asked leave to refer the question to Standing Counsel, and that later, after learned Counsel on both sides had gone into the learned Judge's chamber and informed him of their agreement on the lines of his sug-

gestion, accused pleaded guilty to the minor charge whereupon the prosecution withdrew the major charge. We were also informed that the prisoner was sentenced leniently as a result of his pleading guilty in the aforesaid manner. Since the learned Judge had done this in a previous case we thought there would be nothing wrong in our seeing him in chamber with regard to the present case with a view to requesting him that he might deal with our client similarly.

As neither of us knew Mr. Justice Page well enough, we both went, in the first instance, to another learned Judge of this Court to ascertain his views on the propriety of the course we were contemplating; and the said learned Judge unhesitatingly approved of our going in to see Mr. Justice Page in his chamber. We may add that we fully explained to this learned Judge the object of our proposed visit to Mr. Justice Page. Accordingly, we went into Mr. Justice Page's chamber, and told him that, subject to his permission, we should like to speak to him about the case of Barendra Kumar Ghose in which we had been briefed. On the learned Judge nodding his approval, we told him we had not seen our client yet, but had gone through the brief and thought it was a difficult case; and subject to what the client had to say to us, we wished to ascertain from the learned Judge beforehand if he would accept a plea of guilty under sec. 394, I. P. C., and be ready thereafter to let the charge under sec. 302, I. P. C., be withdrawn against the accused. We reminded the learned Judge of what he had done in the Postal Fraud case, whereupon he said that although he had adopted a course like that in the previous case he could not do so in a case like the present one, that it was a ghastly affair, and that whilst we might be thinking of the poor prisoner in the dock, he, the learned Judge, could not but be thinking of the life that was gone; that in this case he could not accept a plea of guilty to anything less than a charge under sec. 302, I. P. C. and that not even a plea of guilty to a charge of culpable homicide not amounting to murder would be acceptable to him. Before leaving his chamber we were assured by the learned Judge that in his opinion we had done nothing wrong in speaking to him on behalf of our client in the way we had.

(Sd.) B. C. Chatterjee.
(Sd.) S. K. Sen.
12-9-23."

I have anxiously compared the two statements, *viz.*, the one made by Mr. Chatterjee in Court on 6th September and the other signed by Mr. Chatterjee and Mr. Sen on 12th September, and I have contrasted them with the passage in the memorandum prepared by Mr. Justice Page. I regret to place on record my conclusion that I cannot accept the statements made by the learned Counsel as correct in all particulars; I do not wish to extend the application of the well-settled principle that when the Court is called upon to review a case under cl. 26 of the Letters Patent, it will accept as unquestionable the statement of the trial Judge as to what actually took place before him in Court, as ruled in *R.* v. *Pestonji* (2) and *Emperor* v. *Upendra Nath Das* (1), on the authority of *Everett* v. *Youells* (3), *R.* v. *Grant* (4), *Gibbs* v. *Pike* (5) and *R.* v. *Mellor* (6). The con-

(1) 19 C. W. N. 653: s. c. 21 C. L. J. 377 (1914).
(2) 10 Bom. H. C. R. 75 (1873).
(3) 4 B. & Ad. 681 (1833).
(4) 5 B. & Ad. 1081 (1834).
(5) 9 M. & W. 351; 60 R. R. 749 (1842).
(6) Dears & Bell 468; 7 Cox. C. C. 454 (1858)

clusion I have formed is based on the inherent improbability of the version given by the learned Counsel. A plea of guilty in answer to the charge under sec. 394 would be of no avail to the prisoner, if he was still to be tried upon the charge of murder with the consequent possibility of capital sentence. The charge under sec. 302 could not, at that stage be withdrawn by the trial Judge, though, after evidence had been adduced, he might, if satisfied that there was no evidence to go to the jury, direct the jury to return a verdict of not guilty.

The object of the Counsel, who sought and secured the interview with the trial Judge, must have been to bargain with him as to the sentence in respect of the charge under sec. 302, if the prisoner should plead guilty to that Court. The gravity of their misconduct cannot, in my judgment, be exaggerated. But for what has actually happened, I would have considered it inconceivable that Counsel, who have been engaged to defend a prisoner charged with murder, should proceed to intimate to the trial Judge that, in their opinion, there was no defence to the charge, or, as they euphemistically, express it, that their case was "difficult;" and should then endeavour to persuade the Judge, before he has heard the evidence, to agree to a particular sentence if the accused should plead guilty. It would be wrong for me to conceal that my surprise is intensified when I find that the trial Judge who has thus been approached and placed in possession of the view taken of the case by the Counsel for the defence, advises them how the defence should be conducted.

On a superficial view of what happened in this case the erroneous assumption may possibly be made that a parallel is furnished by the conduct of Charles Phillips, Counsel for the accused in the celebrated trial of Courvoisier for the murder of Lord William Russel before Tindel, C. J., in 1840. The trial of Courvoisier, which is reported very briefly upon a question of practice only, *R.* v. *Courvoisier* (7), is described elaborately in three well-known works; Celebrated Trials connected with the Aristocracy by Peter Burke, Barrister-at-Law, 1849, pp. 461-485; Modern State Trials by William Townsend, Queen's Counsel and Recorder of Macclesfield, Vol. I, 1850, pp. 244-313, and Chronicles of Crime by Camden Phelm, Barrister-at-law, Vol. II, 1886, pp. 563-583. The conduct of Charles Phillips, who defended the accused, will be found discussed by Samuel Warren in his Introduction to Law Study, Vol. I, 1863, pp. 389-96, by Serjeant Ballantine in his Experiences, Vol. I, 1882, Chap. VII, by Serjeant, Robinson in his Reminiscences, 1889, Chap. VI, and by Cooly in his Constitutional Limitations, 1903, p. 478. The statement of Charles Phillips himself is set out in an appendix to the Essay on Professional Ethics by George Sharwood, Chief Justice of the Supreme Court of Pennsylvania, first published in 1854 and reprinted as Vol. XXXII of the Reports of the American Bar Association. The facts are beyond dispute and may be concisely stated.

Lord William Russell was found murdered in his bed on the 5th May 1840. His house was occupied only by himself and three servants, a young Swiss Valet by name Courvoisier and two women, a cook and a house-maid. Suspicion fell upon Courvoisier, and he was sent up for trial on a charge of murder. His Counsel Charles Phillips went to the trial with a full persuasion of his innocence and conducted the cross-examination of the wit-

(7) 9 C & P. 362 (1840).

THE KING-EMPEROR v. BARINDRA KUMAR GHOSE.

nesses closely and zealously, specially of one of the female domestics, with a view to show that there was as much probability that the witness or the other domestic was the culprit; as the prisoner. At the close of the first day's proceedings, the prosecutors were placed unexpectedly in possession of a new and important item of evidence, by the discovery of the plate of the deceased, which had been missed and was found to have been deposited with a lady a week before the murder. The only question remained, whether Courvoisier was the person who had so left it. If he was, it would increase the probability that it was he who subsequently committed the murder with the object of plunder. On the morning of the second day of the trial, the person who had made this discovery was shown a number of prisoners in the prison yard; one of these was Courvoisier, whom she instantly recognised as the person who had left the plate with her and had formerly lived in her employ. Courvoisier also suddenly recognised her and was dismayed. The immediate effect of his panic was that, when brought to the Bar of the Court a few minutes afterwards, he spoke privately to his Counsel and confessed his guilt, coupled nevertheless with an expression of his desire to be defended to the utmost. Phillips consulted his junior Clarkson and resolved to abandon the case. His junior remonstrated and suggested that they might take the advice of Baron Parke, who was not trying the cause, upon what he considered to be the professional etiquette under circumstances so embarrassing. They obtained an interview. Baron Parke enquired whether the prisoner insisted on Phillips defending him; and on hearing that he did, said that Phillips was bound to use all fair arguments arising on the evidence. This course was considered right, for, in the words of Phillips, "to have abandoned the prisoner in the midst of the trial, would have been virtually surrendering him to death." I may add that Phillips states explicitly that, as he subsequently learnt from Baron Parke, the latter did not mention to the Chief Justice what he had learnt from Phillips. The Chief Justice charged the jury who returned a verdict of guilty and the prisoner was thereupon sentenced to death.

The special features which distinguished the case of Courvoisier from that now before the Court may be indicated here: (1) the incident there took place while the trial was in progress; (2) Counsel took action upon confession of guilt by the prisoner himself; (3) Counsel asked for advice from a judge who was not trying the cause; (4) the Judge so approached did not mention the matter to the Chief Justice who would have to sum up and to pass sentence in the event of conviction; and (5) Counsel asked advice upon a matter of professional etiquette only and did not attempt to make a bargain with the Judge upon the question of sentence.

The view taken by Baron Parke upon the question of the duty of Counsel for a prisoner when the latter had, in the midst of the trial, confessed to the Counsel that he did commit the offence charged, is in substantial agreement with what was adopted by the General Council of the Bar in 1915, as appears from the following extract from the annual statement for 1915, p. 14:

"The Council were asked to advise on the propriety of Counsel defending on a plea of 'not guilty' a prisoner charged with an offence, capital or otherwise, when the latter has confessed to Counsel himself the fact that he did commit the offence charged. The questions raised were—(1) What is the duty of Counsel

under the circumstances; may he, according to modern views, defend in such case, and if so, ought he to do so? (2) Does the same answer apply where he has already appeared in Court for the prisoner?"

The Council adopted the following report:

"Different considerations apply to cases in which the confession has been made before the Advocate has undertaken the defence and to those in which the confession is made subsequently during the course of the proceedings.

"If the confession has been made before the proceedings have been commenced, it is most undesirable that an Advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another Advocate.

"Other considerations apply in cases in which the confession has been made during the proceedings, or in such circumstances that the Advocate retained for the defence cannot retire from the case without seriously compromising the position of the accused.

"In considering the duty of an Advocate retained to defend a person charged with an offence who in the circumstances mentioned in the last preceding paragraph confesses to Counsel himself that he did commit the offence charged, it is essential to bear the following points clearly in mind:—(1) that every punishable crime is a breach of the common or statute law committed by a person of sound mind and understanding; (2) that the issue in a criminal trial is always whether the accused is guilty of the offence charged, never whether he is innocent; (3) that the affirmative rests on the prosecution. Upon the clear appreciation of these points depends broadly the true conception of the duty of the Advocate for the accused.

"His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.

"The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence charged by reason of insanity or want of criminal capacity, or (b) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or, even if believed, is insufficient to justify a conviction for the offence charged, or (c) by setting up in answer an affirmative case.

"If the duty of the Advocate is correctly stated above, it follows that the mere fact that a person charged with a crime has in the circumstances above mentioned made such a confession to his Counsel is no bar to that Advocate appearing or continuing to appear in his defence, nor indeed does such a confession release the Advocate from his imperative duty to do all he honourably can do for his client.

"But such a confession imposes very strict limitation on the conduct of the defence. An Advocate 'may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud.'

"While, therefore, it would be right to take any objection to the competency of the Court to the form of an indictment, to the admissiblity of any evidence, or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person had committed the offence charged, or to call any evidence which he must know to be false having

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act, that is to say, an Advocate must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him.

"A more difficult question is within what limit, in the case supposed, may an Advocate attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged. Further than this he ought not to go.

"It must be clearly understood that this report is not intended as anything more than an answer to the specific question submitted. It is based on the assumption that the accused has made a clear confession that he did 'commit the offence charged,' and does not profess to deal with the very difficult questions which may present themselves to Counsel when a series of inconsistent statements are made to him by the accused before or during the proceedings, nor does it deal with the questions which may arise where statements are made by the accused which point almost irresistibly to the conclusion that the accused is guilty but do not amount to a clear confession. Statements of this kind must hamper the defence, but the questions arising on them are not dealt with here. They can only be answered after careful consideration of the actual circumstances of the particular case."

The above report was submitted to and approved by the then Attorney-General (Sir Edward Carson, K.C., M. P.) and by Sir Robert B. Finlay, K. C., M.P.

I see no escape from the conclusion that what has happened in this case is not supported either by the advice given to Baron Parke in 1840 or the opinion recorded by the General Council of the Bar in 1915. Counsel, who embarked upon such a perilous adventure as to inform the trial Judge in advance that they were satisfied that the prisoner had no defence to the charges, must have been oblivious of what Baron Bramwell said in *Johnson v. Emerson* (8): "A man's rights are to be determined by the Court, not by his attorney or Counsel. A client is entitled to say to his Counsel, I want your advocacy, not your judgment. I prefer that of the Court." The same thought was expressed more recently by Lord Halsbury when he observed: "If an Advocate were to reject a story because it seemed improbable to him, he would be usurping the office of the Judge, by which I mean the judicial function, whether that function is performed by a single man or by the composite arrangement of Judge and Jury" (Law Notes, 1899). It is significant that this view had appealed equally forcibly to two such diverse types of intellect as were represented by Johnson and Erskine (Boswell's Life of Johnson, Vol. I and Campbell's Lives of the Lord Chancellors, Vol. VIII). I shall not pursue this matter further or examine the vexed question of the duty of an Advocate who has lost faith in the cause he has been engaged to support. This much appears to me to be incontestable that it is not his duty to approach the trial Judge and to apprise him that in his opinion the man, whose fate has been entrusted to his care,

(8) L. R. 6 Exch. 329, 367 (1871).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

has no defence to make. I venture to add that if, as trial Judge, I had been placed in such a predicament, I would, without hesitation, have reported the Counsel concerned to the Chief Justice for disciplinary action, and I would have asked to be relieved of the duty of participating in the trial and of passing sentence upon a man whose Counsel had previously assured me that there was no defence to make.

Let me now pass on to an examination of the questions specified in the certificate of the Advocate-General.

The Advocate-General has certified that whether the direction and the non-direction (as specified by him) amount in law to misdirection, should be further considered by the Court. The direction is alleged to be contained in the three following passages of the summing up :—

(a) "In this case, if these three persons went to that place with a common intention to rob the Post Master, and, if necessary, to kill him, and if death resulted, each of them is liable, whichever of the three fired the fatal shot."

(b) "If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob, and, if necessary, to kill, and death resulted from their act, if that be so, you are to find a verdict of guilty."

(c) "I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied, on the other hand, that the shot was fired by one of those persons in furtherance of the common intention, if that be so, then it is your duty to find a verdict of guilty."

The non-direction is alleged to consist in the omission of the trial Judge to draw the attention of the jury to the defence of the accused, save and except a mere reference to the statement of the accused, recorded under sec. 342 of the Criminal Procedure Code. It will be convenient to consider the questions of erroneous direction and non-direction separately.

First, as to erroneous direction. The contention has been put forward on behalf of the accused that the direction specified is found upon an erroneous view of the scope and effect of sec. 34 of the Indian Penal Code. In support of this argument, reliance has been placed principally upon the judgment of Stephen, J., in *Emperor* v. *Nirmal Kanta Roy* (9). In that case, Stephen, J., ruled that sec. 34 read according to its own terms without reference to the doctrine of the English Law, applies only where a criminal act is done by several persons of whom the accused charged thereunder is one, and not where the act is done by some person other than the latter. On this basis, Stephen, J., held that where two persons, in furtherance of a common intention of both, fire at another, and one only actually hits and kills him, the other is guilty, not of murder under sec. 302 read with sec. 34, but of attempt to murder; these offences do not constitute the same act. Stephen, J., conceded that a wider construction had been placed on sec. 34 in *Queen-Empress* v. *Mahabir Tewari* (10), and as will presently appear, there has been much divergence of judicial opinion on the subject. In my judgment the question of the true construction and correct application of sec. 34 is beset with graver difficulties than appear at first sight, and as I have arrived at a conclusion contrary to the opinion maintained by Stephen, J., who had made a profound study of Criminal Law, both Indian and English, it is only fair that his views should be

(9) I. L. R. 41 Cal. 1072 (1088): s. c. 18 C. W. N. 723 (1914).

(10) I. L. R. 21 All. 263 (1899).

stated in his own words. The exposition of these views, concisely set out in his judgment in *Emperor* v. *Nirmal Kanta Roy* (9) was amplified and re-stated by him in the following extract from a letter published by him in the Calcutta Weekly Notes, Vol. XVIII, p. 222, short notes:

"The case made by the prosecution which had to be put before the jury may be presented in the familiar style of an illustration thus: 'A and B set out to murder C. Both fire pistols at him. A hits him and kills him. B misses him.' Does B's act come under sec. 34? That section runs—'When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner, as if the act were done by him alone.' I hold that as the act in question was the killing of C and as that was represented as having been done by A alone, the section did not apply to the case. I am not now concerned to consider the merits of this decision from a legal point of view, but, I believe, that it is contrary to the view of the section generally held by the profession hitherto, and it is certainly opposed to the statement of its meaning contained in Mr. Mayne's note thereon in his well-known work. The note is as follows: 'When several persons unite with a common purpose to effect any criminal object, all, who assist in the accomplishment of that object, are equally guilty, though some may be at a distance from the spot where the crime is being committed, and ignorant of what is actually being done.' For reasons, that I need not repeat, I think that this is wrong; but I believe that I have discovered the source of the error, and, if I am right, it is a curious example of the difficulty that attends the application of English Law to India, even in the form of a most carefully prepared Code.

"What I believe has happened is that the old English Law as to parties to the commission of an offence has proved too strong for the purifying effect of the Penal Code; and that its complexity has proved so attractive to the most learned of our commentators, and I may add to our highest judicial officers, that they have read a perfectly simple enactment in a highly artificial way in order to retain at least a flavour of it.

"I will, therefore, state as shortly as may be what I understand the English Law to be, and then consider how the Indian legislature adapted it to India.

"Taking Russel on Crimes, Ch. V, and Stephen's Digest, Ch. IV, as my authority, the English Law put very shortly is as follows:—

"A principal in the first degree is the man who commits the crime with his own hands. A principal in the second degree is one who is present, aiding and abetting; and (here comes in Mr. Mayne's explanation of sec. 34) he may be present though he is not really there, but only thereabouts watching for intruders or standing ready to assist.

"An accessory before the fact is a man who procures, etc., or abets another to commit or in committing a crime, but is not there or thereabouts when it is committed.

"An accessory after the fact is a man who helps the criminal to escape; he completes the group, but otherwise it is unnecessary to consider him for present purposes.

"I omit any consideration of the non-application of these rules to misdemeanours or treason; but a glance at the cases in Russell (and their number might be indefinitely increased) will show how little

(9) I. L. R. 41 Cal. 1072; s. c. 18 C. W. N. 728 (1914).

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our predecessors were open to the reproach of neglecting any technical points that possibly would be available for the defence of prisoners.

"Such was the English law before 1861. But in that year the inconvenience of those clumsy distinctions that had slowly grown up since the time of Hale—it is curious how many inconveniences the English Criminal Law owes to his age, if not to him—was clearly recognised, and advantage was taken of the framing of the Consolidation Acts of that year to correct it. The correction contained in the Accessories and Abettors Act, 24 and 25 Vict., c. 241, is characteristic of English legislation in such matters, as it abolished the distinction and leaves the difference. It consists of an enactment to the effect that 'accessories before the fact, principals in second degree and principals in the first degree are each considered as having committed' the crime, and may be tried as if they had committed it (Stephen, Art. 45).

"How did the Indian Legislature deal with this position? The Penal Code was, after much consideration, finally passed on the 6th October 1860. The English Accessories and Abettors Act was, also after prolonged investigations, passed in the following August. The two are no doubt closely connected, though I am not able at the moment to trace the connection. In 1846, however, we find the Commissioners who were preparing the Penal Code studying the labours of a commission then performing similar work in England, and evolving in para. (8) of their report a rudimentary edition of our sec. 34. That paragraph clearly shows that they saw that the distinction between degrees of principals must be abolished, and in the following paragraphs they consider various difficulties, which, no doubt, led them, or rather, their successors, to their very short but sufficient method of dealing with abettors. Ultimately in para. 662 to their postscript, they are naturally pleased to find that the English Commissioners in dealing with principals and the punishment of accessories, propose to follow the same course that has recommended itself to them. These considerations lead me to suppose that the framers of the Penal Code, as we have it, meant to do what I think, they in fact did, namely, to distinguish between a man who does a thing—the credit of the simplicity of the phrase is theirs—and the man who abets him, making the latter, however, punishable as though he were the former, and Chap. V of the Code is the result.

"What then, it will be asked, is the use of sec. 31? The answer is to be found in sec. 3 of the Code of 1837, Macaulay's Criminal Code, and the illustrations thereto. The section is practically the same as our sec. 31, though it is more obscurely expressed. The illustrations are shortly: (1) A digs a pit intending to cause some one's death. B covers it with turf with the same intention. Z falls in and is killed. Both A and B have committed culpable homicide. (2) A and B are gaolers having charge of Z alternately. They both omit to furnish Z with food, intending to cause his death. Z dies of hunger. Both A and B have committed culpable homicide. The language of the section has been changed, and the illustrations have been dropped; but I believe the law is as Macaulay planned it. That is, the man who does a thing is principal, and one who puts him on or helps him to do it, is an abettor whether he is present or not; and there are no other parties.

"But there remains another little puzzle, and that is sec. 114. I need not set out

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

its terms. But what I suspect is that the Commissioners could not help preparing a little resting place for the ghost they were laying. What they had in their minds was that a principal in the second degree really differed from an abettor, and must be provided for; they, therefore, intended to say that whereas an abettor was to be punished as if he had done the thing (the phrase will bear repetition); if he was present he was to be deemed to have done it, which, after all, was and is English law. Practically I cannot see that this makes any difference, as the punishment for the thing is all that need be considered.

"If, therefore, the section said what I think it was intended to say, I should think it superfluous. But, it, in fact, says something else, and when the abetting consists in attempting to do what another man did, which is a most effective method of aiding, the section does not apply, because I think it must be impossible to attempt to do a thing if you are not there. The result is that it will often apply, as it did in my case, to charges which are of no importance in comparison to the abetting. The distinction between secs. 109 and 114 really depends on the difference between being punished as if you had done a thing, and being deemed to have done it, which seems to me merely inconvenient.

"I should, therefore be glad to see sec. 114 repealed. But, at the same time, the principle laid down in Mr. Mayne's note seems to me quite a sound one and I should like to see sec. 114 replaced by an enactment that where several persons take part in the execution of a common criminal purpose, each is to be deemed to have committed every offence committed by any one of them in execution of the purpose. This is the English law according to Stephen's Digest, Art. 30; and we are of course familiar with the principle in sec. 149. The ground of such an enactment may be covered by secs. 107, 109, in fact, I think it usually would be. But some such enactment would make the matter perfectly plain."

It may be observed that the historical investigation undertaken by Stephen, J., in his judgment in *Emperor* v. *Nirmal Kanta Roy* (9) and reproduced in the letter quoted above, if at all allowable, does not go far enough. No reference is made to the principles which regulated the liability of principals and accessories at the time of the introduction of the Indian Penal Code. A very useful historical summary will be found in the well-known Digest of Criminal Law by F. L. Beaufort, 1857, Vol. I, pp. 40-47, where reference is made to Reg. 53 of 1803, sec. 4, the Hedaya, Vol. II, pp. 30, 104, 133, Vol. IV, p. 302, and decisions of the Nizamat Adaulat; these took a very stringent view of the liability of joint actors. But such a historical survey is not permissible in the interpretation of sec. 34. Such reference to the history of legislation can only be legitimately made, as was done by the Judicial Committee in *Iswari Prasad* v. *Lal Chaterpat* (11) and *Brown* v. *McLachlan* (12), when reasonable doubt is entertained as to the true construction of a statute. The operation may, however, be easily carried too far, and may, in the case of codifying statutes, lead to results which have been emphatically condemned in decisions of the highest authority; see, for instance, the observations of Lord Herschell in *Bank of England* v. *Vagliano Brothers* (13), of Lord Watson in

(9) I. L. R. 41 Cal. 1072 (1089); s. c. 18 C. W. N. 723 (1914).
(11) 3 M. I. A. 100, 130 (1843).
(12) L. R. 5 P. C. 443, 550 (1872).
(13) [1891] App. Cas. 107 (144).

Robinson v. *Canadian Pacific Railway Co.* (14) and of Lord Macnaghten in *Narendranath* v. *Kamal Bisini* (15). The proper course is, in the first instance, to examine the language of the statute, to interpret it, to ask what is its natural meaning, uninfluenced by considerations derived from the previous state of the law. To begin with an examination of the previous state of the law on the point, is to attack the problem at the wrong end; and it is a grave error to force upon the plain language of the section of an Indian Statute an interpretation which the words will not bear, on the assumption of a supposed policy on the part of the legislature to adopt or to vary, as the case may be, the rules of the English law on the subject; see the decisions of the Full Bench in *Kripasindhu* v. *Annada Sundari* (16) and *Satis Chandra* v. *Ramdayal* (17), see also *Baleswar Bagarti* v. *Bhagirathi Das* (18). We must consequently examine, in the first instance, the terms of sec. 34.

In the Indian Penal Code, as enacted in 1860, sec. 34 was expressed in the following terms :—

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if it were done by him alone."

In 1870 the section was amended by the insertion of the expression "in furtherance of the common intention of all" after the word "persons" and before the word "each." We have it on the authority of Mr. J. F. Stephen, who was Law Member of the Council of the Governor-General at the time, that the amendment was made "so as to make the object of the section clear." It is immaterial whether the amendment was suggested by the judgment of Sir Barnes Peacock, C. J., in *Queen* v. *Gorachand Gopee* (19), as was assumed by Mahmood, J., in *Emperor* v. *Dharam Rai* (20) or by the judgment of Sir James Colvile in *Ganesh Singh* v. *Ram Raja* (21). It is sufficient for our present purpose to note that the section is now expressed in the following terms :—

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

This section does not create a new offence; it uses the expression "criminal act" and formulates a principle of liability. Sec. 32 shows that act includes an illegal omission save where the contrary appears from the context. Sec. 33 shows that the word "act" includes a series of acts and the word "omission" includes a series of omissions. Sec. 34 shows that when a criminal act is done by several persons, each is liable as if he did it alone, provided the act is done in furtherance of the common intention of all. Sec. 35 shows that when an act, criminal only in respect of knowledge or intention, is done by several persons, each person, joining with criminal knowledge or intention, is liable as if he had done it alone with that knowledge or intention. Sec. 36 shows that when an offence is the effect partly of an act or partly of an omission, it is one offence only. Sec. 37 shows that when an offence is committed by several

(14) [1892] App. Cas. 481, 487.

(15) L. R. 28 I. A. 18 : s. c. I. L. R. 23 Cal. 563 (1896).

(16) I. L. R. 35 Cal. 34 (55) : s. c. 11 C. W. N. 983 (F. B.) (1907).

(17) I. L. R. 48 Cal. 388 ; s. c. 24 C. W. N. 982 (Spl. B.) (1920).

(18) I. L. R. 35 Cal. 701 (711) : s. c. 12 C. W. N. 657 (1908).

(19) 5 W. R. Cr. 45 ; B. L. R. F. B. 443 (1866).

(20) [1887] 7 All. W. N. 236 (237).

(21) 12 W. R. 38 ; 3 B. L. R. 44 (P. C. (1869).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

acts, each person intentionally committing one of those acts singly or jointly with others, commits the offence. Sec. 38 shows that persons jointly engaged in a criminal act may be guilty of different offences. To justify the application of sec. 34, it is, consequently, necessary to prove what may be briefly described as a common act and a common intention. The real difficulty emerges when we are called upon to decide, on the concrete facts of a given case, whether the criminal act can be said to have been done by several persons; in other words, what is it that is involved in the expression "a criminal act is done" when there is more than one person who has contributed to the result. I am persuaded that it is not possible to frame a universal formula which will comprehend all imaginable combinations of circumstances.

Reference has been made to opinions of commentators which, in some instances at least, do not go to the root of the matter. The commentary on the Indian Penal Code by Mr. W. Morgan and Mr. A. G. Macpherson may be mentioned as an illustration, though their opinion, so far as it goes, is entitled to the highest respect. Mr. Morgan was clerk to the Legislative Council and assisted Sir Barnes Peacock when the Bill, which was subsequently enacted as the Indian Penal Code, was put into its final form; he was one of the Judges of this Court till he was appointed the first Chief Justice of the Agra High Court. Mr. Macpherson also was for many years a Judge of this Court. The only observation which they have to offer on sec. 34 is that "the actual doers, who are the persons referred to here, are to be distinguished from those who abet the doing of a thing;" they then add that the law concerning principal actors is contained in secs. 34, 35 and 37, while what constitutes an abetment is explained in Chap. V. The question, however, remains who are the persons who may, in a particular case, be rightly regarded as the actual doers.

Mr. Mayne in the notes on sec. 34, in his edition of the Indian Penal Code, quotes with approval the following passage from sec. 489 of the Commentaries on the Criminal Law (1856), by Joel Prentiss Bishop, an American Jurist of high repute :—

"The true view is doubtless as follows: Every man is responsible criminally for what of wrong flows directly from his corrupt intentions; but no man, intending wrong, is responsible for an independent act of wrong committed by another. If one person sets in motion the physical power of another person the former is criminally guilty for its results. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. If he did not contemplate the result in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action and indiscriminate power he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what might be presumed to have been his understanding of them, he is responsible. But, if the wrong done was a fresh and independent wrong springing wholly from the mind of the doer, the other is not criminal therein, merely because, when it was done, he was intending to be a partaker with the doer in a different wrong. These propositions may not always be applied readily to cases arising, yet they seem to furnish the true rules."

This exposition is reproduced by Bishop, with slight variations, in the latest edition of his great work (New Commen-

taries, 1892, Vol. I, Chap. XLV, sec. 641). Mr. Mayne adhered to this view in his work on the Criminal Law of India (Fourth Edition, 1914, p. 238), where the following statement occurs: "Where several persons unite, with a common purpose, to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed and ignorant of what is actually done." This is manifestly based on the assumption that in certain circumstances at least, all who assist in the accomplishment of a common purpose to do a criminal act may be deemed to have "done that act" within the meaning of sec. 34. This view of sec. 34 does not necessarily render sec. 149 superfluous as was urged on behalf of the prisoner. Sec. 34 speaks of "common intention" while sec. 149 refers to "common object." Besides this, sec. 149 comes into operation only when there is an unlawful assembly of five or more persons as required by sec. 141, and in that event it has a wider scope than sec. 34. In this connection reference may be made to the judgment of Field, J., in *Empress* v. *Jhubboo Mahton* (22), where the recondite problem is considered, whether a prisoner, who is constructively guilty of murder under sec. 34 can be said to have committed the offence of murder within the meaning of sec. 149 so as to make other prisoners guilty by a double construction.

A similar view is indicated by Sir Michael Foster in his Discourse on Crown Law, 1809, p. 350:—

"Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him: some to commit the act, others to watch at proper distances and stations to prevent a surprise, or to favour if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant toward the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprise."

Sir Michael Foster adds in a later passage (p. 351) that "in combinations of this kind, the mortal stroke, though given by one of the party, is considered in the eye of the law and of sound reason too, as given by every individual present and abetting; the person actually giving the stroke is no more than the hand or instrument by which the others strike," or, as he phrases it later on, "the stroke of one is, in consideration of law, the stroke of all;" see Pleas of Crown by Hale, Vol. I, pp. 437, 463; Vol. II, pp. 344, 345; Pleas of the Crown by Hawkins, Vol. II, Chap. 29, secs. 21, 22, Pleas of the Crown by East, Vol. I, p. 70. The theory which underlies this view is that if one has the criminal intent and another does the criminal act, the intent not contributing to the act, nor strengthening it, and not in any way influencing it, there is in the former person no crime; but it is otherwise if there is a unity of intent and act.

The subject, as is fairly clear, is by no means free from difficulty and the principle is analysed with great acuteness by Collett in his Comments on the Indian Penal Code, 1889, pp. 2-5. He sums up his conclusion concisely in the statement "that community of criminal intention determines the community of liability in

(22) I. L. R. 8 Cal. 739 (1882)

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

every instance of accession at the fact." In illustration, he refers to the two contrasted cases, *viz.*, *The Sissinghurst House* case (23), where an assistant of a constable was killed by some members of a riotous assembly and *R.* v. *Sarum* (24), where three soldiers went together to rob an orchard. As instance of cases where the question is as to what constitutes community of action, he refers to the decisions in *R.* v. *Salmon* (25), (where three soldiers went to practise firing with rifle), *R.* v. *Coney* (26), where a crowd assembled to witness a prize fight, *Queen* v. *Sabed Ali* (27), where, in an attempt to eject a man from land, a gun was fired which caused the death of one of the party resisting, and *Emperor* v. *Jhubboo Mahton* (22), where the nature of the wounds inflicted by different assailants on different parts of the body of the deceased could be ascertained. The divergence of opinion expressed in some of these cases, specially in *R.* v. *Coney* (26) forcibly illustrates the difficulty inseparable from the application of a general principle like that embodied in sec. 34 to the circumstances of an individual case. This is fully realised when the cases to be found in our reports are closely examined. In this connection, we may usefully recall the weighty observations of Lord Halsbury in *Quinn Leathem* (28) and of Lord Haldane in *Kreglinger* v. *New Patagonia Meat and Cold Storage Coy.* (29), as to the misuse of judicial precedents. The language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts; the generality of the expression which may be found there is not intended to be an exposition of the whole law, but is governed and qualified by the particular facts of the case in which such expressions are to be found. It follows as a corollary that a case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem logically to follow from it.

(22) I. L. R. 8 Cal. 739 (1882).
(23) [1673] 1 Hale P. C. 462.
(24) [1697] Foster 393.
(25) 6 Q. B. D. 79 (1880).
(26) 8 Q. B. D. 534 (1882).
(27) 20 W. R. 5; 11 B. L. R. 347 (1873).
(28) [1901] A. C. 495 (506).
(29) [1914] A. C. 25 (40).

The earliest cases in this Court, such as *Queen* v. *Jan Mahammad* (30) and *Queen* v. *Ruchee* (31) do not examine the principle, but assume that when two persons take an active part in a murder, they become principals in the first degree, though one of them only may have been the actual killer. This was apparently the opinion of Sir Barnes Peacock, C. J., as indicated in the case of *Queen* v. *Gorachand* (19), where he stated that if several persons go out together for the purpose of apprehending a man and taking him to the Police Station on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert and that the beating was in furtherance of a common design. On the other hand, all who are present do not necessarily assist by their presence every act that is done in their presence. Markby J., took a similar view in *Queen* v.

(19) 5 W. R. Cr. 45; B. L. R. F. B. 443 (1866).
(30) 1 W. R. Cr. 49 (1864).
(31) 2 W. R. Cr. 39 (1865).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

Hyder (32), when he stated that if a master accompanies a servant, knowing the latter's intention to commit murder and is present at the commission of the murder, although he struck no blow, still he is guilty as a principal; the reasonable presumption was that both were acting with a common intent. Markby, J., adhered to this view when in *Queen* v. *Mohammad Asger* (33), he reiterated that if a blow is struck by A in the presence of and by the order of B, both are principals in the transaction. He added that where two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was. The same view was emphasised by him in *Queen* v. *Gour* (34), where he ruled that if each of several persons is proved to have taken part in beating a man so as to break his ribs and cause his death, each is guilty, as a principal, of the murder of the deceased. The next case in this Court which deserves special mention is that of *Queen-Empress* v. *O'Hara* (35) which was tried by Norris, J., and a special jury and led to a review under cl. 26 of the Letters Patent. One of the instructions given by Norris, J., to the jury was that if two shots were fired by two men and both men fired at the deceased with the intent to kill him, and it was not proved who fired the shot which produced the fatal effect, both were guilty of murder. It is significant that Norris, J., when at the Bar, had acted as Counsel for the prosecution in *R.* v. *Salmon* (25) the decision wherein would support the instruction in question. The Advocate-General certified that the construction did require further consideration. But the point was left undecided, as the conviction was ultimately set aside on the ground that it had been based on the uncorroborated testimony of an accomplice. There is, however, a long catena of later cases which contain expressions of opinion—some of them *obiter dicta*—which militate against the restricted interpretation placed by Stephen, J., on sec. 34. Amongst these decisions may be mentioned *Sriprasad* v. *Empress* (36), *Keshawar Lal* v. *Giris Chandra* (37), *Nibaran Chandra* v. *King-Emperor* (38), *Khudiram* v. *Emperor* (39), *Gauridas* v. *Emperor* (40), *Emperor* v. *Morgan* (41), *Jhakri* v. *King-Emperor* (42), *Reazuddi* v. *King-Emperor* (43), *Jamiruddi* v. *King-Emperor* (44), *Manindra* v. *Emperor* (45), *Emperor* v. *Narendranath* (46), and *Foezullah* v. *King-Emperor* (47). In some of these cases, the Court declined to apply sec. 34, not because the act could not be said to have been done by several persons, but because there was no proof that it had been done in furtherance of the common intention; these cases furnish a clear indication that the Court would have applied sec. 34 if a common intention had been proved. In one of these cases *Emperor* v. *Morgan* (41) the Court expressly relied upon the decision in *R.* v. *Salmon* (25). The bullet which killed the deceased

(25) 6 Q. B. D. 79 (1880).
(32) 6 W. R. Cr. 83 (1866).
(33) 23 W. R. Cr. 11 (1874).
(34) 24 W. R. Cr. 5 (1875).
(35) I. L. R. 17 Cal. 642 (1890).

(25) 6 Q. B. D. 79 (1880).
(36) 4 C. W. N. 193 (1899).
(37) I. L. R. 29 Cal. 496 (1902).
(38) 11 C. W. N. 1085 (1907).
(39) 12 C. W. N. 530: s. c. 9 C. L. J. 55 (1908).
(40) I. L. R. 36 Cal. 659 (1908).
(41) I. L. R. 36 Cal. 302: s. c. 13 C. W. N. 302; 9 C. L. J. 204 (1909).
(42) 16 C. L. J. 440 (1912).
(43) 16 C. W. N. 1077 (1912).
(44) 16 C. W. N. 909 (1912).
(45) I. L. R. 41 Cal. 754 (1914).
(46) 21 C. L. J. 396 (1915).
(47) 25 C. W. N. 34 (1920).

was fired by one or other of the accused, but it was impossible to say which of them had fired it; the Court expressed the opinion that the rule laid down in *R.* v. *Salmon* (25) might be applied. In another case, *Amrita Lal Bose* v. *Corporation of Calcutta* (48), the question was examined from first principles, from a different standpoint and irrespective of the provisions of sec. 34, and it was ruled that as a general principle of Criminal Law, all who participate in the commission of an offence are severally responsible, as though the offence had been committed by each of them acting alone, and consequently each must be separately punished. On the other hand, the decision of Stephen, J., in *Emperor* v. *Nirmal Kanta Roy* (9) was followed without question in *King-Emperor v. Profulla Kumar* (49). There is thus a preponderance of authority in this Court against the limited construction of sec. 34 which found favour with Stephen, J., in *King-Emperor* v. *Nirmal Kanta* (9).

A similar divergence of judicial opinion is traceable through the decisions pronounced by the Allahabad High Court; *Empress* v. *Dharm Rai* (20), *Queen-Empress* v. *Mahabir* (10), *Queen* v. *Santa* (50), *Emperor* v. *Nageshwar* (51), *Emperor* v. *Bhola Singh* (52), *Dhian Singh* v. *King-Emperor* (53), *Emperor* v. *Kanhai* (54), *Emperor* v. *Ram Newaz* (55), *Emperor* v. *Hanuman* (56), *Emperor* v. *Chandan Singh* (57), *Emperor* v. *Gulab* (58) and *Bhagwana* v. *Emperor* (59). How the pendulum has swung will be appreciated when we mention that *Queen* v. *Mahabir* (10) which was pressed upon the attention of Stephen, J., in *Emperor* v. *Nirmal Kanta* (9) was dissented from in *Queen* v. *Santa* (50) and *Emperor* v. *Nageshwar* (51) while *Dhian Singh* v. *King-Emperor* (53) was questioned in *Emperor* v. *Ram Newaz* (55), *Emperor* v. *Hanuman* (56), *Jafar* v. *Emperor* (60), *Karan* v. *Emperor* (61), *Emperor* v. *Gulab* (58) and *Abdul Karim* v. *Emperor* (62).

In the Madras High Court what may be called the liberal interpretation of sec. 34 is supported by the high authority of Subrahmania Iyer, J., in *Queen* v. *Ranu* (63) and *Queen* v. *Duma* (64). But a discordant note has been recently sounded by the decision in *Aydroos* v. *Emperor* (65) where it was ruled that to justify the application of sec. 34, evidence of some distinct act by the accused which can be regarded as part of

(9) I. L. R. 41 Cal. 1072: s. c. 18 C. W. N. 723 (1914).
(10) I. L. R. 21 All. 263 (1899).
(20) 7 All. W. N. 236 (1887).
(25) 6 Q. B. D. 79 (1880).
(48) I. L. R. 44 Cal. 1025: s. c. 21 C. W. N. 1016 (1917).
(49) I. L. R. 50 Cal. 41 (47) (1922).
(50) 19 All. W. N. 186; I. L. R. 28 All. 404n (1899).
(51) I. L. R. 28 All. 404 (1906).
(52) I. L. R. 29 All. 282 (1907).
(53) 9 All. L. J. 180 (1912).

(9) I. L. R. 41 Cal. 1072: s. c. 18 C. W. N 723 (1914).
(10) I. L. R. 21 All. 263 (1899).
(50) 19 All. W. N. 186; I. L. R. 28 All. 404n (1899).
(51) I. L. R 28 All. 404 (1906).
(53) 9 All. L. J. 180 (1912).
(54) I. L. R. 35 All. 329 (1912).
(55) I. L. R. 35 All. 506 (1913).
(56) I. L. R. 35 All. 560 (1913).
(57) I. L. R. 40 All. 103 (1917).
(58) I. L. R. 40 All. 686 (1918).
(59) 17 All. L J. 1095 (1919).
(60) 14 All. L. J. 789 (1916).
(61) 14 All. L. J. 792 (1916).
(62) 21 Cr. L. J. 734 (1920).
(63) I. L. R. 19 Mad. 482 (1896)
(64) I. L. R. 19 Mad. 483 (1896).
(65) [1922] Mad. W. N. 800; 17 Mad. L W 21.

the criminal act in question is required, see also *Queen* v. *Thornath* (66).

In the Bombay High Court, Westrop, C. J., in *Queen* v. *Pitambar* (67) apparently inclined to the view contrary to that adopted by Stephen, J. The later decisions in *Queen* v. *Maganlal* (68), *Emperor* v. *Subbappa* (69), *Emperor* v. *Chhotalal* (70) and *Emperor* v. *Haribijal* (71) cannot be claimed as decisive authorities in support of either of the conflicting views.

In Lahore there has been a similar diversity of judicial opinion. But it is worthy of note that two of the latest cases, *viz.*, *Harnam Singh* v. *Emperor* (72) decided by Chevis and Raoof, JJ., and *Bahal Singh* v. *Emperor* (73) decided by Rattigan, C. J., and Raoof, J., lend strong support to the opinion expressed by Stephen, J. A different note was perhaps sounded in *Raja* v. *Emperor* (74) and *Dangar Khan* v. *Emperor* (75) where *Emperor* v. *Mohna* (76) and *Empress* v. *Mahabir* (10) were followed, while the decision in *Allahditta* v. *Crown* (77) really presents no difficulty on its special facts.

In Patna, a similar difference of attitude is traceable through the decisions. In *Lochho Singh* v. *Emperor* (78) four persons formed themselves into a body with the common object of beating the complainant, and while two of them assaulted him, the other two stood by, armed with *lattis*, ready to take part, if necessary; it was ruled that the latter two were equally guilty with the others of an offence under sec. 323, I. P. C. The later decisions in *Ritbaran* v. *Emperor* (79) and *Satrughan* v. *Emperor* (80), however, indicate a distinct reluctance on the part of the Court to push the application of sec. 34.

What irreconcilable difference of opinion is possible in this class of cases is illustrated by the decision in *Emperor* v. *Mohabir* (81) where two of the Judicial Commissioners (Rafique and Kanahialal) took a limited view of the scope of sec. 34, while the third (Lindsay) adopted a liberal construction, in the application of the principle to a fairly simple state of facts. Reference may also be made to *Imperator* v. *Vahilai* (82), where the two Judicial Commissioners (Pratt and Fawcett) followed *Gauridas* v. *Emperor* (40); there A had struck B with hatchet; B fell down whereupon C hit B and B subsequently died. The Court declined to apply sec. 34 on the ground that it was not a necessary inference that C had a common intention with A to kill B. Reference may also be made to *King-Emperor* v. *Kala Nanji* (83) decided in the Chief Court of Criminal Justice in Kathiawar.

The Courts in Burma have been faced, from time to time, with the question of the application of sec. 34 to a variety of circumstances, and as might be anticipated the pronouncements are by no means easy to reconcile. Amongst recent cases may be mentioned *Nga Do Sein* (84), *Pha*

(10) I. L. R. 21 All. 263 (1899).
(66) 1 Weir. 495 (1883).
(67) I. L. R. 2 Bom. 61, 66 (1877).
(68) I. L. R. 14 Bom. 115 (1889).
(69) 16 Bom. L. R. 303 (1912).
(70) I. L. R. 36 Bom. 524 (1912).
(71) 17 Bom. L. R. 906 (1915).
(72) [1919] P. R. 21; 20 Cr. L. J. R. 635.
(73) [1919] P. R. 24; 20 Cr. L. J. R. 711.
(74) [1919] P. L. R. 18; 20 Cr. L. J. 369.
(75) 23 Cr. L. J. 593 (1922).
(76) [1901] P. R. 16.
(77) 4 Lahore L. J. 276 (1922).
(78) 18 Cr. L. J. 882 (1917).
(40) I. L. R. 36 Cal. 659 (1908).
(79) 4 Pat. L. W. 120; 18 Cr. L. J. 789 (1917).
(80) 20 Cr. L. J. 289 (1919).
(81) [1912] 16 Oudh Cases; 14 Cr. L. J. R. 241.
(82) [1911] 5 Sindh L. R. 247; 13 Cr. L. J. 538.
(83) 1 Cr. L. J. R. 920 (1904).
(84) [1902] 1 L. B. R. 283.

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

Laung (85), *Nga Tun Ba* v. *Emperor* (86), *Tha Mya* v. *Emperor* (87), *Emperor* v. *Cook* (88), *Nga Bai* v. *King-Emperor* (89), *Nga Shwe On* v. *Emperor* (90), *Po Ya* v. *Emperor* (91) and *Po Myaing* v. *Emperor* (92), while amongst the earlier decisions, the most noteworthy are *Maung* v. *Queen* (93) and *Hakim Ali* v. *Queen-Empress* (94).

This analysis of the course of decisions in the different Courts which administer criminal justice according to the Indian Penal Code discloses a deep-seated divergence of judicial opinion as to the true interpretation of sec. 34. The apparent simplicity of the language of the section is delusive, as it furnishes no test to determine when a particular criminal act may be said to have been "done by several persons"; and the consequence has been that the Courts have sometimes, in their reluctance to apply the section to the facts of the case before them, come to the conclusion that the criminal act was not proved with certainty to have been done in furtherance of the common intention of all. In my judgment, the exposition given by Stephen, J., places too narrow an interpretation upon sec. 34, and that the question whether a particular criminal act may be properly held to have been "done by several persons" within the meaning of the section cannot be answered regardless of the facts of the case. To show that the problem may require solution in the most diverse circumstances imaginable, we may refer to *Breese* v. *State* (95). In that case the accused had agreed with others to commit a burglary in a store house at night. As a part of the said agreement and to facilitate the breaking and entry and to lessen the chances of detection, it was agreed that the accused should on that night decoy the owner away from the store where he usually slept, to a music party about a mile distant, and detain him there, while the other confederates were to break and enter the store and remove the goods. The parties did, in fact, perform their respective parts of the agreement, and the burglary was successfully committed. The Supreme Court held that the accused was constructively present at the breaking and entry by his confederates and could be convicted as principal therein. Peck, J., referred to the decision in *R.* v. *Standley* (96) as an authority for the proposition that if several persons act in concert to steal a man's goods and he is induced by fraud to trust one of them in the presence of the others with the possession of such goods and another of them entices him away, in order that the man who has the goods may carry them off, all are guilty of felony. Reliance was placed also on *Hess* v. *State* (97) where it had been ruled that if several unite in a common design to do some unlawful act, and each takes the part assigned to him, though all are not actually present, yet all are present in the eye of the law. It was observed that the part assigned by the agreement to the accused, namely, a constant supervision over the

(85) [1906] 3 L. B. R 264; 5 Cr. L. J. R. 414.
(86) [1907] 14 Bur L. R. 264; 7 Cr L. J. R. 205.
(87) [1908] 4 L. B. R. 271; 8 Cr L J R 272.
(88) [1914] 7 Bur. L. T. 187; 7 L. B R 319; 15 Cr L. J 243.
(89) [1914] 15 Cr. L. J. R. 484
(90) [1919] 13 Bur. L. T 47; 10 L. B R. 117; 21 Cr. L. J. R 678
(91) [1919] 13 Bur L. T 44; 21 Cr. L. J. R. 797.
(92) [1920] 13 Bur L T. 158; 10 L B. R. 269; 22 Cr. L. J. R. 593.
(93) [1894] L. B. R, 1893-1900, 112.
(94) [1896] L B. R, 1893-1900, 150.
(95) [1861] 12 Ohio. 146; 80 Am. Dec. 340.
(96) [1816] Russ. & Ry 305.
(97) [1831] 5 Ohio. 12; 22 Am. Dec. 767.

owner while the burglary was effected, formed an essential part of the plan of the burglary agreed upon, quite as much as the rending of the shutter or the forcing of the door. A second illustration is afforded by *State* v. *Poynier* (98), where it was ruled that if a person whose duty it is to guard property leaves his post so as to facilitate the theft of the property, which to his knowledge has been determined upon, he should be deemed constructively present and liable as a principal. Manning, J., who delivered the opinion of the majority observed: "The test to determine whether he is principal rather than accessory is whether he is so situated as to make his personal help available—not actual physical help necessarily, but help of any kind—not help rendered in or by actual presence, but constructive presence as well. Thus if he watched near, or at a distance to prevent his companions being surprised, or stationed himself to give the alarm to favour their escape, or was in such a situation as to come to their assistance, so that the knowledge of his watching or position or situation inspired or was calculated to inspire his companions with additional confidence and enabled them quicker or safer or more effectually to commit their crime, then he is the principal. One need not be either an eye witness of the criminal act or within hearing of it to make him a principal. If he has knowledge of it and watches so as to assist in any manner, it is enough; or if he does any act in execution of the common design or to aid those who are immediately engaged, to escape. Each person consenting to the commission of an offence and doing any one act which is an ingredient in the crime or immediately connected with or leading to its commission is a principal. *R.* v. *Flatman* (99), Todd, J., dissented though he conceded that if a party watches for his companions, the actual perpetrators, to prevent surprise or favour their escape, or give assistance and is near enough to afford it, if required, he may be deemed constructively present. He referred to the decision in *R.* v. *Tuckwell* (100) where, in circumstances very similar, the employee who had, in pursuance of an arrangement, with his confederate left the house so as to enable the latter to commit the robbery, the employee had been held by Coleridge, J., to be not a principal in the crime, but an accessory before the fact. To the same effect is the decision in *R.* v. *Jefferies* (101). A third illustration is furnished by the decision in *State* v. *Hamilton* (102) which carries the law probably to its furthest limit. There a plan was arranged to rob an express train on the road; one of the parties to such plan was to ascertain when the express left a certain point and to signal to his confederates by building a fire on the top of a mountain in one county which could be seen by them in another county 40 miles distant. This signal was given by him and his confederates, advised by it, met the express; in the attempt to rob it, one of the guards was killed. It was ruled that the man who gave the signal was, in contemplation of law, constructively at the scene of the homicide. Again, in *People* v. *Batterson* (103) it was ruled by Haight, J., that if one of several persons acting in concert leads a girl's escort away, while his confederates rape the girl, he is a principal in the second degree, though not actually present at the time of the rape. I shall mention one further il-

(98) [1884] 36 Louisiana 572.

(99) 14 Cox. 396 (1884).
(100) C. & Mar. 215 (1841).
(101) [1848] 3 Cox 85.
(102) [1878] 15 Nevada 386.
(103) (1889) 50 Hun. 44; 2 N. Y. Supp. 376.

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

lustration which is furnished by the decision in *Commonwealth* v. *Lucus* (104). A person, in pursuance of a pre-concerted plan, remained downstairs in his own house, while his confederates above, stole money from a lodger, brought it down and delivered it to him. Bigelow, C. J., ruled that he was a principal in the larceny and observed as follows:

"To charge a person as principal, a strict, actual, immediate presence at the time and place of the commission of the crime is not necessary. Nor is it requisite that he should be so situated as to be an eye or ear witness of the criminal act. It is the expectation of aid, in case it is necessary to the completion of the crime, and the belief that his associate is near and ready to render it, which encourage and embolden the chief perpetrator, and incite him to accomplish the act. By the countenance and assistance which the accomplice thus renders, he participates in the commission of the offence. It is therefore sufficient to hold a party as principal, if it is made to appear that he acted with another in pursuance of a common design; that he operated at one and the same time for the fulfilment of the same pre-concerted end, and was so situated as to be able to furnish aid to his associates with a view to insure success in the accomplishment of the common enterprise. Thus, if two persons agree to commit a burglary, and in order to effect their purpose one of them breaks and enters a house and commits a larceny therein, while the other remains outside, even at a distance, in order to guard against surprise and detection, and to receive the goods, or a portion of them, after the larceny has been committed, there can be no doubt that the latter would be liable as principal, although he did not see his accomplice do any act towards the commission of the offence. He would be, it is true, an accessory before the fact, by advising and procuring the commission of the felony; and after the fact, by receiving the property after it was stolen; but he would also be a principal, because, at the time when the felony was committed, he co-operated with the chief perpetrator and aided and abetted him in doing the acts which constituted the crime."

I shall not multiply instances to show when a man may be said to participate in a criminal act, lest we get lost in an endless maze of decisions remarkable for refined distinction such as we find in *R.* v. *Stewart* (105), *R.* v. *Soares* (106), *R.* v. *Royce* (107), *R.* v. *Towle* (108), *R.* v. *McPhane* (109), *R.* v. *Gaylor* (110), *R.* v. *West* (111), *R.* v. *Jone* (112), *R.* v. *Manners* (113), *R.* v. *Buttcris* (114), *R.* v. *Kelly* (115), *R.* v. *Badcock* (116), *R.* v. *Else* (117), *R.* v. *Davis* (118), *R.* v. *Manning* (119), *R.* v. *Whittakar* (120), *R.* v. *Kelly* (121), *R.* v. *Vanderstein* (122), *R.* v. *Murphy* (123), *R.* v. *Howell* (124), *R.* v. *Jordan* (125), *R.* v. *Locket* (126), *R.* v.

(104) [1861] 2 Allen 170.

(105) [1818] R. & R. 363.
(106) [1802] R. & R. 25.
(107) [1767] 4 Bur. 2073.
(108) [1816] R. & R. 314.
(109) [1841] C. & M. 212.
(110) [1857] 7 Cox. 253; D. & B. 288.
(111) [1847] 2 Cox. 237.
(112) 9 C. & P. 761 (1841).
(113) 7 C. & P. 801 (1837).
(114) 6 C. & P. 147 (1833).
(115) [1820] R. & R. 421.
(116) [1813] R. & R. 249.
(117) [1808] R. & R. 142
(118) [1806] R. & R. 113.
(119) [1849] 2 C. & K. 903n; 1 Den. 467.
(120) [1848] 1 Den. 310.
(121) [1847] 2 C. & K. 379.
(122) [1865] 10 Cox. 177.
(123) [1853] 6 Cox. 340.
(124) [1839] 9 C. & P. 437.
(125) [1836] 7 C. & P. 432.
(126) [1836] 7 C. & P. 300.

Passey (127), *R.* v. *Hurse* (128), *R.* v. *Bingley* (129), *R.* v. *Gogerly* (130), *R.* v. *Standley* (96), *R.* v. *Borthwick* (131), *R.* v. *Owen* (132), *R.* v. *Duffey* (133), *R.* v. *Jackson* (134) and *R.* v. *Dacre* (135). The balance of reason and authority is, in my opinion, against the limited interpretation placed by Stephen, J., on sec. 34 in *Emperor* v. *Nirmal Kanta Roy* (9) and I must hold accordingly that the first point specified in the certificate of the Advocate-General, namely, that direction erroneous in law was given, cannot be sustained.

Secondly, as to non-direction. The argument advanced on behalf of the accused is that Mr. Justice Page omitted to draw the attention of the jury to the case for the defence, save and except the reference made by him, at the request of the Standing Counsel, to the statement recorded under sec. 342 of the Criminal Procedure Code. This contention has rendered necessary a minute examination of the entire evidence and of the summing up inasmuch as the defence has to be gathered in this case from the cross-examination of the witnesses for the prosecution and from the statement made by the accused after the close of the evidence. Whether there has or has not been misdirection by reason of non-direction cannot be discussed as an abstract question of law.

As Lord Alverstone, C. J., said in *R.* v. *Stoddar* (136) quoting with approval the words of Lord Esher, M. R., in *Abrath* v. *N.-W. Railway Co.* (137) mere non-direction is not necessarily mis-direction : those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood: see also *R.* v. *Cohen* (138) and *R.* v. *Elahee Bux* (139). Besides, every summing up must be regarded in the light of the conduct of the trial, and the questions which have been raised by the Counsel for the prosecution and for the defence respectively. As Jenkins, C. J., observed in *Emperor* v. *Upendra Nath Das* (1), the conduct of a case by a Counsel is not a negligible factor even in a Criminal Court though it may not necessarily conclude the accused, and that it is not without its influence is forcibly illustrated by the judgment of Lord Alverstone, C. J., in *R.* v. *Bridgwater* (140), with which all the Judges hearing that case agreed. The substance of the matter is that non-direction when it consists in omission to put the material facts or to put the defence to the jury is sufficient to cause the Court to quash the conviction, if the Court comes to the conclusion that is reasonably probable that the verdict of the jury was affected thereby: *R.* v. *Hill* (141), *R.* v. *Wilson* (142), *R.* v. *Sturgess* (143), *R.* v. *Baily* (144), *R.* v. *Wann*

(9) I. L. R. 41 Cal. 1072: s. c. 18 C. W. N. 723 (1914).
(96) [1816] Russ. & Rn. 305.
(127) [1836] 7 C. & P. 282.
(128) [1841] 2 M. & R. 360.
(129) [1821] R. & R. 446.
(130) [1818] R. & R. 343.
(131) [1779] 1 Douglas 207.
(132) [1825] 1 Moody. 96.
(133) [1830] 1 Lewin C. C. 194.
(134) [1857] 7 Cox. 357.
(135) [1842] Palmer 85; 1 Hale P. C. 439.
(1) 19 C. W. N 653: s. c. 21 C. L. J. 377 (1914).
(136) 2 Cr. App. Rep. 217, 246; 25 T. L. R. 712 (1909).
(137) L. R. 11 A. C. 247 (1886).
(138) 2 Cr. App. Rep. 197, 207 (1909).
(139) 5 W. R. Cr. 80 (1866).
(140) [1905] 1 K. B. 131 (135).
(141) 7 Cr. App. Rep. 26 (1911).
(142) 9 Cr. App. Rep. 124 (1913).
(143) 9 Cr. App. Rep. 120 (1913).
(144) 9 Cr. App. Rep. 94 (1913).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

(145), *R.* v. *Smith* (146) and *R.* v. *Willett* (147).

The points which have been emphasised before us by Counsel for the prisoner may be summarised as follows :—(1) Did three or four persons form the party? (2) Did two or three persons go inside the room and fire? (3) Was the prisoner the man who stood outside? Did the prisoner share the murderous intention of the other members of the party? Special stress has also been laid on what has been called the live-cartridge incident. The Standing Counsel has urged, on the other hand, that the case as now presented with so much elaboration was not developed in the evidence as elicited by cross-examination of the witnesses for the Crown. He has further maintained that the live-cartridge incident was not mentioned when Counsel for the prisoner addressed the jury. I have come to the conclusion that the importance of the live-cartridge incident, whatever its value may be, was not realised by Counsel for the accused at the trial. Purna Chandra Dey, a clerk in the Meteorological office, who was examined as a witness on behalf of the prosecution, produced two cartridges which he stated had been made over to him by the Police. He then added that they were given to him by another man in front of 26, Sankaritolla East Lane at about 4 P.M. in the afternoon of the 3rd August, and that he showed to the Police the spot which that man pointed out to him, as the place where they were found. The record ends here, as the witness was not further examined or cross-examined. The Standing Counsel has stated that as soon as the cartridges were produced by the witness, Counsel for the prisoner enquired whether the prosecution would call the man who, it was alleged, had found the cartridges. The prosecution stated that the man could not be produced as his whereabouts had not been traced. Counsel for the prisoner thereupon objected to the reception of the cartridges in evidence or of a hearsay statement as to the spot where they had been picked up by the unknown man. The objection was allowed and Mr. Justice Page ruled that the cartridges would not go in evidence. But they were not formally struck out of the list of exhibits and were shown to Mr. Bavin, Deputy Commissioner, though not to Mr. Todd, the gun-maker, when they were subsequently examined as witnesses. The evidence, however, furnished no indication as to the bearing of the discovery of the cartridges on the case for the defence. No doubt, we have been here pressed with the argument that the discovery of the live-cartridge shows that the accused fired his pistol for the first time in the course of his flight in the street, that he had not fired his pistol inside the Post Office, that he was consequently not one of the men who went inside the room, that his identification by the witnesses was accordingly unreliable and that he was really the man who stood outside, not participating in the murderous intention entertained by his confederates. This argument is attractive; but if the discovery of the live-cartridge was intended to be used as the basis for this theory, Counsel for accused should not have objected to the reception of the evidence. When we pass on to the other points emphasised on behalf of the accused, his Counsel finds himself in a difficulty, but of a different character. The points whereon such emphasis has been laid in the argument before us were not clearly foreshadowed, indeed, they were very im-

(145) 7 Cr. App. Rep. 135; 23 Cox. 183 (1912).
(146) [1920] 84 J. P. 67.
(147) 16 Cr. App. Rep. 146 (1922).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

perfectly indicated in the cross-examination. I have read the summing up with the care it deserves. The impression left on my mind is that, taken as a whole, it is what is sometimes designated a charge for conviction. But it cannot fairly be said that the facts were not left to the jury to decide and that the Judge usurped their function, merely because he gave expression, as he was entitled, to his opinion on the evidence strongly. *R.* v. *West* (148), *R.* v. *Beely* (149), *R.* v. *Frampton* (150), and *R.* v. *O'Donnell* (151). We must further remember that as Lord Hatherley said in *Prudential Assurance Coy.* v. *Edmonds* (152), it is not fair to criticise every line and letter of a summing up which has been delivered by a Judge in trying a case, specially when there is a somewhat imperfect record of it. We are not called upon to consider whether this or that phrase was the best that might have been chosen or whether a direction which has been attacked might have been more fully or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should have been introduced. As Lord Shaw observed in *Arnold* v. *King-Emperor* (153), a charge to a jury must be read as a whole; the substantial question is, whether the evidence for the prosecution and the case for the defence were fairly summed up. I am not unmindful that, as ruled in *Emperor* v. *Upendra Nath* (1), the mere fact that Counsel for the accused has failed to present to the Court a particular aspect of the case, cannot justify an omission on the part of the Judge to draw the attention of the jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence; it is the duty of the Judge to draw the attention of the jury to such possible view of the case, on the evidence, notwithstanding that it may have escaped the Counsel for the accused; in other words, the line of defence adopted by Counsel does not relieve the Judge of his duty; *R.* v. *Totty* (154), *R.* v. *Davis* (155) and *R.* v. *Burton* (156). But the duty which is thus imposed on the Judge can be discharged only with reference to the evidence adduced at the trial. In the case before us, the real difficulty is that the case for the defence was not adequately developed in such evidence as could be elicited by cross-examination of the witnesses for the Crown. I do not hesitate to record my opinion that the cross-examination was perfunctory and the defence of the accused became intelligible only when he made his statement under sec. 342 of the Criminal Procedure Code, namely the three-fold assertion that he was the man in the courtyard, that he was not one of those who did fire at the Post Master and that he did not share the intention of his confederates to commit a murder. The fact, however, cannot be overlooked that a statement under sec. 342 is not made on oath and cannot be tested by cross-examination. The accused is afforded an opportunity to explain any circumstances appearing in the evidence against him, on the principle explained by Tindal, C. J.,

(1) 19 C. W. N. 653: s. c. 21 C. L. J. 377 (1914).

(148) 4 Cr. App. Rep. 179 (1910).

(149) 6 Cr. App. Rep. 138 (1911).

(150) 12 Cr. App. Rep. 202 (1917).

(151) 12 Cr. App. Rep. 219 (1917).

(152) 2 App. Cas. 494 (1877).

(153) I. L. R. 41 Cal. 1023; s.c. 18 C. W. N. 785; 16 Bom. L. R. 544 (P. C.) (1914).

(154) [1914] 111 L. T. 167; 10 Cr. App. Rep. 78; 24 Cox. 227.

(155) [1917] 2 K. B. 855; 13 Cr. App. Rep. 10 26 Cox. 98.

(156) 17 Cr. App. Rep. 5 (1922).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

in *R.* v. *Frost* (157), namely, that though the proof of the case against the prisoner must depend for its support, not upon the absence of explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt given by the Crown, yet if he is involved by such evidence in a state of considerable suspicion, he is called upon, for his own sake and for his own safety, to state and elucidate the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence: see *Amrita Lal Hazra* v. *Emperor* (158). The statement of the accused cannot be placed on a higher level than this, and the Court and the jury are expressly left free to draw such inference from the refusal of the accused to answer or from the answers he gives, as they think just. Mr. Justice Page accurately appraised the function of the statement of the accused, and no exception can be taken on that ground. But his summing up was defective to this extent that it did not at first specifically refer to the statement. The Standing Counsel, however, properly called attention to the point, whereupon Mr. Justice Page made supplementary observations. This might not have been sufficient, if the points which arose on the statement had not already been dealt with by him on reference to the evidence, for as observed in *R.* v. *Willett* (147), a grave omission to direct the jury on a cardinal matter in the case cannot be made good merely by Counsel's calling attention to it at the termination of the summing up. It is one thing to indicate agreement with a submission made by Counsel; it is another to direct a jury effectively.

(147) 16 Cr. App. Rep. 146 (1922).

(157) 9 C & P. 129; 4 St. Tr. N. S. 85; 2 Moody (P. C.) 148 (1840).

(158) I. L. R. 42 Cal. 957, 1011; s. c. 19 C. W. N. 676 (1915).

The vital truth of the matter is, not that the summing up was inadequate, judged in the light of what had been elicited in the cross-examination of the prosecution witnesses, but that proper foundation for the defence theory had not been laid in the evidence. This has created serious doubts in my mind as to whether in view of the perfunctory nature of the cross-examination, the accused can be said to have had a fair trial. I am not in a position to explore the reason for this perfunctory cross-examination, or to ascertain whether it is attributable to the inaptitude of Counsel who had from a very early stage formed the opinion that the accused had no defence to make and who had been advised that while it was their duty to test by cross-examination the accuracy of the witnesses for the Crown, they were not entitled to set up any substantive defence in opposition to the case for the Crown. How defective the cross-examination was is illustrated by the fact that a very material point was elicited from the packer Hara Prasad Das not on cross-examination by defence Counsel, but in answer to a question by the Court when the witness was re-called at the request of one of the jurors. What cannot but be regarded as a grave defect in the conduct of the defence case cannot in such circumstances be remedied except by a retrial, if such retrial is permissible under the law.

I am fortified in this view by another circumstance of fundamental importance which cannot be overlooked, *viz.*, the question of the proper sentence when an accused is convicted under sec. 302 read with sec. 34. The cases in the books since the decision in *Queen* v. *Baboo Lall* (159) show that in such a contingency the facts must be carefully ascertained before the sentence is determined. This aspect of

(159) [1864] 1 W. R. Cr. 48.

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

the matter was indicated by Sir James Colvile in *Ganes Singh* v. *Ram Raja* (21). In that case, chiefs of several villages collected people together with the preconcerted purpose of plundering the Plaintiff's property; all acted with a common purpose of plunder and each co-operated more or less. The Judicial Committee held that where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other, in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. In such a contingency, each and every person, co-operating to any extent in a plunder of this description, is responsible in a civil proceeding to recoup the party plundered for the loss he has sustained. But in a criminal matter, punishment may be apportioned. In the civil proceeding, it is immaterial what share of the plunder one received of whether one was coerced to join in the transaction, although if the matter culminated in a criminal proceeding, where the Judge had to inflict a punishment, all that might be taken into account. In my opinion, it would not be right on principle even to consider the punishment, before it has been determined whether the accused is to be convicted under sec. 302 alone or under sec. 302 read with sec. 34. This is precisely a case where a special verdict may appropriately be taken, so as to enable the Judge, who alone fixes the punishment, to ascertain what are the precise facts found by the jury, on whom after all the duty is imposed to decide which view of the facts is true; *R.* v. *Dudley* (160). Such a course becomes almost essential, where, as here, Counsel for the accused even before the commencement of the trial, has informed the Judge that there is no defence to the charge and has raised the question of punishment. I fully realise that a Judge is sometimes placed inevitably in a difficult situation, such as when he has before him a confession by the accused which is retracted or rejected because obtained by improper means, or where he has before him the fact of previous conviction of the accused, or, where, notwithstanding a plea of guilty by an accused in a capital case, the prosecution, according to established procedure, seeks to prove the case; *Emperor* v. *Chinna* (161) and *Emperor* v. *Laxmya* (162). But I am not convinced of the necessity or propriety of an addition to the embarrassments of a Judge, the formation of whose judgment is subject to the operation of subconcious forces, as has been felicitously expressed by Benjamin Cardozo in his illuminating analysis of the nature of the Judicial Process: "There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if Judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in any analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do." (Page 168). This would be an additional reason for retrial, if the grant of retrial be within the power of this Court, and this brings me to the consideration of the scope of cl. 26 of the Letters Patent.

(21) 12 W. R. 38; 3 B. L. R. 44 (P. C.) (1869).
(160) 14 Q. B. D. 273 (1884).
(161) 8 Bom. L. R. 240 (1906).
(162) 9 Bom. L. R. 356; 2 Hn'e P. C. 225 (1907).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

Cls. 25 and 26 of the Letters Patent are in these terms: "25. And we do further ordain, that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

"26. And we do further ordain, that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of Original Criminal Jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right."

Cl. 25 ordains that there shall be no appeal from any sentence or order passed or made in any criminal trial before the High Court as a Court of Original Criminal Jurisdiction. The trial Judge, however, is granted discretion to reserve any point or points of law for the opinion of the High Court. Cl. 26 contemplates in addition a case where the Advocate-General has certified that in his judgment there is an error in the decision of a point or points of law decided by the trial Judge or that a point or points of law which has or have been decided by the trial Judge should be further considered. Cl. 26 provides that in both the classes of cases, that is, where a point of law has been reserved by the trial Judge or where a certificate has been granted by the Advocate-General in either of the two forms mentioned, the High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the trial Court and to pass such judgment and sentence as to the High Court shall seem right.

The initial step is for the trial Judge to reserve a point of law or for the Advocate-General to grant a certificate. The successive stages of the process which follows inevitably may now be enumerated:—

(i) The Court reviews the entire case or such part of it as may be necessary.

(ii) The Court finally determines the point or points of law reserved or certified.

(iii) The Court thereupon alters the sentence passed by the trial Court.

(iv) The Court passes such judgment and sentence as shall seem right to the Court.

As regards the first stage, it is plain that the Court reviews the case in whole or in part with a view to decide the point of law reserved or certified. This is placed beyond doubt by the use of the word "necessary," which clearly means "necessary for the decision of the point of law reserved or certified." The Court does not at this stage treat the case as open for re-consideration in all its generality, as might have been possible if an appeal had not been excluded by cl. 25.

As regards the second stage, it is equally clear that what is finally determined is

the point of law reserved or certified. This confirms the view just indicated as to the function of the Court in the first stage.

As regards the third stage, where the Court can alter the sentence passed by the trial Court, the scope manifestly depends upon the true construction of the term "thereupon." The term "thereupon" may be interpreted as equivalent to "upon final determination of the point of law reserved or certified." Such an unqualified interpretation, if adopted, would lead to the result that even if the point of law reserved or certified has been decided against the prisoner, he would be entitled to invite the Court to alter the sentence. Such an interpretation, in my judgment, would be unreasonable, and would defeat the fundamental restriction that no appeal lies from the sentence or order of the trial Judge. When a point of law is reserved by the trial Judge or a certificate is granted by the Advocate-General, the purpose is to secure an alteration of the sentence on the hypothesis that it is based on an erroneous view taken by the trial Judge of a point of law. If no error is established, the reason why the prisoner can claim an alteration of the sentence disappears. The term "thereupon" must consequently be construed with reference to the context; and it may, with good reason, be interpreted as equivalent to "upon final determination of the point of law reserved or certified in favour of the prisoner." It is not necessary that the contention of the prisoner should succeed in its entirety; if the opinion of the trial Judge on the point reserved or certified, which forms an ingredient of the reasons for conviction and sentence, is not supported, the conviction cannot be sustained, and it then becomes open to the Court to alter the sentence passed by the trial Judge.

As regards the fourth stage, the context shows that if the third stage has been reached and the Court is in a position to exercise the full power and authority vested in it to alter the sentence, the Court is competent to pass such judgment and sentence as to the Court shall seem right. The question must be faced, at this stage, whether the power and authority to pass such judgment and sentence as to the Court shall seem right include power and authority to direct a retrial. In the determination of this matter, we cannot obviously ignore the judicial decisions pronounced on the subject during the last sixty years.

In this Court, sec. 26 has been invoked and applied in the cases of *R.* v *Yad Ali* (163), *R.* v. *Haribole* (164), *R.* v. *Pemantle* (165), *R.* v. *Shib Chandra Mitra* (166), *R.* v. *Nilmadhab Mitter* (167), *R.* v. *Barton* (168), *R.* v. *O'Hara* (169), *R.* v. *Abbas Ali* (170), *R.* v. *McGuire* (171), *R.* v. *Zawar Rahaman* (172), *R.* v. *Imam Ali* (173), *R.* v. *Charu Chandra Mookerjee* (174), *R.* v. *Khudiram* (175), *R.* v. *Taleb* (176), *R.* v. *Upendra Nath Das* (1), *R.* v. *Fateh Chand* (177), *R.* v. *Peary* (178) and

(1) 19 C. W N 658: s. c. 21 C. L. J. 877 (1914).
(163) [1866] 1 Ind. Jur. 424.
(164) I. L. R. 1 Cal. 207: s. c. 25 W. R. Cr 36 (1876).
(165) I. L. R. 8 Cal 971 (1882).
(166) I. L R. 10 Cal. 1079 1884).
(167) I. L R. 15 Cal. 595 (F B.) (1888).
(168 I L. R. 15 Cal 238 (1889).
(169) I L. R 17 Cal. 642 (1890).
(170) I. L. R. 25 Cal. 512: s. c. 1 C. W. N. 255 (1897).
(171) 4 C. W. N. 433 (1898).
(172) I. L R. 31 Cal. 142 1903.
(173) 8 C. W. N. 278 (1903.
(174) 38 C. L. J. 309 (1904)
(175) 12 C. W. N. 580 (1906).
(176) 10 C. L. J. 13 (1909.
(177) I. L. R. 44 Cal. 477: s. c. 21 C. W. N 83; 24 C. L. J. 400 (1916).
(178) 23 C. W. N. 426 (1919).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

R. v. *Panchu Das* (179). In *R.* v. *Pemantle* (165), *R.* v. *Nilmadhab* (167), *R.* v. *Abbas Ali* (170), *R.* v. *Zawar Rahaman* (172) and *R.* v. *Panchu Das* (179) points of law had been reserved by the trial Judge under cl. 25. In *R.* v. *Taleb* (176) a point had been reserved by the trial Judge under cl. 25 and a certificate had been granted by the Advocate-General under cl. 26. In the other cases, certificates had been granted by the Advocate-General. It is worthy of note that Advocate-Generals have, in all modesty, generally granted certificates in the second form, *viz.*, that there is a point or points of law which should be further considered. There are four instances of certificates in the first form, *viz.*, that the point of law has been erroneously decided; in two of these, *R.* v. *Yad Ali* (163) and *R.* v. *Taleb* (176) the opinion expressed in the certificate prevailed; in the other two, *viz.*, *R.* v. *McGuire* (171) and *R.* v. *Upendra Nath Das* (1) the opinion expressed in the certificate was rejected.

In each of the cases mentioned, whether the point of law had been reserved or certified, the Court, in the first instance examined and determined such point and such point alone, and it was only when that point had been decided in favour of the accused that the Court proceeded to consider the question of alteration of the sentence passed by the trial Court. Where the point reserved or certified was decided against the accused the Court did not proceed further. This is illustrated by the cases of *R.* v. *Pemantle* (165), *R.* v. *Shib Chandra* (166), *R.* v. *Nilmadhab* (167), *R.* v. *Barton* (168), *R.* v. *Abbas Ali* (170), *R.* v. *McGuire* (171), *R.* v. *Zawar Rahaman* (172), *R.* v. *Charu Chandra Mookerjee* (174), *R.* v. *Upendra Nath Das* (1) and *R.* v. *Peary* (178). The case of *R.* v. *Yad Ali* (163) stands in a class by itself; there the conviction was proper, but the sentence was illegal, inasmuch as rigorous imprisonment had been directed where simple imprisonment was prescribed by the Indian Penal Code. This was the error certified, and the sentence was accordingly set right.

In cases where the point reserved or certified was decided in favour of the accused, the Court proceeded to consider the evidence on the record, in other words, assumed the functions of the jury. This class comprises the cases of *R.* v. *Haribole* (164), *R.* v. *O'Hara* (169), *R.* v. *Imam Ali* (173), *R.* v. *Khudiram* (175), *R.* v. *Taleb* (176), *R.* v. *Fateh Chand* (177) and *R.* v.

(1) 19 C. W. N. 653: s. c. 21 C. L. J. 377 (1914).
(163) [1866] 1 Ind. Jur. 424.
(165) I. L. R. 8 Cal. 971 (1882).
(167) I. L. R. 15 Cal. 595 (F. B.) (1888).
(170) I. L. R. 25 Cal. 512: s. c. 1 C. W. N. 255 (1897).
(171) 4 C. W. N. 433 (1898).
(172) I. L. R. 31 Cal. 142 (1902).
(176) 10 C. L. J. 13 (1909).
(179) I. L. R. 47 Cal. 671: s. c. 24 C. W. N. 501; 31 C. L. J. 402 (1920).

(1) 19 C. W. N. 653: s. c 21 C. L. J. 377 (1914).
(163) [1866] 1 Ind. Jur. 424.
(164) I. L. R. 1 Cal 207: s. c. 25 W. R. Cr 36 (1876).
(165) I. L. R. 8 Cal. 971 (1882).
(166) I. L. R. 10 Cal. 1079 (1884).
(167) I. L R 15 Cal. 595 F. B) (1888).
(168) I. L. R. 16 Cal. 238 (1889).
(169) I. L. R. 17 Cal. 642 (1890).
(170) I. L R. 25 Cal. 512: s. c. 1 C. W. N. 255 (1897).
(171) 4 C. W. N. 433 (1898).
(172) I. L. R. 31 Cal 142 (1902).
(173) 8 C. W. N. 278 (1903).
(174) 38 C. L. J 309 (1904).
(175) 12 C. W. N. 580 (1908).
(176) 10 C. L. J. 13 (1909).
(177) I. L. R. 44 Cal. 477: s. c. 21 C. W. N. 33; 24 C. L. J. 400 (1916).
(178) 23 C. W. N 426 (1919).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

Panchu Das (179). In the first of these cases, *R.* v. *Haribole* (164) the Court, upon consideration of the residue of the evidence, affirmed the conviction and sentence. In the other cases, the Court either set aside the conviction and sentence or affirmed the conviction but modified the sentence. Except in *R.* v. *Yad Ali* (163) in every case that I have been able to discover the conviction was challenged on the ground of what may be comprehensively termed "misdirection" which includes erroneous direction or non-direction as also erroneous reception or exclusion of evidence. In cases of misreception of evidence, the Court was faced with sec. 167 of the Indian Evidence Act and felt constrained to consider whether the balance of evidence left after exclusion of what had been erroneously admitted was sufficient to support the conviction. In cases of erroneous direction or non-direction. sec. 167 was held inapplicable and yet the Court proceeded to estimate the probative value of the evidence recorded at the trial. The most important decisions from this point of view are those of *R.* v. *Fateh Chand* (177) and *R.* v. *Panchu Das* (179). The construction placed on cl. 26 in the case last mentioned, *R.* v. *Panchu Das* (179), militates against the view that the clause authorises the Court to grant a retrial. It must be noted, however, that the case then under consideration was that of erroneous reception of evidence which would attract the application of sec. 167 of the Indian Evidence Act. I had occasion to point out that the view taken accorded with the accepted interpretation of sec. 2 of the Crown Cases Act, 1848, which furnished the model for the provisions of cls. 25 and 26 of our Letters Patent; *R.* v. *Saunders* (180) and *Queen* v. *Gibson* (181). It was further observed that though *R.* v. *Mellor* (6) and *R.* v. *Yeadon* (182) might be invoked as authorities in support of the grant of a *venire de novo* when the trial has been what is called a mis-trial, that is, a trial under such very exceptional circumstances as vitiate it because it is conducted in a manner unknown to law, weighty authority for the contrary position might be found in the decisions of the Judicial Committee in *R.* v. *Bertand* (183) and *R.* v. *Murphy* (184), which dissented from *R.* v. *Scaife* (185) and was mentioned by Bovill, C. J., in *R.* v. *Martin* (186). The view thus taken by this Court in the case of *R.* v. *Panchu Das* (179) is in accord with the prevailing opinion in Bombay as well as in Madras, as appears from the decisions in *R.* v. *Dayal Jayraj* (187), *R.* v. *Navroji* (188), *R.* v. *Pestonji* (2), *R.* v. *Pitambar* (67), *R.* v. *Narayan* (189), *R.* v. *Subrahmania* (190) and *R.* v. *Muthu Kumar Swamy* (191).

Since the decision of this Court in *R.* v. *Panchu Das* (179), the question of re-trial

(163) [1866] 1 Ind. Jur. 424.
(164) I. L. R. 1 Cal. 207: s. c. 25 W. R. Cr. 36 (1876).
(177) I. L. R. 44 Cal. 477: s. c. 21 C. W. N. 83; 24 C. L. J. 400 (1916).
(179) I. L. R. 47 Cal. 671: s. c. 24 C. W. N. 501; 31 C. L. J. 402 (1920).

(2) 10 Bom. H. C. R. 75 (1873).
(6) Dears & Bell 468; 7 Cox. C. C. 454 (1858).
(67) I. L. R. 2 Bom. 61 (1877).
(179) I. L. R. 47 Cal 671: s. c. 24 C. W. N. 501; 31 C. L. J. 402 (1920).
(180) [1899] 1 Q. B. 490.
(181) 18 Q. B. D. 537 (1887).
(182) L. & C 81; 9 Cox. 91 (1861).
(183) L. R. 1 P. C. 520 (1867).
(184) L. R. 2 P. C. 535 (1869).
(185) 17 Q. B. 238 (1851).
(186) L. R. 1 C. C. R. 378 (1872).
(187) 3 Bom. H. C. R. 20 (1866).
(188) 9 Bom. H. C. R. 358 (1872).
(189) I. L. R. 32 Bom. 111 (1907).
(190) L. R. 28 I. A. 257: s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 866 (1900).
(191) I. L. R. 35 Mad. 397 (1912).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

has been examined by the House of Lords in *Crane* v. *Director of Public Prosecution* (192), where the decision of the Court of Criminal Appeal in *R.* v. *Crane* (193) was affirmed by a majority. Viscount Finlay maintained that the deliberate policy of the legislature in the Criminal Appeal Act, 1907, is to prevent any further proceedings, such as would have taken place on an award of a *venire de novo* by the Court of Error or the granting of a new trial by the High Court in criminal cases. Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Parmoor took the contrary view, and upon an analysis of *R.* v. *Mellor* (6) and *R.* v. *Yeadon* (182) held that the award of a *venire de novo* in the event of mis-trial was competent to the Court of Crown Cases Reserved and was equally open to the Court of Criminal Appeal; *R.* v. *Dickman* (194) and *R.* v. *Wakefield* (195). To put the matter briefly, the choice, in their opinion, did not lie between affirmation and acquittal.

I am not called upon to decide whether, under any imaginable combination of circumstances which may place a criminal trial in the category of mis-trial, that is, no trial in the eye of the law, this Court is competent under cl. 26 to direct a retrial when it is in a position to exercise full power and authority to pass such judgment and sentence as shall seem right. When such a contingency happens, the true effect of the decision of the Judicial Committee in *Subrahmania* v. *King-Emperor* (190) will require careful consideration, and the Court will have to determine whether the expression pass judgment and sentence" may be so interpreted as to include an order of retrial.

In the case before us, there are several difficulties which bar the path of the prisoner. In the first place, according to the accepted interpretation of cl. 26, the only points open for examination during the first two stages of the proceedings under cl. 26, are the points of law specifically mentioned in the certificate of the Advocate General; [*cf.* the observation of Wills, J., in *R.* v. *Stubbs* (196)]. No other points are open for consideration at those stages, even though such points may have emerged from an examination of the materials requisite for the decision of the certified points, or have otherwise come to the knowledge of the Court. The matters which in my judgment have tended to affect the fairness of the trial are not mentioned in the certificate; indeed, they could not, in the circumstances already explained, be expected to appear in a certificate granted upon application made by Counsel who have conducted the defence as they have done. In the second place, as neither of the two points specifically certified has been sustained, we cannot pass from the second to the third stage when alone the question of alteration of sentence can come under consideration. In the third place, even if cl. 26 were construed to include full power and authority to direct a retrial when there had been no trial in the eye of the law, the question would still remain whether what had happened brought the case within that category.

It may seem unsatisfactory that the jurisdiction created by cls. 25 and 26 of the Letters Patent should be so limited in scope and that its exercise should be subject to such stringent conditions. It must be remembered, however, that these provi-

(6) Dears & Bell 468; 7 Cox. C. C. 454 (1858).
(182) L. & C. 81; 9 Cox. 91 (1861).
(190) L. R. 28 I. A. 257: s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 866 (1900).
(192) [1921] 2 A. C. 299.
(193) [1920] 3 K. B. 236.
(194) [1910] 74 J. P. 449.
(195) [1918] 1 K. B. 216.
(196) [1855] Dearsley 555.

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

sions were framed in view of the powers exercised by the Court of King's Bench under a Writ of Error on the fiat of the Advocate-General and by the Court of Crown Cases Reserved under the Statute of 1848. (For the antecedent state of the law reference may be made to the charges of Ryan, C. J., and Grant, J., which are set out in the Appendix to the edition of the Supreme Court Rules by Smoult and Ryne). Since then the Criminal Appeal Act of 1907 has been brought into operation, and yet notwithstanding the extensive powers of interference conferred on the Court of Criminal Appeal, that Court has occasionally found it impossible to grant relief by way of appeal, though it did not hesitate to express the opinion that the circumstances might justify the intervention of the Secretary of State with a view to the exercise of the clemency of the Crown. Two such instances will be found in the cases of *R.* v. *Law* (197) and *R.* v. *Pridmore* (198). In the case last mentioned, it was ruled that if two persons are engaged in a common unlawful enterprise, and one of them, to avoid apprehension, attempts murder, both may be found guilty of the felony, if the jury are satisfied from their conduct at the time that at any moment there was a determination on the part of each to aid the other in escaping arrest; but if it can be ascertained which actually made the attempt, the sentence on him should be the heavier. This fits in with the principle enunciated by Sir James Colvile in *Ganesh Singh* v. *Ram Raja* (21) and the concluding observations made by Phillimore, J., may be recalled here: "We wish to add a word on another matter. There is a good deal to support the suggestion that the other man fired, and although in law both are guilty, if it is clearly established that one fired the shot, the sentence on the other might well be reduced. If there is additional evidence to show that the other prisoner fired the shot, it would be proper to submit it to the Home Secretary, and we think that if he is satisfied on the point, it would be proper to reduce the sentence on the Appellant by the clemency of the Crown; but it is not a matter with which this Court can deal." [*Cf.* *Queen* v. *Babee* (199)]. If the Court of Criminal Appeal found itself in this position we cannot put an extended construction on cls. 25 and 26 of our Letters Patent.

In my opinion, there is no escape from the conclusion that as neither of the two points of law specifically certified by the Advocate-General can be answered in favour of the accused, his application for review must be dismissed so far as the exercise of the powers conferred on this Court by cl. 26 of the Letters Patent is concerned. I desire to add finally that the trial of this case has made clearer than ever the necessity for full and accurate shorthand notes of the proceedings at the trial, on the lines indicated in sec. 16 of the Criminal Appeal Act.

The importance of such shorthand notes was emphasised by Reading, L. C. J., in *R.* v. *Dixon* (200) and by Trevethin, L. C. J., in *R.* v. *Monkham* (201) and in the case last mentioned, the following observations were made: "This shorthand note of the proceedings is not clear. In several cases recently this Court has had to complain of the insufficiency of the shorthand notes. It must be understood by shorthand writers that their duty is to

(21) 12 W. R. 38; 3 B. L. R. 44 (P. C.) (1869).
(197) 9 Cr. App. Rep. 246 (1913).
(198) 8 Cr. App. Rep. 198 (1913).
(199) [1864] W. R. Gap. 27.
(200) 15 Cr. App. Rep. 96 (1920).
(201) 16 Cr. App. Rep. 215, 116 (1922).

take in shorthand everything that occurs at the trial, so that if an appeal is brought, this Court may be able to form as good an opinion as is possible when reading the transcript. An abbreviated note is not sufficient. Everything that occurs at the trial must be taken, in the form of question and answer, which should be numbered, to admit of easy reference."

The order of the Court is that the application made by the prisoner under cl. 26 of the Letters Patent do stand dismissed.

RICHARDSON, J.—At the outset I desire to express my concurrence generally with the observations which have been made by the learned Judge presiding in reference to the duties cast upon an Advocate-General by cl. 26 of the Letters Patent.

As to the meaning of sec. 34 of the Penal Code, which I regard as the main question in this case, a question which touches the daily administration of the law, I also agree with the conclusion which has been stated.

I need not recapitulate the facts. Amrita Lal Ray, the Post Master of the Sankaritolla Post Office in Calcutta, was killed on the 3rd August last by a bullet fired from an automatic pistol. For my present purpose it is not necessary to decide which of the three or four men, including the accused Barendra Kumar Ghosh, fired the fatal shot. The accused Barendra was subsequently tried by Page, J. and a Special Jury on a charge of murder framed under sec. 302 of the Penal Code. The jury found him guilty and he was sentenced to death.

In the course of his charge to the jury, the learned Judge instructed them in effect, that if the three or four persons, of whom the accused Barendra was one, went to the place with a common intention to rob the Post Master and, if necessary, to kill him, and if the jury were satisfied that one of them fired the fatal shot in furtherance of that common intention, then they were all equally liable. In those circumstances it was the duty of the jury to find the accused guilty of murder, whether the fatal shot was fired by him or by one of the others.

That is the substance of the direction in respect of which the learned Advocate-General has given his fiat or certificate that a matter of law is raised proper for the further consideration of this Court.

Now, the learned Counsel for the accused conceded that judged by the common law of England, the learned Judge was not in error. The law of England on the subject is of old standing as a reference to any well-known text-book and to such cases as *R.* v. *Salmon* (25) and *R.* v. *Coney* (26) will show.

Learned Counsel, however, was careful to remind us, and I do not forget, that we are bound to consider Indian and not English law. But some reference to English law is still necessary because the point before us cannot well be discussed without using expressions, which, though they have dropped out of use in India because they are not to be found in the Code, are still familiar in England, and were, I think, familiar to Indian lawyers of the middle of the last century, at any rate to those of the Presidency towns, including Calcutta, where the principal laws were wont to be promulgated. These expressions merely supply a convenient terminology and, when they are understood, I know of nothing in the history of the Penal Code before it became law which throws much, if any, light on the mean-

(25) 6 Q. B. D. 79 (1880).
(26) 8 Q. B. D. 534 (1882).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

ing of sec. 34.* The usual rule applies that the intentions of the legislature are to be gathered from the words used in the context in which they stand. The Code, however, became law in 1860 and in construing any of its provisions, we are entitled to guidance from the course of judicial decision, even if there be no authority binding on us as a Full Bench.

The terms referred to and their meanings are as follows :—

A principal in the first degree is the immediate perpetrator of an act, the person, for instance, by whose proper hand a death wound is inflicted.

A principal in the second degree (1) must be present at the commission of the act, and (2) he must be aiding and abetting. The older and perhaps better term "accessory at the fact" implies both elements. But if this term be employed, it has to be remembered that the person so described is in English law a principal.

An accessory before the fact is under the Code an abetter and is dealt with in the chapter on abetment.

The accessory after the fact has no present interest. Under the Code he is punishable in particular cases for such separate and independent offences as harbouring or concealing an offender, or facilitating escape from lawful custody and so forth.

The difference between the two degrees of principals is clearly explained in the following charge given to a jury in a case where a man had been killed in a duel and the seconds or one of the seconds was under trial for murder as an accessory at the fact. It does not signify whether the offence committed was murder, as in England, or, as it would be in India, culpable homicide not amounting to murder [Code, sec. 299, Exception (5)]. The charge runs :—

"There is no difficulty as to the law on this subject. Principals in the first degree are those by whom the death wound is inflicted, principals in the second degree, those who are present at the time it is given aiding and abetting, comforting and assisting, the persons actually engaged in the contest. Mere presence alone will not be sufficient to make a party an aider and abetter, but it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals" (that is, the principals in the first degree). "If either of the persons sustained the principal" (that is, the principal in the first degree) "by his advice or presence, or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not do or say anything, yet if he was present and assisting and encouraging when the pistol was fired, he will be guilty of the offence imputed by the indictment."

That charge was approved in *Coney's* case (26) by Cave, J., with whose judgment the eight Judges comprising the majority generally agreed.

Coming then to the Code, I propose, in the first instance, to deal with the point which arises as though it were *res integra*.

Sec. 34 and the closely connected secs. 35, 37 and 38 were intended to lay down compendiously, in the fewest possible words, some elementary principles of criminal liability. They do not create offences and, given the common intention, in practice it does not signify which section applies in any particular case. As

* NOTE.—It may be convenient if I attached a brief note of so much of the relevant history as I know.—T. W. R.

(26) 8 Q. B. D. 534 (1882).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

matter of construction they are interpretative clauses, included in the chapter of General Explanations, and must be read into the Code definitions of substantive offences.

The precise point for determination, as I conceive, is whether the liability imposed by sec. 34, with which we are chiefly concerned, extends only to principals in the first degree or whether it also extends to principals in the second degree or accessories at the fact. The narrower view is urged for the accused, the wider one for the Crown.

If the narrower view be adapted the liability of accessories at the fact must depend entirely on provisions in the chapter on abetment such as secs. 107, 109 and 111. Another way, therefore, of stating the question is this:—

As the Code does not use the terms principal in the first degree and principal in the second degree, the inference is that it was thought unnecessary to retain the distinction. What is the result? Are accessories at the fact classed with principals under sec. 34 or are they classed under the later provisions with abetters?

Sec. 34 speaks of a criminal act being done by several persons in furtherance of the common intention of all, and it pronounces that "each of such persons is liable for that act in the same manner as if it were done by him alone."

The objection to giving the section the wider meaning is founded on the opening phrase:—"When an act is done by several persons." It is argued that when, for instance, one man is stabbed by another in the presence of the latter's confederates, the act of stabbing is done by the one man and not by his confederates. That is no doubt true in one sense of the words. But it is argued on the other side, that to stop at the opening words is to give no force or value to the words which follow, "in furtherance of the common intention," that the reference to common intention introduces the notion of common responsibility, and that if the language as a whole be given its full sense, the act done is the joint act, or the act of the immediate perpetrator and his confederates, because it is done in furtherance of the common intention of them all.

The fact that the words "in furtherance of the common intention" were inserted by an amending Act of 1870, makes no difference to the meaning. In either view of the section, the qualification, if not expressed, would necessarily have to be implied.

No assistance again for either view is to be obtained from sec. 33 which says that "the word 'act' denotes as well a series of acts as a single act." For clearly sec. 34 must be so construed as to have an intelligent meaning when applied to the case of a single act done by several persons.

Nor do I think that anything turns, as the learned Standing Counsel suggested, on any difference between a criminal act and an offence. Leaving out "special" and "local" laws, and confining myself to the Penal Code, a criminal act would seem to be an act forbidden by and punishable under some provision of the Code, if the requirements of that provision as to the intention or state of mind of the doer are satisfied. By definition, therefore, (sec. 40), a criminal act is an offence and it may be an offence under more than one provision. The limit of punishment awardable may depend on the quality of the intention with which the act is done and on the effect produced. The offence at its highest is then the complete whole comprising the act

done with the concomitant criminal mind, or intent, or *mens rea*, and the effect produced. An unjustifiable blow is a criminal act and an assault. If it causes death, the offence may amount to murder. If the injury is not fatal, the offence will amount to something less than murder.

An effect, *e.g.*, death, may be caused—

(*a*) by a single act done by one man;

(*b*) by a series of acts done by one man at the same time and place, *e.g.*, a succession of blows;

(*c*) by acts done by different men at the same time and place, *e.g.*, two men inflicting separate wounds each of which, apart from the other, would be fatal, or one man holding a ladder while another ascends and kills the occupant of the room above.

The acts of the different men may each be a single act or a series of acts;

(*d*) by separate acts (or series of acts) done by the same man, or by different men, at different times or places, *e.g.*, the case in illustration (*a*) of sec. 37, of a man being killed by small doses of poison administered at different times.

The question is, does the group of sections render liable accessories at the fact to these various acts?

According to the wider view, an act (or a series of acts) is done by several persons when one man in the presence of confederates gives another a blow (or a succession of blows). According to the same view, the case of a series of acts done by different persons at different times and places, each separate act possibly in the presence of different confederates, is governed by sec. 37. This result is intelligible.

The other view of the section presents great difficulty when applied to a single act done by several persons. Learned Counsel for the accused said that sec. 34 postulates not only identity in intention but also identity in act. But when do several persons do the same act in the narrow sense suggested? The question, so far as I know, has no place in criminal law and has never been discussed in India or in England. Take the case suggested in the argument, of three men pulling a heavy roller over a sleeping child. The three men are not doing the same act. There are three men doing different acts of pulling, possibly with different degrees of strength. One man might say by way of excuse or palliation that the pulling was done by the other two and that he merely had his hand on the handle bar. Or suppose that three men hold the dagger which was driven into the victim. The driving force might come from one man. The hold of the other two men on the dagger might merely show that their minds and consent went with the act. What is the difference between these two men and the men who, without pulling a useless hand on the dagger, stand by aiding and assisting, as for instance by preventing the victim from struggling or by keeping watch? The latter participates or cooperates in the act just as much as the two men. The act is done by them all. Other cases suggested by learned Counsel fare no better.

Take the case of the two men pulling taut from opposite directions, the noose which they have put round a third man's neck. Here again it would be open to one of the two men to say that he at his end of the rope did no pulling and the deceased was killed by the rope being sharply jerked by the man at the other end.

Similarly in the cases suggested of several men causing death by drowning

by holding a man under water or upsetting him out of a boat. The individuals concerned in these offences do not each and all do the same act. In the case of two men drowning a third, one of the two men might plead that while he only committed an assault by pushing the deceased over the bank, it was the other who held the head of the deceased under the water and so drowned him.

The truth is that in all these cases what is single is the effect produced. The different men who take part in the offence may do similar acts. But their acts are not the same. They are different acts. Even if mere similarity were sufficient, it would be impossible to prove. As shown above pleas destructive of similarity, still more of identity, might be put forward in excuse. Murders of the sort suggested are not usually committed in broad day-light in the presence of witnesses able to take stock of the precise part taken by different offenders.

In the wider view of secs. 34 and 37, these cases would present no difficulty. Prove the common intention of the persons present at the commission of the offence and all would be equally guilty of nothing less than that offence. If death were the result of the act or series of acts of one out of several confederates, the act would be done by them all within the meaning of sec. 34. If death followed the different acts of different confederates at the same time and place, then again sec. 34 would probably suffice. Every confederate would be regarded as having done every criminal act and would therefore be liable as if he had done them all alone. The responsibility is mutual. If necessary, however, sec. 37 might be resorted to and it would not matter which section applied, provided that one or other section covered all reasonable hypotheses.

So far, therefore, I take the wider view of sec. 34 and the connected sections. I have next to deal with the contention founded on the Code provisions relating to abetment.

Abetment is an independent offence whether the abetted offence is committed (sec. 109) or not committed (secs. 115 and 116). We are concerned with the case where the abetted offence is committed. There must then be an abettor on the one hand and an abettee who is a principal on the other. Even where the offender acts by the hand of an innocent person, such as a person not capable by law of committing an offence, the Code (sec. 108) treats the former not as principal but as abettor. It certainly does not follow as of course that the Code regards accessories at the fact as abettors and not as principals.

It is true that under the definition in sec. 107, abetment may take the forms of instigation, conspiracy or aid, and that by Exp. 2, "whoever either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act." But as I read the section it does not contemplate the abettor being present when the abetted criminal act or offence is committed. The aid given at the time of commission referred to in Exp. 2 seems to mean aid given at the time but at such a distance from the scene that the abettor cannot be said to be present. The case of *Kashi Nath Naek* v. *Queen-Empress* (202) is typical. The explanation may have been intended to obviate any diffi-

(202) I. L. R. 25 Cal. 207: s. c. 1 C. W. N. 681 (1897).

culty arising out of the expression "accessories before the fact."

If I am right, then A, B and C being together, if A says to B, "kill C," and B thereupon shoots C, A would be punishable not under sec. 109 but under sec. 302 construed in the light of sec. 34. This result accords with the opinion of Markby, J., in *R.* v. *Mohamed Asger* (33), where the word accessory is used as meaning "accessory before the fact" or abettor. (See also Mayne, Criminal Law, Part II, sec. 246).

It may be said that "instigation" and "conspiracy" must occur before the offence, even if, in the case of instigation, it is only just before. But abettors by these modes seem to be thought of as separated from the commission of the offence not only by time but also by place. Abetment is not thought of as coincident with the offence. If the general term "abettors" included accessories at the fact, Exp. 2 would be superfluous. Persons who, having previously abetted (as accessories before the fact), are also present when the offence is committed are dealt with in sec. 114.

Sec. 114, the only section in the chapter which speaks of the abettor being present on the scene, supports the foregoing construction of secs. 107 and 109. It provides that when any person "who, if absent, would be liable to be punished as an abettor," is present at the commission of the act or offence abetted, "he shall be deemed to have committed such act or offence." It was held, as early as 1867, in *R.* v. *Musstt. Niruni* (203), that to bring an accused within these words, it is necessary first to make out the circumstances which constitute abetment, so that "if absent" the accused would have been liable to be punished as an abettor, and this ruling has since been followed [*Abhi Misser* v. *Lachmi Narain* (204) and *Keshawar Lal Saha* v. *Girish Chunder Dutt* (37)]. If present at the time, the person who would otherwise be an abettor, is treated as a principal.

An illustration will be found in a recent case which came before the Court of Criminal Appeal in England, *R.* v. *Edith Thompson* (205). The prisoner there was present when her husband was killed by her lover, *R.* v. *By-Waters* (206). Though present, it is doubtful whether she would have been convicted as an accessory at the fact, if it had not been for the incriminating letters which she had previously written to By-Waters. Under sec. 114, if absent, she would have been liable as an abettor, and therefore her mere presence when the murder was committed would have rendered her guilty of that offence.

Sec. 114 would appear to serve two purposes. Firstly, it marks the fact that where it can be proved that the accused, if absent, would be liable as an abettor, his mere presence when the offence is committed is, without more sufficient proof of common intention, to make him an accessory at the fact or principal. Secondly, it marks the fact that in those circumstances the accused cannot be punished twice, once for the abetment and once for being present as an accessory at the fact. The section resembles sec. 34 in this, that it rather regulates procedure and punishment than creates an offence [cf. *Gould & Co.* v. *Hougton* (207) and see Collett's Comments on the

(33) 23 W. R. Cr. 11 (1874).
(203) 7 W. R. Cr. 49 (1867).

(37) I. L. R. 29 Cal. 496 (1902).
(204) I. L. R. 27 Cal. 566: s. c. 4 C. W. N. 546 (1900).
(205) 17 Cr. App. Rep. 71 (1922).
(206) 17 Cr. App. Rep. 66 (1922).
(207) [1921] 1 K. B. 509 at p. 519.

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

Indian Penal Code, published in a collected form in 1889.]

Sec. 114, therefore, is not wide enough to include all accessories at the fact. It would not apply for instance where one man is assaulted by several others and the assault is unpremeditated. It only applies where the accused, if absent, would be liable as an abettor, and there are many cases in which no such liability can be proved.

But supposing that I am wrong and that a person present aiding and abetting the commission of a criminal act or offence is punishable under sec. 109, a conviction thereunder could only be sustained if the part played by the abettor as accessory at the fact could be distinguished from the part played by the principal in the first degree. The principal in the first degree does not, as such, abet the abettors. Sec. 109 would not supply a general rule that accessories at the fact are equally liable as principals with the principal in the first degree. The result would merely be that sec. 109 would to some extent overlap sec. 34 in its wider interpretation. If there be this overlapping, we are not thereby precluded from giving a reasonable meaning to sec. 34. On the contrary it seems improbable that the framers of the Code would have forgotten to lay down the general rule. And if the general rule cannot be found in sec. 109 or sec. 114 it can only be found in sec. 34.

It was suggested that if sec. 34 bore the wider meaning, sec. 149 of the Code was unnecessary. Sec. 149 is doubtless a special application of the general principle of sec. 34, but as the language is different so may be the precise meaning or shade of meaning. As Mookerjee, J., said in *Jhakri Chamar* v. *R.* (42), "the essence of sec. 34 is common intention, as the presence of a common object is requisite to establish a case under sec. 149." In any case the special provision may have been thought desirable because in the country parts of India, disputes relating to land or boundaries, frequently lead to riots ending in grievous hurt or loss of life.

It appears to me that sec. 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In *R.* v. *Salmon* (25)* three men had been negligently firing at a mark. One of them—it was not known which—had unfortunately killed a boy in the rear of the mark. They were all held guilty of man-slaughter. Lord Coleridge, C. J., said :—"The death resulted from the action of the three and they are all liable." Stephen, J., said :—"Firing a rifle" under such circumstances "is a highly dangerous act, and all are responsible for they unite to fire at the spot in question and they all omit to take any precautions whatever to prevent danger."

Moreover, secs. 34, 35 and 37 must be read together, and the use in sec. 35 of the phrase "each of such persons who joins in the act" and in sec. 37 of the phrase, "doing any one of those acts, either singly or jointly with any other person" indicates the true meaning of sec. 34. So sec. 38 speaks of "several persons

(42) 16 C. L. J 440 at p. 453 (1912).

(25) 6 Q. B D. 74 (1880).

* NOTE.—*R.* v. *Salmon* was followed in *R.* v *Morgan*, 13 C W. N. 352. Curiously enough, however, the learned Judges expressly disclaimed the aid of sec. 34. I do not know what section other than sec. 34 made both the accused soldiers liable. With respect, the Court would seem to have been unnecessarily puzzled over the question of their "common intention."

engaged or concerned in a criminal act." The different modes of expression may be puzzling but the sections must, I think, be construed as enunciating a consistent principle of liability. Otherwise the result would be chaotic.

To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised.

This view of sec. 34 gives it an intelligible content in conformity with general legal notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal, and leads nowhere.

The wider view, therefore, accords with what *a priori* the law might have been expected to be. The true doctrine, that which leads to fruitful and valid legal consequences, must depend on the notion of agency or representation. In the offence of criminal conspiracy (secs. 120A and 120B), as in civil law, representation is carried a step further. Conspirators are like partners. They are all principals. The immediate doer of an overt act in pursuance of the conspiracy is the agent of all the others, whether they are present at the time or not. (Evidence Act, sec. 10). In the case of accessories at the fact, confederates present at the time, representation occurs in its simplest form. If two persons are present aiding and abetting a third who kills their common enemy with a shot from a revolver or a blow with a knife, every lawyer, and I think, every reflecting layman, would pronounce all three equally guilty. Common intention makes the shot or the blow the act of them all. It is as if the six hands belonged to one body, controlled by one mind, and it matters not by which hand the bullet is sped or the blow is given. As Sir Michael Foster puts it:—"In combinations of this kind, the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving stroke is no more than the hand or instrument by which the others strike" (Foster's Crown Law, Ed. 1809, p. 351). And in a case cited by Mayne, *Ganesh Sing* v. *Ram Raja* (21), their Lordships said this:—"Where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common so must be the responsibility." That principle is as valid in criminal as in civil law.

It would be surprising if the law were otherwise. A premium would be put on crime. There would be safety in mere numbers. The more cowardly, secret and brutal the crime, the greater would be the chance of the guilty escaping the full measure of justice for their misdeeds.

As to authority, the weight of judicial opinion has from the first been in favour of the wider view of sec. 34, very clearly so, in my opinion in this Court and in the High Courts of Bombay and Allahabad.

One of the earlier cases in this Court, *R.* v. *Gora Chand Gopee* (19), is significant because the judgment was delivered by Sir Barnes Peacock, C. J., who in the capacity of Vice-President of the Legislative Council had piloted the Penal Code Bill through its different stages. I will not say that the judgment is conclusive

(19) 5 W. R. Cr. 45; B. L. R. F. B. 443 (1866).
(21) 12 W. R. 38; 3 B. L. R. 44 (P. C.) (1869).

upon the point before us because sec. 34 is not expressly referred to. But dealing with the question of mere presence on the scene, the learned Chief Justice pointed out "that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals." The importance of the observation lies in the use of the word 'principals' as including accessories at the fact. The word was used in the same sense by Markby, J., in *R.* v. *Hyder Jolaha* (32) and again in *R.* v. *Mahomed Asger* (33). Later cases explicitly refer to sec. 34. A compact and sufficient illustration will be found in *Sri Prosad Misser* v. *R.* (36). In that case a Pathan had killed a Nawab by successive blows with a *tulwar*. Four other men were present at the time. The Court (Sir Francis Maclean, C. J., and Banerjee, J.) observed :—"The Judge ought to have called the attention of the jury to the facts and then said that it was for them to consider whether from those facts, they concluded that the criminal act was done by the several persons in furtherance of the common intention of all, and if they so concluded then to direct them that the case came within sec. 34 of the Penal Code and that each of them would be liable for that act, in the same manner as if it were done by him alone." That this view of the law has predominated is shown again by the judgment of Mitra and Fletcher, JJ., in *Nibaran Chandra Roy* v. *King-Emperor* (38). The current of decision in this Court was not, I think, disturbed till Stephen, J., delivered his judgment in *R.* v. *Nirmal Kanta Roy* (9).

That case is the sheet-anchor of the learned Counsel's argument. I state only the facts now material. A police officer, Inspector Nripendra Nath Ghosh, had been murdered in Calcutta. The prisoner and another had both fired at him with revolvers but as the bullets found in the officer's body could not have come from the prisoner's revolver, it was not the prisoner's shots which caused the fatal injuries but those of his comrade. Stephen, J., held that these facts would not support a charge against the prisoner under sec. 302 read with sec. 34. The act of shooting the officer, he said, had been done by the prisoner's comrade and not at all by the prisoner, whose act amounted merely to an attempt. The judgment, I gather, was delivered after the jury, on the learned Judge's direction, had found the prisoner not guilty on the charge referring to sec. 34. The jury had differed on another charge under secs. 302 and 114 and the learned Judge had directed a fresh trial of that charge. The learned Judge was dealing mainly with the question whether the acquittal on the charge referring to sec. 34 was a bar to this fresh trial. He overruled the plea and as things fell out, on the fresh trial, that is, of the charge under secs. 302 and 114, the jury again disagreed. The then Advocate-General entered a *nolle prosequi* and the prisoner was discharged.

With the greatest respect for the learned Judge's view on this subject, it appears to me that as the authorities stood, the learned Judge should have taken the verdict of the jury on the charge referring to sec. 34. If the jury had convicted on that charge, the learned Judge

(32) 6 W. R. Cr. 83 (1866).
(33) 23 W. R. Cr. 11 (1874).
(36) 4 C. W. N. 193, 196 (1899).
(38) 11 C. W. N. 1085 at p. 1089 (1907).

(9) I. L. R. 41 Cal 1072; s. c. 18 C. W. N. 723 (1914).

might have reserved any question of law on which he felt a doubt for consideration by a Bench of the Court.

The learned Judge recognised that he was departing from tradition. He referred to two Indian cases in which a wider view of sec. 34 had been taken. He said that those cases were in accord with Mr. Mayne's paraphrase of the section with which he disagreed. After referring to the history of the matter in England and India, he expressed the opinion that sec. 34 was to be read without reference to any doctrines derived from the English Common Law. In substance I agree but I regret that the learned Judge gave no indication of the meaning which he attributed to the section on that footing.

The learned Judge then turned to the abetment sections. He stated as to sec. 109 that there was no reason for supposing that a man must be absent in order to abet under that section. If he then looked to sec. 114 to fill up the gap left by his view of sec. 34, he was putting a forced construction on one section to avoid what appeared to him a forced construction of another.

Finally, he said: "In reference to English Law, it seems to me that the effect of secs. 109 and 114 is to supersede all the English Law relating to principals of the first and second degrees and accessories before the fact." I do not see, however, how secs. 109 and 114 can touch principals of the first degree. If the learned Judge had said that the group of sections including sec. 34 together with the abetment sections superseded all the English Law on those topics, I could have understood it. But then the difficulty would have remained whether accessories at the fact are to be treated as principals or abettors.

In the case before the learned Judge the prisoner was clearly an accessory at the fact. But if he and his comrade had used revolvers of the same calibre and the officer had been killed by one bullet, it would have been impossible to say which of the two men was principal and which accessory. Then, on the view of the learned Judge, neither man could have been convicted as an abettor, for he might be the principal, nor as principal, because he might be the abettor. Such a difficulty might perhaps be surmounted by framing charges in the alternative under sec. 236 of the Procedure Code, but that seems a clumsy expedient to put before a jury.

I do not see how all distinctions between principals of two degrees and accessories before the fact can be superseded unless, where the abetted act is committed, they are all brought under one common category as principals, that is to say, unless the step further were taken which has been taken in the general law of conspiracy. Apart from some such comprehensive provision, distinctions which exist in the nature of things, necessitate a line being drawn somewhere. According to the general scheme of the Code, abettors are a separate class, and the question whether accessories at the fact are principals or abettors must therefore find an answer. The only advantage I can see in classing them as abettors is that the question of the physical limits within which a man may be said to be present at the commission of a crime would not arise. The question has been discussed in England [*R.* v. *Borthwick* (131) and *R.* v. *Stewart* (105), Archbold's Criminal Pleadings and Practice, 25th Ed., 1368], but under modern legislation it is probably no longer of any importance. I have suggested above that the Code solution of the diffi-

(105) [1818] R. & R. 363.
(131) [1779] 1 Douglas 207.

culty is to be found in Explanation 2 to sec. 107. The person aiding at the time but at a distance is an abettor.

The treatment of the accessory at the fact as a principal will not be more productive of technicality than his treatment as an abettor. The most glaring and indefensible technicalities of English Law seem to have gathered not so much round the principal in the second degree as round the accessory before the fact. In Sir James Stephen's History of the Criminal Law (II, 234) an excuse is found for those technicalities in the harsh severity of punishment under the old Criminal Law. Under milder conditions and legislation, the technicalities have for the most part disappeared along with the excuse for them. And happily, in India, under a modern Code, such as the Penal Code, redress by mere technicality is not required. That of course is not to say that an accused person is not always entitled as of right to a fair trial according to the established forms of law. "In all criminal cases it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence. Everything should be strictly and accurately pursued; and if in any one of these three points a substantial defect should appear, it would be a ground for revising the proceeding." [*Ex parte Van Sandan* (208); *In re Vallabhdas* (209)]. It is a miscarriage of justice "to deprive an accused person of the protection given by essential steps in Criminal Procedure." [*Per* Lord Sumner, *Crane* v. *Public Prosecutor* (192)]. In that connection the distinction is observed between irregularities, which a Court exercising Appellate Jurisdiction may disregard, if the accused has not been prejudiced, and illegalities which render the trial void and of no effect [*Subrahmania Ayyar* v. *R.* (190)].

Whether consistently or not with his postulate of identity in act, learned Counsel further contended that in cases of the type where two men assault and inflict, one a grave and the other a less grave injury on a third, sec. 34 only applies where death or grievous hurt results from the combined injuries. But apart possibly from the language of Field, J., in *R.* v. *Jhubboo Mahton* (22) which may be accounted for by the facts on the case, the emphasis in cases of this type is not on the fact that both men caused injuries, still less on the fact that the effect resulted from the combined injuries. The emphasis is on this, that the fact of both men taking an active part in the assault is proof positive of some common intention, the extent of the common intention being of course a question of fact.

Is the common intention less apparent where two men shoot at a third, one hitting and wounding him mortally and the other missing him? The solution that in such a case (apart from sec. 114) one man has committed murder and the other only an attempt at murder, shows at least the common intention. And is the solution tenable? Does it not lead, again with great respect, to an impossible result? Suppose both men cause wounds each of which would by itself be mortal. Are two murders committed? And if so, would it be necessary to determine whether or not the deceased had died before the second shot entered his body? Apart from two wounds being inflicted, suppose that the shock and terror of seeing two

(192) [1921] 2 A. C. 299 at p. 331.
(208) 1 Phillips 445 (1844).
(209) I. L. R. 27 Bom. 394 (1903).
(22) I. L. R. 8 Cal. 739 at p. 751 (1882).
(190) L. R. 28 I. A. 257: s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 866 (1900).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

men fire at him, contributed to the fatal result? Moreover, it is impossible to say what might have happened, if one man alone had set out to accomplish the murder. Without the support, moral and physical, of a comrade, his resolution might have failed him and his pistol remained in his pocket, or diminution of confidence might have interfered with his aim; or again, he might have been successfully resisted and put to flight. It appears to me that this solution cannot possibly have come within the intention or contemplation of the legislature and is not compelled by the language of sec. 34. The language is compatible with the reasonable solution, namely, that both shots, the shot that took effect, and the shot that missed, are the joint acts of the two men. Each man in the eye of the law does both acts. The result follows that they are severally but equally liable for the effect produced, in accordance with the principle, I again quote my brother Mookerjee, "that all who participate in the commission of a crime are severally responsible to the State, as though the crime has been committed by any one of them acting alone," *Amrita Lal Bose* v. *Corporation of Calcutta* (48). The fact, that the attack is made by two men and not by one may well be an aggravation and not a palliation of the crime. The attack is cowardly so far as the criminals look to superiority in numbers for security and courage.

The second case on which learned Counsel relied, that of *King-Emperor* v. *Profulla Kumar Mojumdar* (49), came before the present Chief Justice and Panton, J., on a reference made by the Sessions Judge of Dacca under sec. 307 of the Procedure Code. To my mind, the case carries the matter no further. It is obvious from the terms of the Court's judgment, delivered by the learned Chief Justice, that the discussion was not taken beyond the stage at which the judgment of Stephen, J., had left it. No reference appears to have been made to the view of the law taken in this Court before and after *Nirmal Kanta Roy's* case (9). No reference was made to the argument in *R.* v. *Nogendra Nath Sen Gupta* (46) or to the rulings of the Court in that case (p. 404), or to the case of *R.* v. *Faezulla* (47) which came before C. C. Ghosh, J., and myself. Nor was the difficulty as to the precise meaning of sec. 114 indicated. The point was not fully argued, if it can be said to have been argued at all, and the Court did not come to a considered conclusion upon it. If the judgment be carefully read, it will be seen that the decision comes to no more than this, that inasmuch as there might be a doubt whether the accused could properly be convicted under sec. 302 and sec. 34, the safer course in the circumstances was to direct his retrial on a charge framed under sec. 302 and sec. 114.

In fine, I entertain the opinion that the wider construction of sec. 34 is the right one, not only because I should myself so construe the words in their context, not only because principle seems to me to demand such a construction but also on the firmer ground of a long course of decisions in this and other Courts, interrupted in this Court only recently and in effect only once There is this further to be said that the Penal Code has been amended not a few times and if the prevailing view

(48) I. L. R. 44 Cal. 1025 at p. 1048: s. c. 21 C. W. N. 1016 (1917).
(49) I. L. R. 50 Cal. 41 (47) (1922).

(9) I. L. R. 41 Cal. 1072: s. c. 18 C. W. N. 723 (1914).
(46) 21 C. L. J. 396 at pp. 399, 403, 404 (1915)
(47) 25 C. W. N. 24 (1920).

had been wrong, presumably the Legislature would have taken some opportunity to correct it. It might be said that we are dealing with settled jurisprudence but if there be a doubt as to the law, our labour will not be in vain if that doubt is dispelled.

As to the form of the charge, in my opinion, where an accused is liable under sec. 34 as an accessory at the fact and therefore as a principal, a charge simply of the offence of murder under sec. 302, without express reference to sec. 34 is sufficient. As sec. 34 must be read into sec. 302 of the Penal Code, sec. 224 of the Criminal Procedure Code comes into play—"In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable." No doubt, it is always open to the prosecution to state in the charge particulars showing that the accused is charged as an accessory at the fact. But it is not necessary, nor always possible, to do so. The prosecution cannot state in the charge particulars of which they are ignorant. In a case of murder the murdered man cannot be called at the trial and there may be no other eye-witnesses except the actual principals in the crime. If it is not known which of several men fired the fatal shot or delivered the fatal blow, the charge cannot be explicit and nothing is gained by multiplying charges to meet all possible hypotheses.

In England also a principal in the second degree is chargeable with the substantive offence. Sir Mathew Hale, for instance, says this: "If A be indicted as having given the mortal stroke and B and C as present, aiding and assisting, and upon the evidence it appears that B gave the stroke and A and C were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all, for it is only a circumstantial variance, for in law it is the stroke of all that were present, aiding and abetting." (Hale's Pleas of the Crown, Ed. 1800 at p. 43 and see Archbold at pp. 1371, 1372 and 1374).

I come now to the second ground on which the learned Advocate-General granted his certificate, namely, that the learned Judge in charging the jury did not sufficiently refer to the defence put forward by the accused. This objection involves a consideration of the defence made at the trial and the merits.

There were two charges. To the charge of attempted robbery under sec. 394 of the Code, the accused pleaded "guilty," in open Court, not meaning that he with his own hand caused hurt to the Post Master, but meaning that he and others went to rob the Post Master, and that in attempting to commit the robbery, the Post Master was injured—fatally injured as the fact is—by one of the party.

To the charge of murder the accused pleaded "not guilty."

From the point of view of Counsel for the accused, though on the facts the defence on that charge might be difficult, the case was of a simple character. Unless the evidence showing that the accused fired the fatal shot could be discredited, there was nothing more to be said in any view of the law. For the rest, the case turned on the element of intention. For, if the accused was not privy to any intention, including murder, he could not have fired the fatal shot or have fired at all at the Post Master, and any circumstance, suggestion or argument tending to show that the accused did not fire at the Post Master might also be pleaded for what it was worth as relevant in regard to his intention.

In the view of the law taken by the learned Judge, a view of which learned

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

Counsel must have been aware during the trial, the issues were, whether the accused fired at the Post Master and if not, what intentions should be imputed to him. The former issue, however important, was subordinate to the latter. The defence was that the accused had no part in any common intention going as far as murder. Now, no one who reads the charge can doubt that the learned Judge put that defence to the jury not once but several times. The jury were fully instructed that the charge of murder involved participation by the accused in a common intention not only to rob, but also, if necessary, to kill, the Post Master. The point might have been put less specifically. A common intention to carry out an unlawful design at all cost, even at the cost of overcoming resistance, or evading capture by taking life is sufficient. The jury were a special jury and I see no reason to suppose that they did not fully appreciate the legal position. Without mincing matters, the ascription of a common intention to add murder, if necessary, to robbery, is not easily avoided, where all, or some to the knowledge of the rest, of those engaged in the enterprise, are proved to have carried firearms and firearms have been used with fatal effect.

The objections taken to the charge, so far as they seem to me to call for mention at all, are based on the statement made by the accused at the close of the case for the prosecution. It is said that the learned Judge did not advert, or sufficiently advert, to certain suggestions—I cannot put them higher—contained in that statement.

There is first the suggestion that only three, and not, as the prosecution say, four men, were concerned. With regard to that it appears to me that the cross-examination of the material witnesses, and especially that of the packer, Hara Prasad Das, was directed to making out that the accused was not one of the men who entered the room but was the man who stood outside on the door-step or just below. The suggestion that only three men went to the Post Office and only two went inside, was, however, not foreshadowed, at any rate, as clearly as it might have been. The point of the suggestion is that if only two men entered the room the accused even if he was the middle man of the three, as the witnesses said, might have been the man outside who did not fire. But let that pass. The learned Judge, as I read the charge, left it to the jury to make up their own minds, if necessary, whether there were three or four men.

The next suggestion was perhaps more clearly an after-thought. The statement as to the live-cartridge falling out of the pistol as the accused was running away down the lane on the north of the Post Office (Mohendra Sircar Lane) was intended to support a suggestion to this effect, namely, that inasmuch as a pistol of the kind which the accused carried, automatically cocks itself after being fired, and inasmuch as the accused found in Mohendra Sircar Lane that his pistol was not cocked or that the safety-catch was not down, therefore the accused could not have fired in the Post Office. If the point so put had been in the minds of those conducting the case for the defence, the importance of the live-cartridge and the place where it was picked up must have been fully recognised. But what occurred at the trial was this. A witness, Purna Chandra De, spoke to having received the live-cartridge and an empty cartridge case (Exbts. X and XI) from another man. He was prepared to indicate the spot

where this other man had said he had picked them up. But as the learned Standing Counsel stated that the prosecution were not in a position to produce the other man, learned Counsel for the accused objected, as he was entitled to do, to hearsay evidence being given. Nothing further was said at the time and there is no evidence where the live-cartridge was picked up. The learned Judge's recollection is that during the trial nothing more was said about these two exhibits and that he told the jury that they went out of the case. The learned Judge's statement of what took place is conclusive. It is here abundantly confirmed by the fact that the gun-maker, an expert witness who went later into the witness-box, was not even asked whether the live-cartridge fitted the accused's pistol. Assuming in accordance with what seems to have been the case for the prosecution, that it did fit the pistol, the gun-maker was not questioned as to the circumstances in which a live-cartridge might drop out, or be ejected, from an automatic pistol. There are such things as mis-fires and mis-fits. It does not seem beyond the bounds of possibility that an ill-graduated cartridge should be forced by the mechanism too far into the breech and so be beyond the proper reach of the striker when the trigger is pulled. Such a cartridge might be ejected in the ordinary course of firing without a dent or a visible dent on the cap. I have no wish to speculate. All I am saying is that the matter was not pursued and that no sufficient foundation was laid in cross-examination for any plea founded on the live-cartridge.

There is more to be said on this point. At the best the evidence left open a mere suggestion that the live-cartridge dropped out in Mohendra Sircar Lane in the manner described by the accused. It is surprising therefore to find, in the application made to the learned Advocate-General for a certificate, the positive statement, more than once repeated, that this live-cartridge was picked up in Mohendra Sircar Lane. It is admitted that the application, though apparently not signed or verified, was drawn up for the accused by his legal advisers. Beyond referring to the resolution of the Judges in *R.* v. *Shimmin* (210) cited in *R.* v. *Nogendra Nath Sen Gupta* (46) I will say no more on this topic, because in the result the learned Counsel frankly admitted that the positive statements as to the live-cartridge ought not to have been made and might be attributed to the haste and hurry of the moment.

The last suggestion is that in running away the accused fired in the air to frighten his pursuers and not to kill them. On his own showing, therefore, it is a mere chance that he did not kill, if not one of his pursuers, then some other person inside or outside a house. Such firing in the streets of a city was itself evidence of a criminal intent sufficient to go to the jury in support of the charge of murder. But, apart from that, here again, the suggestion, such as it is, was not led up to by the cross-examination of the witnesses. The medical student Purnendu Nath Mukherjee—he was not a pursuer—he was approaching the accused from the opposite direction—states that the accused fired at him and that he heard the whiz of the bullet as it went past his left ear. This witness was not cross-examined, and there may have been good reasons at the time for not cross-examining him.

When I say of these suggestions or any of them that they were after-thoughts,

(46) 21 C. L. J. 306 at p. 401 1915),
(210) 15 Cox. 122 (1882).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

what I mean is that regard being had to the conduct of the case in Court, the suggestion could not have formed part of any instructions given to learned Counsel before the trial or before the witnesses were examined.

I have not so far referred to the first part of the accused's statement. Evidence had been given of the finding in an almirah in the living room occupied by the accused of a bundle which contained two revolvers and three ugly-looking daggers.

The accused endeavoured to account for the possession of this armoury by saying that the bundle had been given to him for safe custody by a gentleman unnamed. Having stowed away the bundle he was taken by the same gentleman to his house, where he seems to have been somewhat easily persuaded to join in an enterprise in the nature of a dacoity. The pressure brought to bear on him was apparently moral, and not physical, but he says he was not in a position to argue. He speaks of four pistols, one of which was given to him. He was taught by the unnamed gentleman how to use the pistol. That I suppose was to account for his firing as he ran away. The pistol was then loaded and a start was made. I cannot think that such a story would, or ought to make, much impression on a jury and I have heard no grievance made of any failure of the learned Judge to deal fully with this part of the statement.

The trial having taken its course, the jury returned a verdict of guilty. I doubt whether the fact that the verdict was unanimous makes any difference [see *per* Holmwood, J., *Emperor* v. *Upendra Nath Das* (1) and *West Indian Company* v. *Roberts* (211)]. Again there were materials not certainly without weight on which the jury could find that it was the pistol of the accused which killed the Post Master. But I do not go into that because the verdict does not necessarily mean that in the jury's opinion the accused fired the fatal shot. On the law as laid down to them, the verdict is in that respect ambiguous. But it does mean that the accused was privy to a common murderous intention.

I should have been surprised if the jury had returned any other verdict in this case. It is established, not only by the sworn testimony of the witnesses but by the admission of the accused himself, that he and two or three others were at the Post Office, all harbouring a wicked design and all carrying loaded firearms. Hardly had the innocent and unfortunate Post Master uttered a word of remonstrance or surprise, before three of the four, or two of three, shot at him from a distance of two or three paces and killed him on the spot. He was given no chance. It was not even a case of "hands up or we will fire." A hue and cry was raised. In running away the accused was behind the others, possibly as a rear guard or possibly, as he says, because he was unnerved and late in starting. If he did not enter the Post Office, he would naturally have been one of the first to run. Two or three of the men escaped. The accused though he used his pistol to prevent capture did not escape. He was captured, as it may be said, red-handed. His pistol, which he had thrown away when it became useless, the magazine having been emptied, was picked up close by. As to the presence of the accused on the scene, no question of identity arises, no *alibi* is possible. Apart from the question of common intention the facts are admitted. And it appears to me that the facts themselves speak so loudly that the

(1) 19 C. W. N. 653 at p. 672; s. c. 21 C. L. J. 377 (1914).

(211) [1920] A. C. 1025.

defence offered was as desperate as any defence could well be. On the facts it would seem almost as easy to say that the original design was murder, pure and simple, as to say that it was robbery first and murder only if necessary. In the view of the law which we reject, the denial by the accused that he fired at the Post Master might have been regarded as a defence. Otherwise his statement reads more like a plea in extenuation. I cannot entertain any doubt as to the justice of the verdict.

On a careful and anxious examination of the case I can only say that to my mind the complaint of non-direction amounting to mis-direction is not sustainable. In my opinion on the evidence as it stood, the substantial questions and issues involved, for the defence as well as for the prosecution, were fairly put to the jury. Their minds were not perplexed by a minute discussion of every detail of the evidence, or of every suggestion made at the close of the evidence. After a trial extending over two days, after the accused had made his statement, after the learned Standing Counsel and the learned Counsel for the accused had delivered their addresses, the case was left to the jury by the learned Judge broadly on its merits.

It is, as I entirely agree, an elementary principle that a defence made by or for an accused, or apparent on the evidence for the prosecution, should be fairly presented to the jury, and I have before now drawn attention to this principle. As Lord Watson said in *Bray* v. *Ford* (212): "Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal." In India, so far as the criminal law is concerned, that right is embodied in sec. 297 of the Procedure Code. In the present case, however, a very plain one as I see it, it does not appear to me that the learned Judge's charge was insufficient as regards the defence. The charge was doubtless on the whole adverse to the accused—in the circumstances it could hardly be otherwise—but the learned Judge was entitled to express his opinion, and the issue was not taken out of the hands of the jury. The learned Judge, again, laid down the law on the subject of common intention with some force of language, but he was within his province in so doing and we are not dissenting from what he said.

I will add that if a defence is substantially put to the jury, a mere omission to refer to this or that circumstance or suggestion is not non-direction which amounts to mis-direction. It is not the function of the Judge to repeat to the jury every argument or suggestion urged by the learned Counsel for the accused. It is a satisfaction to me that we have heard the learned Counsel at length but on this part of the case his argument covered "topics proper only to be addressed to the jury at the trial" [*Manson* (213)] and I much doubt whether the omissions of which he complained were in any instance of the sort of which it can be said that non-direction amounts to mis-direction in law. [*R.* v. *Stoddart* (136), cited in *R.* v. *Fateh Chand Agarwala* (177).]

If the learned Advocate-General had not felt pressed by the question of law turning on sec. 34, it may well be that he would not have granted any certificate on the question of non-direction, particularly if the facts had been more carefully stated in the application submitted to him.

(212) [1896] A. C. 44.

(136) 2 Cr. App. Rep. 217; 25 T. L. R. 612 (1909).

(177) I. L. R. 44 Cal. 477 at p. 508: s. c. 21 C. W. N. 83 (1916).

(213) 1 Cr. App. Rep. 73.

There is still an incident which occurred some days before the trial to which I am compelled to make some reference. I do not propose to enter into the details of the incident, for the reason that I am not now prepared. I do not consider it necessary, for any purpose material to the accused, to express an opinion on the conduct of the learned Counsel in seeking the learned Judge, whether notice of the intention to do so had or had not been given to the learned Standing Counsel. Still less am I prepared to discuss the course taken by the learned Judge in listening to the learned Counsel and in advising them as he says he did. The questions raised may be questions on which a difference of opinion is possible. They may call for further consideration when the full Court reassembles after the vacation, not with reference to this case but with reference to the future. The accused is entitled to have any point in his favour considered, but with submission, it appears to me dangerous to convert the trial of the accused into the trial of others officially connected with the proceedings, against whom no specific charge calling for an answer has been made.

So far as the accused is concerned I had thought that the incident was disposed of on the first day of the hearing before us. After the relevant part of the learned Judge's note of the proceedings, which he had prepared for our information, had been read out in Court to the learned Counsel, Mr. Chatterjee, we adjourned the hearing from 11 A.M. to 2-30 P.M. in order that the learned Counsel might see his client and ascertain from him whether he desired in the circumstances that his case should be argued by the learned Counsel or by some other Counsel. We were told in due course, as I understood, that the accused had full confidence in the learned Counsel and desired him to argue the case, which he proceeded to do. The hearing lasted for our days and a half and, as I had thought, every material aspect of the case was fully placed before us. I cannot avoid saying that it is embarrassing to find after so full a hearing that this incident is again brought into question.

It is not suggested that the tribunal which tried the accused was in any respect incompetent or that the trial was a nullity.

The learned Judge has told us that the learned Counsel came to him before he had read the papers in the case, and were with him for a very short time. He had no interest in the matter except to do his public duty to the best of his ability. No objection was taken to his presiding at the trial and apart from the complaints made in regard to his charge to the jury—complaints which I hold to be quite unfounded—it has not been suggested before us and in my opinion it could not properly have been suggested that the learned Judge did not preside with strict impartiality and fairness.

As to the jury who tried the facts, they had no knowledge at all of the incident. The verdict was that of a jury against whom nothing has been or can be said.

Lastly, as to the learned Counsel, we have been told that their action was taken without previous consultation with the accused. It is to be presumed, however, that before the trial the learned Counsel had received their instructions from the accused's attorney and had also seen the accused. The accused himself pleaded guilty to the charge of attempted robbery, and he doubtless did so after consultation with his legal advisers. He must then have come to learn their view generally of his case, and I can find no ground for any suggestion that his confidence in them was misplaced in the sense that his Counsel

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

did not afterwards do all that could be done to secure his acquittal on the charge of murder. From what the learned Counsel, Mr. Chatterjee, has told us of the substance of his address to the jury, I do not conceive that he could have said more than he did say.

It appears to me that the learned Counsel, who appear to have gone to the learned Judge in what they considered to be the interests of their client, did not feel themselves at all hampered by anything which may have fallen from the learned Judge. I have not detected any want of freedom or enterprise in their conduct of the defence or in the mode in which they put before the learned Judge and the jury the case for the accused on the two crucial questions, the question whether the accused was one of those who fired at the Post Master and the question of common intention.

No witnesses for the accused were called and in such a case and in such circumstances it would be surprising if any were called. The defence was necessarily of a negative rather than an affirmative character. The only hope was by cross-examination to shake the prosecution evidence telling most strongly against the accused. I have already indicated my belief that the learned Counsel not only acted up to their original instructions but possibly exceeded those instructions. So far as I can see they left no stone unturned and in my opinion the accused was in no way prejudiced at his trial.

I have made these observations out of respect for the difficulty which has been felt by my learned brother Mookerjee, J. But as the position appears to me, we were constituted a Bench to try matters arising out of the certificate of the learned Advocate-General and I am not to be understood as conceding that this incident in any way comes within that description. So far as I am aware, the learned Advocate-General knew nothing of it and it is not one of the grounds upon which he acted. No complaint has been made by or on behalf of the accused that his Counsel failed in any way in their duty to him. The question, which in my view of it is not one of law, is raised by the Court itself on the merits, as it appears to me, upon a mere possibility or conjecture that the accused may have been prejudiced.

No one will dispute that our powers as a Court of review or a Court for cases reserved or certified—whatever be the correct designation—are circumscribed by the terms of cl. 26 of the Letters Patent. As I read the clause, the certificate of the Advocate-General does not give us a roving commission to inquire into every incident connected with the case which may have occurred before or at the trial. When the question or questions of law raised by the certificate for our consideration are determined in a sense adverse to the accused, our function ends. We have then no power to retry the case and the judgment and sentence of the trial Court stand.

As at present advised, I hold that to be the constitutional position and for authority I should go no further than the case of *R.* v. *Upendra Nath Das* (1). In that case Sir Lawrence Jenkins, C. J., said: "If there was no mis-direction or other error as certified, the certificate was misconceived and we have no power to interfere. If the merits of the case or the sentence are to be further considered, then that must be not by the Court, but by some other authority vested with the requisite power." This view was specifically endorsed by Woodroffe, J. and by my learned brother Mookerjee, J. and received the

(1) 19 C. W. N. 653: s. c. 21 C. L. J. 377 (1914).

concurrence of the other two members of the Bench, Stephen and Holmwood, JJ.

As to a retrial on the merits, I see no ground for considering whether a retrial should be directed. But apart from that even if we were accepting and not repelling the learned Advocate-General's certificate, we should have no power to direct a retrial, at any rate on any ground short of an illegality which made the trial abortive and no trial at all. The question is concluded by the authorities reviewed by Mookerjee, J., in *R.* v. *Panchu Das* (179).

I conclude that we should pronounce the certificate of the learned Advocate-General to be misconceived. I am glad to think that in so concluding I am in agreement with the learned Judge who has presided over our deliberations.

[*Note by Richardson, J., on previous history of sec. 34 and secs. 35, 37 and 38.*

The draft Code prepared by Lord Macaulay and his colleagues was completed in 1837. It began with a chapter bearing the same heading—"General Explanations"—as the present Chap. II. Notes on various Chapters are appended to the draft but it does not seem to have been thought necessary to furnish any note on the "General Explanations" which are in the nature of interpretation clauses. The following observations, however, occur in two paragraphs of the first report, dated the 23rd July 1846, of a subsequent body of Indian Law Commissioners:—

"181. There is no distinction of principals in the first degree and principals in the second degree in the Indian Code. In the 3rd clause of the Chapter of General Explanations, it is laid down once for all that 'wherever the causing of a certain effect with a certain intention or with a knowledge of certain circumstances is an offence, it is to be understood that if more persons than one jointly cause that effect, every one of them who has that intention or that knowledge, commits that offence.'

"182. The definitions of substantive offences, construed with reference to this general explanatory clause, take in all who actually cause or assist in causing the effect which constitutes the offence, without distinction of leaders or followers, principals or subordinate agents . . . ."

The Indian Law Commissioners go on to refer to the corresponding articles, under the heading "Criminal Agency and Participation" of the Digest of the English Law prepared at a time when thoughts were entertained of codifying that law, a project afterwards abandoned.

Then in a postcript, dated 5th November 1846, there is the following paragraph:—

"662. With reference to our observations . . . . upon the provisions of the Code compared with the English Law of principal and accessory, we have now to point out that . . . . Her Majesty's Commissioners propose to abolish the difference of punishment between principals in the first and second degrees and accessories, and the technical distinction between principals in the first and second degrees, and to make the offence of being an accessory a substantive offence. By the change proposed the Law of England will correspond with the Indian Code on these points."

The word "accessory" is here used as meaning accessory before the fact and the reference would appear to be, or may be taken to be, to the recommendations of the English Criminal Code Commissioners set out in Sir James Stephen's History of the Criminal Law at page 236, as follows:—

(179) I. L. R. 47 Cal. 671 at pp. 698, 699: s. c. 24 C. W. N. 501; 31 C. L. J. 402 (1920).

"Every one is a party to and guilty of an indictable offence who

(a) actually commits the offence, or does or omits to do any act the doing or omission of which forms part of the offences; or

(b) aids or abets any person in the actual commission of the offence, or in any such act or omission as aforesaid; or

(c) directly or indirectly counsels or procures any person to commit the offence, or to do or omit any such act as aforesaid."

Cl. (a) contemplates the offenders known in England as principals in the first degree, the immediate perpetrators of the act done, cl. (b) those known as principals in the second degree or accessories at the fact, and cl. (c) those known as accessories before the fact. In English Law principals in the first degree and principals in the second degree are equally principals and are, as such, distinguished from accessories before the fact.

It will be observed that in the Code as finally passed by the legislature in 1860, cl. 3 of the original draft is drawn out into the secs. 34, 35, 37 and 38. This difference of language may, of course, have affected the meaning. I have no knowledge when or by whom the change was made, or for what reasons the language adopted was chosen.

As to the relation of sec. 34 and the connected sections to abetment in the original draft, "abetment" was defined as being of two kinds, previous abetment and subsequent abetment. Clearly Lord Macaulay and his colleagues were thinking of accessories before the fact and accessories after the fact. Accessories after the fact, as I have said in my judgment, are now dealt with separately, and in the Code as passed abetment is not expressly qualified by the word "previous." Does the omission of that word make any difference to the meaning? Or, was it omitted simply because it became unnecessary to distinguish previous abetment from subsequent abetment.

Here again I am not aware how the Chapter on abetment came to take its present form. Considerable changes were made between 1847 (the year of the Commissioner's second report) and 1860, but of the reasons for those changes, I know nothing.]

C. C. GHOSE, J.—One Barendra Kumar Ghose, having at the last Criminal Sessions been convicted by a Special Jury of the murder of one Amrita Lal Roy, was sentenced to death by Mr. Justice Page. Thereafter the accused through his Counsel applied to the Advocate-General for a certificate under sec. 26 of the Letters Patent for the further consideration by this Court of certain matters of alleged mis-direction and non-direction arising out of the summing up of the learned Judge to the Jury. The facts are as follows:—

The accused above-named was, on the 16th August 1923, charged at the Criminal Session before Mr. Justice Page and a Special Jury on an indictment as follows:—

First, that he, the said Barendra Kumar Ghose, together with certain other persons on or about the 3rd day of August in the year of our Lord 1923 in Calcutta aforesaid committed murder by causing the death of one Amrita Lal Roy and thereby he, the said Barendra Kumar Ghose, committed an offence punishable under sec. 302 of the Indian Penal Code.

Second, that he, the said Barendra Kumar Ghose, together with certain other persons, at or about the time and in the place aforesaid were jointly concerned in attempting to commit robbery on the said Amrita Lal Roy and that at the time of

committing such robbery voluntarily caused hurt to the said Amrita Lal Roy, and thereby he, the said Barendra Kumar Ghose, committed an offence punishable under sec. 394 of the Indian Penal Code.

It is stated that the accused pleaded guilty to the aforesaid charge under sec. 394, I. P. C., with the reservation that he did not cause hurt to the said Amrita Lal Roy and pleaded not guilty to the charge under sec. 302, I. P. C. and that the trial was proceeded with thereafter in respect of the latter charge.

The case for the prosecution was as follows :—

That the accused and three other persons made their appearance at the Sankaritola Post Office at about 3-30 P.M. on the 3rd August 1923, armed with firearms; that three of them, including the accused, entered the Post Office through its south-eastern door, while the fourth man remained outside; that of the three who came inside, the accused stood in the middle and the masked man on his left and the other man on his right; that they stood within less than two yards of Amrita Lal Roy, who was the Post Master, of whom all the three demanded money with the words "Post Master, *rupeya dao;*" that the Post Master asked "*kisher taka*," whereupon all the three levelled their weapons and fired at the Post Master simultaneously; that one of the bullets went through the Post Master's right palm and another struck him on the right side under the right arm-pit, whereupon he fell down with a cry; that a clerk named Sham Dulal Das, who was working in the same room at the time, ran to the Post Master's aid, whilst Hara Prasad Das, the Post Office packer, ran after the three men, who were immediately escaping along with the fourth man, who was outside; that the chase was taken up by two other men named Sitaram and Jhapsaram, employees of one Promotho Lal Sircar residing at 15, Mohendra Sircar Lane, opposite the Post Office; that as they got to the turning of Mohendra Sircar Lane and Sankaritola East Lane, the accused ran down the latter lane, firing his pistol from time to time, whilst the other three ran by Mohendra Sircar Lane to Creek Row; that the accused was followed by the packer and the two others whose number was increased by other pursuers, who all kept following him until he was arrested in front of St. James Square and brought back to the Post Office along with his pistol, which the accused had thrown away near the said Square but which had been picked up by a small boy, who gave it to the packer.

That the prosecution case further was that the Post Master had expired within a short interval of being shot; that one bullet was found inside his body, which on being extracted fitted into the empty cartridge case picked up inside the room of the Post Office, which in its turn was found to be of the same bore as that of the automatic pistol carried by the accused; that the dent of a bullet was found on the wall of 15, Mohendra Sircar Lane in front of the Post Office; that no other empty cartridge was found inside the said room; that no trace of the third bullet was available in or out of it; and lastly that two revolvers and three daggers were found at premises No. 181, Harrison Road, a Chemist's shop, where the accused was employed.

The case for the defence was embodied in the statement made by the accused in Court, the main points in which were as follows :—

(*i*) Three and not four persons went to the Post Office; that the accused went there with the assured feeling that no life

would be taken by anyone; that the accused stayed outside whilst the other two went in; and that only two shots were fired inside and not three.

(*ii*) That the accused was so taken by surprise on account of the shooting of the Post Master that he was temporarily robbed of locomotion and self-control and he remained back whilst his two companions ran away; that he recovered himself later on hearing the cry of "*chor, chor;*" that he was running by himself; that he for the first time tried to fire his revolver in course of being pursued; that his pistol did not go off when he pulled the trigger; that he thereupon remembered his instructions to pull out a portion of the pistol and to release the safety-catch and as he did so, a live-cartridge fell out.

(*iii*) That the accused kept on firing in the air as he ran along and refrained from shooting the packer and others who followed him at close quarters.

No evidence was called on behalf of the accused and the accused contented himself with making the statement referred to above. There was evidence as indicated above before the Jury that immediately on the demand for money being made of the Post Master by the three men who had entered the room, in which the Post Master was working, the packer, Hara Prasad Das, at once ran up towards the Post Master's table and saw three men at the door of the room and that the accused was one of the three and that there was another man in the courtyard near the steps leading to the door. The packer's words were as follows: "The Post Master stood up and said 'what money.' Immediately afterwards all the three men fired their pistols." . . . "From the time I saw prisoner first till he was arrested I never lost sight of him. I am certain that he fired and was one of those in the room. They all three fired simultaneously." The evidence of Sham Dulal Das, the clerk, who was employed at the Post Office, was as follows:—"I first heard a noise and a voice—'*rupeya dao.*' I looked round. I saw three men armed with revolvers standing in front of the Post Master three or four cubits away and another man outside the room with a revolver. The three men were in the room. The prisoner was in middle. The man on the left had a mask on. It was a mask like this (produced). I saw weapons in the hands of the three men. The prisoner was wearing a *khaddar* coat on. It was one like this (produced). The Post Master was closing the mail and had about Rs. 2,000 in notes and money on the table before him. He stood up at '*rupeya dao*' and shouted out 'what money.' All three men fired at him immediately."

The learned Judge charged the jury at some length and in such charge said, amongst others, as follows:—

"Therefore in this case if these persons went to that place with a common intention to rob the Post Master and, if necessary, to kill him, and if death resulted, each of them is liable, whichever of the three fired the fatal shot."

"If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob and, if necessary, to kill, and death resulted from their act, if that be so, you are bound to find a verdict of guilty."

"I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied on the other hand that the shot was fired by one of those persons in furtherance of the common intention, if that

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

be so, then it is your duty to find a verdict of guilty."

The summing up of the learned Judge was placed before the learned Advocate-General for his consideration and it was further represented to him that the learned Judge has "omitted to draw the attention of the jury to the defence of the accused save and except a mere reference to the statement made by the accused."

The learned Advocate-General thereafter under and by virtue of the powers entrusted to him by the Letters Patent, bearing date the 28th September 1865, certified that in his judgment whether the alleged direction and the alleged omission to direct the jury did not in law amount to a mis-direction should be further considered by this Court, and the matter has accordingly come before this Court for consideration.

The certificate of the learned Advocate-General raises two questions, namely, whether there was mis-direction on a question of law, and whether there was non-direction with regard to the case for the defence; but before I proceed to deal with these matters, it is necessary to examine the scope and extent of cl. 26 of the Letters Patent of 1865 under which the learned Advocate-General has given his fiat. Cl. 26 of the Letters Patent runs as follows:—"And we do further ordain, that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that, in his judgment, there is, an error in the decision of a point or points of law decided by the Court of Original Criminal Jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right." In cl. 25 of the Letters Patent it is definitely laid down that there shall be no appeal from any sentence or order passed or made in any criminal trial before the Court of Original Criminal Jurisdiction which may be constituted by one or more Judges of the High Court, but it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the High Court. Cls. 25 and 26 of the Letters Patent therefore make it plain that, when a point or points of law has or have been reserved or certified by the Advocate-General as erroneously decided or as worthy of further consideration, the High Court has full power and authority "to review the case or such part of it as may be necessary, and finally determine upon such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right." As has been observed by Mookerjee, J., in the case of *Emperor* v. *Fateh Chand Agarwala* (177): "It is obvious that the intention is that the case should be finally decided on review and not remitted for retrial. It has also been ruled that when the Court on review holds on the point of law in favour of the accused, it is competent to the Court to consider the whole case on the evidence and to pass such sentence as shall seem right. The Bombay High Court followed

(177) I. L. R. 44 Cal. 477 at p. 504; s. c. 21 C. W. N. 33; 24 C. L. J. 400 (1916).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

this procedure in the cases of *R.* v. *Navroji* (188) and *Imperatrix* v. *Pitambar* (67); in each instance, although the Court decided the question of law in favour of the accused, yet, upon a review of the whole case and an examination of the merits, affirmed the conviction. In this Court, the same procedure was adopted in the cases of *Queen* v. *Haribole* (164), *Queen* v. *O'Hara* (35); in each instance, the point of law was decided in favour of the accused, but on a review of the whole evidence, while the conviction was affirmed in the former case, it was set aside in the latter instance. The cases of *Queen* v. *Sib Chandra* (166) and *Emperor* v. *Upendra Nath Das* (1) do not directly touch the present question, inasmuch as the alleged error of law was not established in either instance." In the case of *Queen* v. *Sib Chandra* (166) a Rule was obtained under the provisions of cl. 26 of the Letters Patent calling upon the Law Officers of the Crown to show cause why the prisoner, Sib Chandra Mitter, should not be acquitted or why there should not be a new trial on the ground that the learned Judge, Mr. Justice Field, who tried him had mis-directed the jury on a point of law. Sir Richard Garth, C. J., observed as follows:—" That being so, we consider that there was no mis-direction; and as in this case it is not shown that in his charge to the jury the learned Judge committed an error of law, we consequently discharge the Rule." In the case of *Emperor* v. *Upendra Nath Das* (1) Sir Lawrence Jenkins, C. J., observed as follows:—" On this view of the case, it is not within my power to re-open the case and I regard myself as not entitled to express any opinion as to its merits. In fact, I am not in a position to deal with the merits; for they have not been discussed before us, nor have those conditions been established on which alone they could be considered by us. Our powers are circumscribed, for we can only act in conformity with cl. 26 of the Letters Patent. If there was no mis-direction or other error as certified, the certificate was mis-conceived and we have no power to interfere. If the merits of the case or the sentence are to be further considered, then they must be not by this Court, but by some other authority vested with the requisite power." In the same case Woodroffe, J., observed as follows: —" With the merits, however, we are not concerned until it is established that there has been an error in law which opens out the case for our judgment. The same ground precludes me from dealing with the question of sentence which may arise on the facts above stated, and the possibility, if the verdict be correct, of the act having been committed without premeditation on a sudden access of passion. This is, however, a matter for the Crown to consider. I can only hold that no error of law has been shown which entitles me to re-open a verdict or to consider a sentence which has already been passed." Mookerjee, J., in the same case stated as follows:—" In the view I take, no error of law has been established and consequently the Court is not called upon to express an opinion as to the propriety of the conviction and sentence, al-

(1) 19 C. W. N. 653: s. c. 21 C. L. J. 377 (1914).
(35) I. L. R. 17 Cal. 642 (1890).
(67) I. L. R. 2 Bom. 61 (1877).
(164) I. L. R. 1 Cal. 207: s. c. 25 W. R. Cr. 36 (1876).
(166) I. L. R. 10 Cal. 1079 (1884).
(188) 9 Bom. H. C. R. 358 (1872).

(1) 19 C. W. N. 653: s. c. 21 C. L. J. 377 (1914).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

though, as Woodroffe, J. has pointed out, if the Court could examine the case on the merits, there might be matters for careful consideration."

The question next arises as to whether the High Court, on a Reference under cl. 26 of the Letters Patent, is entitled to direct a new trial. The cases decided in this Court since the case of *Queen* v. *Haribole Chandra Ghose* (164) show conclusively that the case reserved or certified has got to be finally decided by the High Court on review and that an order for retrial is not competent. [See *Emperor* v. *Panchu Das* (179)]. I think the authorities referred to above are binding on us and that we must proceed upon the footing that there is no power in the High Court to direct a retrial.

I am not unmindful of the fact that it has recently been held in England that in cases of mis-trial the Court of Criminal Appeal has power under the Criminal Appeal Act, 1907 (7, Edw. 7 C. 23) to order a new trial, [See *Crane* v. *Director of Public Prosecution* (192)]. In that case there was a trial before a jury of two persons, on separate indictments and it was held that the trial was a nullity and was not a mere irregularity. The Court of Criminal Appeal, as also the majority of the noble and learned Lords in the House of Lords went at great length into the question of the powers of the Court for the consideration of Crown Cases Reserved under the Crown Cases Act of 1848 and into the powers of the old Court of Queen's Bench on a writ of error and held that the trial being a nullity, it was competent to the Court of Criminal Appeal to order a new trial. Now, it is to be observed that the words of the Crown Cases Act of 1848 are wider than the words used in cl. 26 of the Letters Patent and no proper analogy can be drawn therefrom. Further it may be noticed that the Court of Error sat, as has been said, "not for the exercise of the sound and legal discretion of the Judges but for the benefit of an imperative rule of law" that it was in cases, among others, where the trial was *coram non judice*, that the Court of Error used to grant a *venire de novo*. That contingency for the reason which will be found later has not arisen in this case and I will not, therefore, pause to elaborate it, or to desert the sure anchorage of an established rule, so far as this Court is concerned.

There is one other matter to which I desire to make a passing reference before I come to the matters which properly arise on the learned Advocate-General's fiat. It appears from the information which has been placed before this Court by Mr. Justice Page that two or three days before the trial began before him in the Sessions Court, Mr. B. C. Chatterjee and Mr. S. K. Sen, Counsel for the accused, applied to see Mr. Justice Page in his private room. According to Mr. Justice Page, they informed him that after careful consideration they were satisfied that there was no defence to the charges and that the accused was guilty. They asked him, if the accused pleaded guilty to the charge of murder, whether he would deal with the accused leniently. Mr. Justice Page told learned Counsel that he could give them no information as to what he should do at the trial, but if they were satisfied that the accused was guilty, while it was their duty by cross-examination to test the accuracy of the witnesses for the Crown, that they were

(164) I. L. R. 1 Cal 207 : s. c. 25 W. R Cr 36 (1876).
(179) I. L. R. 47 Cal. 671 at pp. 693-699 : s. c. 24 C. W. N 501 ; 31 C. L. J. 402 (1920).
(192) [1921] 2 A. C. 299.

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

not entitled to set up any substantive defence in opposition to the case for the Crown.

In view of what took place before the trial in Mr. Justice Page's room, it was thought proper that an opportunity should be afforded by the Court to Mr. B. C. Chatterjee (Mr. S. K. Sen was absent at the hearing before us) to consider whether he should appear on behalf of the accused at the hearing before us, or whether the accused should not have an opportunity of being represented by other Counsel. A short adjournment was granted and arrangements were made so that Mr. Chatterjee might interview the accused in the Presidency Jail. Later on, Mr. Chatterjee informed us that the accused had definitely stated that he wished him (Mr. Chatterjee) to represent him at the hearing before us and to argue the case on his behalf. Thereupon the hearing proceeded. It is unnecessary for me to dwell further on the incident referred to above or to refer to the statement made by Mr. Chatterjee from his place at the Bar, or to the written statement handed in to the Court on behalf of Mr. Sen and himself, or to elaborate on the duty of Counsel, assuming that they are impressed with a belief in their client's guilt.

Now, it was said that the accused has pleaded guilty to the charge under sec. 394, I. P. C., with the reservation that he did not cause hurt to the Post Master. With reference to this allegation, however, the learned Judge who presided at the trial has informed us of what precisely happened at the trial when the accused was asked whether he was guilty of the offence charged against him, and we have the learned Judge's word that in respect of the charge under sec. 394, I. P. C., the accused pleaded guilty to the same and that there was no such reservation as is mentioned in the application on behalf of the accused to the learned Advocate-General for his fiat. I think the true rule is that we have no more power of contradicting the statement of a learned Judge in a matter of this description than we have the power of contradicting any allegation which may appear upon the record. As was said by Martin, B., in the case of *R.* v. *Mellor* (6): "We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court, which of itself implies an absolute verity." Therefore the only charge that remained to be enquired into was the charge under sec. 302, I. P. C., and the accused pleaded not guilty to the same.

It has been contended before us on behalf of the accused that if three men fired at another intending to kill him and if one of the shots only proved fatal and if it could not be ascertained which of the three had fired the fatal shot, then in such event all the three men could not be held guilty under sec. 302, I. P. C., read with sec. 34, I. P. C. The argument is that not only must there be a common intention among the persons charged but that the criminal act itself must be jointly, *i.e.*, physically done by all the persons charged in furtherance of the said common intention. In other words, it is argued that the criminal act itself must be participated in by all the persons entertaining a common intention. And if the word "criminal act" is taken to denote a series of criminal acts, then the series of criminal acts must, according to learned Counsel for the accused, be

(6) 27 L. J. M. C. 21 at p. 137; D. & B. 468; 7 Cox. C. C. 454 (1858).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

participated in by all the persons who have a common intention. It is contended that if these two elements are not satisfied on the evidence adduced by the prosecution, the persons engaged in the doing of the criminal acts of the description referred to herein cannot be held to be guilty under sec. 302, I. P. C. It is further contended that the learned Judge impliedly told the jury that if three or four persons came into the Post Office with a common intention to rob the Post Master and, if necessary, to kill him, and death resulted from their act, the man who stood outside the Post Office room and in the courtyard would be equally guilty with the men who were inside the Post Office room, and that in this the learned Judge was wrong. It is argued that if these submissions are correct, the learned Judge misdirected the jury in the passages which have been quoted above.

It therefore becomes necessary to ascertain what is the true meaning of sec. 34 of the Indian Penal Code. Sec. 34, I. P. C., runs as follows:—"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

To start with, it is reasonably clear that the section does not create a distinct offence and it merely lays down a principle of liability. [See *Foczullah* v. *King-Emperor* (47)]. What is the principle? It is, to use the words of their Lordships of the Judicial Committee of the Privy Council, this, that "where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility." [See *Ganesh Singh* v. *Ram Raja* (21)]. This view was expressed in 1869 by their Lordships in a Civil Appeal arising out of a case in which the Defendants had plundered the Plaintiff's property; but before that in 1866 Sir Barnes Peacock, C. J., in the case of *Queen* v. *Gorachand Gopee* (19) in delivering the judgment of the Full Bench had observed as follows:—"If the object and design of those who seized Amordi was merely to take him to the thana on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequences of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge and consent of the others commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention." This is so, because it is a well recognised canon of criminal jurisprudence that the Courts cannot distinguish between conspirators, nor can it inquire, even if it were possible, as to the part taken by each in the crime. As was observed by Markby, J.: "If two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was." [See *Queen* v. *Mohamed Asger* (33)]. In other words, since a combined act and evil intent constitute crime and since a thing which a person does through the agency of another is the same in law as though he had performed it himself, one who contributes

(47) 25 C. W. N. 24 (1920).

(19) 5 W. R. Cr. 44; B. L. R. F. B. 443 (1866).

(21) 3 B. L. R. P. C 44 at p. 46; 12 W. R. 38 (1869).

(33) 23 W. R. Cr. 11 (1874).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

his will to a crime, by whomsoever the physical act of wrong is done, is guilty of the crime; that is to say, when two or more persons unite to accomplish a criminal act, whether through the physical act of one, or of all, proceeding severally or collectively, each individual whose will contributes to the wrong doing is in law responsible for the whole, as if the same were performed by himself alone. Numerous illustrations can be given of the application of the doctrine in varying circumstances. Where one assailant strikes a blow which is not fatal and a confederate follows it up with a fatal blow, both are equally liable. If several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery in pursuance of a common intention, they are all equally guilty of forgery, though they may not be together when the forgery is completed by one of them adding the signature [see *Rex* v. *Bingley* (129), *R.* v. *Dade* (214) and *R.* v. *Kelly* (115)]. If several persons act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of others, with the possession of the goods and another of them entices him away, so that the one who has the goods may carry them away, all are equally guilty of theft. [See *Rex* v. *Standley* (96)]. The foregoing examples serve to visualise the principle that if persons combining in intention perform a criminal act jointly, the guilt of each is the same as if he had done it alone and it is the same if the act being divided into parts, each proceeds with his part unaided. In other words, if several persons unite in one common design to do some criminal act and each takes the part assigned to him, though all are not or may not be actually present, yet all are present in the eye of the law. For instance, if one person in furtherance of a common intention to commit a criminal act stands guard, it is immaterial how distant from the scene of the crime his vigil is maintained, provided it gives some promise of protection to those actively engaged in the commission of the act. It is unnecessary to elaborate this further, but I will content myself with quoting a significant passage from Foster's Criminal Law: "Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him: some to commit the act, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the act be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant toward the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprise." To sum up, persons executing parts of a crime separately in furtherance of a common intention are equally guilty. This seems to me to be the meaning of sec. 34 of the Indian Penal Code and this view is in accordance with that taken in the vast majority of decisions in this Court. [See for instance the cases of *Queen* v. *Gora Chand Gopee* (19), *per* Peacock, C. J.; *Queen* v.

(96) [1816] R. & R. 305.
(115) [1820] R. & R. 421.
(129) [1821] R. & R. 446.
(214) 1 Moody C. C. 307.

(19) 9, B. L. R. F. B. 43; 5 W. R. Cr. 45 at p. 49 (1866).

Hyder (32), *per* Markby, J.; *Queen-Empress* v. *O'Hara* (35), *per* Norris, J.; *Khudiram* v. *Emperor* (39), *per* Brett, J.; *Emperor* v. *Morgan* (41), *per* Holmwood, J.; *Gouridas* v. *Emperor* (40), *per* Maclean, C. J.; *Shriprasad* v. *Empress* (36), *Jamiruddin* v. *King-Emperor* (44), *per* Holmwood, J. and *Faezullah* v. *King-Emperor* (47)]. No doubt a different view of the scope of sec. 34 has been taken in the case of *R.* v. *Nirmal Kanta Roy* (9), which was cited apparently with approval by the Chief Justice, in the case of *King-Emperor* v. *Prafulla* (49) and it has been held that sec. 34 applies only where a criminal act is done by several persons, of whom the accused charged thereunder is one, and not where an act is physically done by some persons other than the latter. In other words, it has been held that where two persons fire at another and one actually hits and kills him, the other is not guilty of murder under secs. 302-34, I. P. C., but of attempt to murder, which offences do not constitute the same "act." Giving the words of sec. 34 their plain and natural meaning, I am unable to take the restricted view of sec. 34, which apparently found favour with the learned Judges who decided the two cases just referred to. In my judgment, the effect of sec. 34, I. P. C. would be entirely nullified if such a restricted meaning of this section is accepted.

(9) I. L. R. 41 Cal. 1072: s. c. 18 C. W. N. 723 (1914).
(32) 6 W R. Cr. 83 (1866).
(35) I. L. R. 17 Cal. 642 at p. 647 (1890).
(36) 4 C. W. N. 192 at p. 196 (1899).
(39) 12 C. W. N. 580: s. c. 9 C. L. J. 55 at pp. 69, 74 (1908).
(40) I. L. R. 36 Cal. 659 (1908).
(41) I. L. R. 36 Cal. 302: s. c. 13 C. W. N. 862; 9 C. L. J. 204 (1909).
(44) 16 C. W. N. 909 (1912).
(47) 25 C. W. N. 24 (1920).
(49) I. L. R. 50 Cal. 41 (1922).

The above being my reading of sec. 34, I. P. C., I have carefully examined the summing up of the learned Judge in this case and I have come to the conclusion that that summing up is not open to the charge of mis-direction as has been contended for by learned Counsel for the accused. The expression "criminal act" need not necessarily mean one single indivisible act. I think the proper interpretation of sec. 34 in the light of the facts of the present case is to read it in manner something like the following: When a criminal act, *e.g.*, the killing of the Post Master, is done, that is, brought about or carried out by several persons in furtherance of the common intention of all, each of such persons is liable for that act, that is, for such killing, in the same manner as if it, that is, the killing, were done or brought about or carried out by him alone. The section can also be read, in the light of the fact in the present case, in the following manner:—When a series of acts involving or resulting in a crime to wit the destruction of the Post Master is done by several persons in furtherance of the common intention of all, each of such persons is liable for that series of acts in the same manner as if the whole series were done by him alone. In my view, therefore, so far as the learned Judge's charge to the Jury is concerned, there has been no mis-direction and the first point taken in the learned Advocate-General's fiat therefore fails.

The view taken as set out above in the decisions of this Court of the true meaning of sec. 34 of the Indian Penal Code finds support, so far as the Madras High Court is concerned, in the case of *Queen-* v. *Raru* (63), so far as the Bombay High Court is concerned, in the cases of *Queen*

(63) I. L. R. 19 Mad. 482 (1896).

v. *Pitambar* (67) and *Emperor* v. *Chota Lal* (70) and so far as the Allahabad High Court is concerned, in the cases of *Empress* v. *Mahabir Prasad* (10), *Emperor* v. *Nageshwar* (51), *Emperor* v. *Bhola Singh* (52), *Emperor* v. *Kanhai* (54), *Emperor* v. *Ram Newaz* (55), *Emperor* v. *Chandra Singh* (57) and *Emperor* v. *Gulab* (58). The Patna High Court has taken the same view in the cases of *Ritbaran* v. *Emperor* (79) and *Satrughan* v. *Emperor* (80). So far as the Punjab Court is concerned, the case in *Emperor* v. *Nirmal Kanta Roy* (9) has been followed in the case of *Bahal Singh* v. *Emperor* (73). It is not to be understood that the above is an exhaustive summary of the cases on sec. 34 of the Indian Penal Code. There are a great many more decisions on that section, but I have only selected the typical ones, more specially so because of the fact that a full discussion of them is contained in the judgment of Mookerjee, J.

I now pass on to consider the second question raised on the fiat of the learned Advocate-General, namely, that the learned Judge had "omitted to draw the attention of the Jury to the defence of the accused save and except a mere reference to the statement made by the accused." In order to appreciate the precise significance of this contention the facts of this case, which have already been referred to by me, have got to be borne in mind and, bearing the same in mind, the learned Judge's charge to the Jury has got to be examined. The case for the defence, as far as one can make out from the cross-examination of the prosecution witnesses and from the statement made by the accused when questioned under the provisions of sec. 342, Cr. P. C., was this :—

(1) That he stood outside the Post Office room and in the courtyard;

(2) that he did not fire; and

(3) that he did not intend to kill the Post Master.

In other words, the real questions on the case for the defence were :—

(1) Did 3 or 4 men form the party and did 2 or 3 men go inside the Post Office room and fire?

(2) Was the prisoner outside the Post Office room and in the courtyard?

(3) Did the prisoner have any murderous intention?

Now the principle which should guide us in determining whether there has been non-direction amounting in law to misdirection is what has been laid down by Lord Alverstone, L. C. J., in the case of *Rex* v. *Stoddart* (136). Lord Alverstone observed as follows :—"As appears from the judgment which has just been delivered the case for the Appellant was conducted by making a minute and critical examination, not only of every part of the summing up, but of the whole conduct of the trial. Objections were raised which, if sound, ought to have been taken at the trial. Probably no summing up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of 20 days, would fail to be open to some objection. To quote

(9) I. L. R. 41 Cal. 1072: s. c. 18 C. W. N. 723 (1914).
(10) I. L. R. 21 All. 263 (1899).
(51) I. L. R. 28 All. 404 (1906).
(52) I. L. R. 29 All. 282 (1907).
(54) I. L. R. 35 All. 329 (1912).
(55) I. L. R. 35 All. 506 (1913).
(57) I. L. R. 40 All. 103 (1917).
(58) I. L. R. 40 All. 686 (1918).
(67) I. L. R. 2 Bom. 61 (1877).
(70) I. L. R. 36 Bom. 524 (1912).
(73) [1919] P. R. 24; 20 Cr. L. J. R. 711.
(79) 4 Pat. L. W. 120; 19 Cr. L. J. 789 (1917).
(80) 20 Cr. L. J. 289 (1919).
(136) 2 Cr. App. Rep. 217; 25 T. L. R. 612 (1909).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

Lord Esher's words in *Abrath* v. *The North Eastern Railway Company* (137) :—'It is no mis-direction not to tell the Jury everything which might have been told them : there is no mis-direction unless the Judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not mis-direction, and those who allege mis-direction must show that something wrong was said or that something was said which would make wrong that which was left to be understood.' Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the Counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a mis-carriage of justice. Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument." These observations have been approved of and acted upon in the Full Bench case of *Emperor* v. *Fateh Chand Agarwala* (177) and in the case of *Emperor* v. *Upendra Nath Das* (1). In the last mentioned case Sir Lawrence Jenkins, C. J., observed as follows :—"The duty of the Judge is in my opinion to lay down the law in reference to the case presented to the Court and the facts of the case, and not to perplex the mind of the Jury with considerations that are outside the legitimate scope of the enquiry. It is, I think, the duty of the Judge to keep the Jury within proper limits and for this purpose to simplify as far as he can the issues fairly and properly before the Court, and direct the minds of the Jurors to those issues and those issues alone."

Now, applying the above principles to this case, the question arises whether on a fair and reasonable reading of the evidence and of the statement made by the prisoner, and of the learned Judge's charge to the Jury, it can be said in this case that the learned Judge had "omitted to draw the attention of the Jury to the defence of the accused, save and except a mere reference to the statement made by the accused." To start with, according to the evidence of Hara Prasad Das, the packer, there were four men, three inside the room and one outside, and that the three men who were inside the room had fired. The evidence of Sham Dulal Das, the Post Office clerk, is also to the same effect. The witness Sitaram says there were four men; he heard three shots being fired and he saw four men running away. The witness Jhapsaram states that he saw four men run away. The point about the number of the men who had formed the party is one of very great importance, because of the description of the clothes the men had on themselves as given by the packer and the Post Office clerk. In my opinion it was most material to know

(137) L. R. 11 A. C. 247 (188 6).
(177) I. L. R. 44 Cal 477: s. c. 21 C. W. N. 33; 24 C. L. J. 400 (191 6).

(1) 9 C. W. N. 883: s. c. 8 C. L. J 277 (1904).

with certainty the exact number of men who had assembled at the Sankaritolla Post Office on the afternoon of 3rd August 1923, because if there were only three men and if out of the three two were inside the room, namely, the man who had the mask on and the man with a striped coat, the third man, who according to the evidence had a white coat on, must have been, having regard to the plan of the Post Office and of the courtyard, the man who stood outside the Post Office room and near the steps leading thereto; but there is no cross-examination upon this most vital point and it is impossible for me to found my judgment in favour of the accused in the absence of cross-examination. There is, however, enough in the learned Judge's charge to the Jury which indicates to my mind that he had not overlooked the question raised in the first point indicated above. In at least three passages in that charge the learned Judge directed, and properly directed, the attention of the Jury to this matter.

Now, as regards the second issue, *viz.*, was the prisoner outside the Post Office room and in the coutyard, the learned Judge did draw the attention of the Jury to the suggestion made on behalf of the defence, although no doubt he pointed out, as he was entirely right in doing, that there was no evidence in support of the suggestion made by the defence.

As regards the third issue, *viz.*, whether the prisoner had any murderous intention, the learned Judge has time after time in the course of his charge to the Jury referred to the question of the common intention of the men who had joined in the enterprise and he very properly left the entire matter to the Jury to decide. The intention of the participants in the criminal act was to be gathered by the Jury from the circumstances disclosed in the evidence and as I read the learned Judge's charge to the Jury, he pointedly drew the attention of the Jury to the fact that they had to be satisfied that the criminal act in question was done by several persons in furtherance of the common intention of all. In other words, the common murderous intention had to be inferred from a net work of facts cast around the accused and the Jury had to act on just and reasonable conviction founded upon just and reasonable grounds.

Therefore, so far as these three issues of fact are concerned, there are no valid grounds for the suggestion that the learned Judge had omitted to direct the Jury thereon. But it is said by learned Counsel for the accused that the learned Judge did not remind the Jury that they were absolute judges of facts, that he did not tell the Jury that a large crowd had collected at the Post Office immediately after the occurrence and that in the *melee* it was impossible to ascertain whether the empty cartridge case which has been produced was the only one which had dropped out, that he gave undue prominence to the evidence of the packer and did not remind the Jury that the packer was contradicted in material particulars by the witness P. L. Sircar, that he omitted to read and explain to the Jury the various sections of the Indian Penal Code on which the charge against the accused was based, and that he did not explain to the Jury the bearing of Exs. 10 and 11 when coupled with the evidence of P. L. Sircar. Many of the points indicated above fade into insignificance if the importance of the last point is once realised. The suggestion therein is that not until the accused had run away into Mohendra Sircar Lane, did a live-cartridge fall out of the automatic pistol that he was carrying, that this live-cartridge had not fallen out before because the

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

accused had forgotten to release the safety-catch on the pistol and further that if Ex. 10 is that live-cartridge which had fallen out of the accused's pistol, then the inference may safely be drawn that the accused had not fired at all until he was chased.

In the first place, it is noteworthy that the suggestion that has now been made before us was never made before the trial Judge and Jury. In the second place, having regard to what happened at the trial when the witness Purno Chandra De was examined, and having regard to the facts which have been stated to us by the learned Judge, showing conclusively that Ex. 10 went out of the case altogether, it is not open, in my opinion, to learned Counsel for the accused at this stage of the case to hark back to Ex. 10 and to make use of it for the purpose of supporting his theory. In the third place, having regard to the fact that the gun-expert Mr. Todd was not examined on the point as to whether Ex. 10 could fit into the automatic pistol which was in the hands of the accused, it would be mere speculation to enlarge further on the question. I am satisfied on the evidence and on the statement of the learned Judge that the case now raised on behalf of the accused was not made at the trial and was not even remotely indicated during the progress of the trial and that it is an after-thought. So much for the theory of the live-cartridge. As regards the other points referred to above, under this head, I do not think it is necessary for me to go into them in detail, the more so because I am satisfied from the tenor and general effect of the whole summing up that substantially the Jury were given a proper direction. No two minds approach a subject from quite the same angle and it may be that another Judge could have framed his charge in different, though I do not say better, language. See in this connection the judgment of Lord Shaw in *Arnold* v. *Emperor* (153). But the test to be applied in this as in every case is whether on the facts of the particular case the summing up can in the light of the principles discussed above be legitimately challenged. In my judgment, Mr. Justice Page's, up cannot be so challenged.

In this case certain considerations arising out of what was stated to and by the learned Judge before the trial were forced upon our attention and we have had to consider whether the accused has had a fair trial. After much anxious consideration I have come to the conclusion that nothing was left unsaid or undone which could have been said or done on behalf of the accused on the facts of this particular case. The considerations to which I have alluded may call for our judgment on a future occasion; for the present I prefer not to say anything further on the same. But I have this satisfaction that all the facts in connection with this trial have been made known to us. The extreme importance of avoiding any grounds for suspicion in trials, civil and criminal, cannot be too strongly emphasised; suspicion feeds on secrecy and the best way to get rid of suspicion is to let all the facts be known. That has been done in this case. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not in the interest of either the Crown or the accused. I have tried to steadily keep this in view and the conclusion I have come to is that the two points raised on the learned Advocate-General's fiat fail and that this application should be dismissed.

(153) I. L R. 41 Cal 1023: 8 C. 18 C. W. N. 785; 16 Bom L. R. 544 (P. C.) 1914.

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

CUMING, J.—I have given my best attention to the elaborate arguments that have been addressed to us by Mr. Chatterjee and the Standing Counsel and after giving them my most careful consideration am of opinion that this certificate of the learned Advocate-General is misconceived and this application for review under cl. 26 of the Letters Patent should be refused.

It is unnecessary for me to set out the facts of the case which will be found in the judgment of my learned brother Mookerjee.

Mr. Chatterjee has urged three points.

His first point is that Mr. Justice Page in his charge to the Jury laid down the law as follows :—

"Therefore in this case if these three persons went to that place with a common intention to rob the Post Master and if necessary to kill him and if death resulted, each of them is liable whichever of the three fired the fatal shot."

Mr. Chatterjee's argument seems to be that this may be the law in England, he does not seem to dispute that it is so, but he would contend that it is not the law in India. His contention seems to be that those who did not actually fire the fatal shot may be charged with abetment but not as principals; that in the present case there is no charge of abetment neither did the learned Judge put such a case to the Jury; further that sec. 34 and the cognate secs. 35, 36 or 37 of the Indian Penal Code have no application to the present case and that the persons who did not actually fire the fatal shot that killed the Post Master could not be guilty as principals. The major portion of his argument has centered round the correct interpretation of sec. 34, Indian Penal Code, and with that argument I now propose to deal. That section runs as follows :—

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Mr. Chatterjee admits that the expression "act" includes a "series of acts" but he would contend that the section contemplates that each of the persons should participate in each of the acts or series of acts and that it does not cover a case where one act of the series is done by one person and another by another person even though these individual acts had a common intention and result, or different persons do different parts of the same act even though they were acting with a common intention.

Now in considering whether the learned Judge correctly put the law to the jury, we are not necessarily restricted to the provision of sec. 34.

Sec. 34 and the connected secs. 35, 36, 37 and 38 create no substantive offence. They are merely declaratory of a principle of law and in charging an accused person it is not necessary to cite them in the charge. If therefore the view of the law given by the learned Judge to the jury fall within any one of these sections it will be sufficient. Taking first of all sec. 34 I am not prepared to accept the extremely restricted view which has been urged by the learned Counsel. The expression criminal act includes also a series of acts.

A criminal act may well consist of parts, each of which is more or less necessary to the accomplishment of the act. Thus one man may keep guard at the door, while another man holds the victim and a third man kills him. Or one man may be there in order by his presence to encourage, support or protect the man who is actually

KING-EMPEROR v. BARENDRA KUMAR GHOSE.

killing the victim. They would to my mind be all of them doing some parts of the act because it may well be that without their support the act could not be done. They must therefore be considered to be all doing the act though each is executing a different part of the act.

Further if the expression act includes a series of acts then all the different acts of the conspirators, such as keeping guard, terrorising the onlookers or victim must be considered as one act. It is impossible to conceive two individuals doing the identically same act. Such a thing is impossible. Therefore to have any meaning the expression "criminal act done by several persons" must contemplate an act which can be divided into parts each part being executed by a different person, the whole making up the criminal act which was the common intention of all. To put it in another way the one criminal act may be regarded as made up of a number of acts done by the individual conspirators, the result of their individual acts being the criminal act which was the common intention of them all.

I think that the expression "criminal act done by several persons" includes the case of a number of persons acting together for a common object and each doing some act in furtherance of the final result, which various acts make up the final act.

Mr. Chatterjee had cited in support of his contention a number of authorities drawn from every High Court in India. I do not myself propose to travel beyond the decision of our own Court.

Mr. Chatterjee had laid much stress on the ruling of Stephen, J., in the case of *Nirmal Kanta Roy* (9). No doubt this case strongly supports his contention but it must be pointed out with great respect to the learned Judge that it is the decision of a single Judge sitting on the Original Side and therefore cannot be considered as an authority so far as we are concerned. It is moreover in direct conflict with a large number of cases in this Court and so far as I can see has never been followed. I will first of all consider the case of *Gauri Das Namasudra* v. *Emperor* (40) where the late learned Chief Justice remarked: "Recourse has, therefore, to be had to sec. 34 of the Indian Penal Code, but in the circumstances of this case we are not prepared to hold that the Appellant who did not strike the fatal blow must have contemplated the likelihood of such a blow being struck."

Another case which may be referred to is the case of *Keshawar Lal Shaha* v. *Giris Chandra Dutt* (37). In this case the servant received the money in payment for *ganja* sold by his master, both master and servant being present. The learned Judges, one of whom was Stephen, J., held that both master and servant were guilty applying the principles of sec. 34 and that sec. 114 was not applicable. Now in this case it will be seen that the two men did different parts of the criminal act which was the sale of the *ganja*, for one handed out the *ganja* and another took the money. It cannot therefore be said that they each did the whole act for they each did a distinct part of the criminal act.

In the case of *Khudiram Bose* v. *Emperor* (39) Brett, J., states :—

"We may add that even if such had been the case the guilt of the accused would have been equal. If he and Dinesh went that night with the intention of

(9) I. L. R. 41 Cal. 1072 ; s. c. 18 C. W. N. 723 (1914).

(37) I. L. R. 29 Cal. 496 (1902).

(39) 12 C. W. N. 530 ; s. c. 9 C. L. J. 55 at p. 74 (1908).

(40) I. L. R. 36 Cal. 659 (1908).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

committing murder by means of the bomb and if in prosecution of this common object the accused stood by and held the heavy articles and the coat of Dinesh so as to facilitate the commission of the offence by Dinesh and to facilitate his escape afterwards and if Dinesh threw the bomb the accused (Khudiram) would be equally guilty with Dinesh of committing the offence of murder (sec. 34, Indian Penal Code)."

In the case of *Nibaran Chandra Ray* v. *King-Emperor* (38) the learned Judges (Mitra and Fletcher, JJ.), remark :—

"If, however, two persons are found under circumstances as assumed in the hypothetical case, with guns in their hands and they had been acting in concert or each was an assenting party to the action of the other, the criminal act done by one must be presumed to have been done in furtherance of the common intention of both and sec. 34 of the Indian Penal Code may be invoked to impose penal liability on any one of the persons in the same manner as if the act was by him alone."

In support of this proposition the learned Judges refer to *Queen* v. *Gora Chand* (19).

The case of *Foezullah* v. *The King-Emperor* (47) on which Mr. Chatterjee apparently relies really supports the case of the prosecution, for the learned Judges held "that when two or more persons join actively in an assault on a third person there is ample authority for the view that they are directly responsible for the injuries caused to the extent to which they had a common intention" and surely to fire a pistol at a man or to stand guard at the door with a loaded pistol is actively joining in murdering him.

Learned Counsel has further contended that if sec. 34 is read as Page, J., would read it in his charge the enactment of sec. 149, Indian Penal Code, would be entirely unnecessary. But a consideration of sec. 149 will shew that it is wider in its scope than sec. 34 for it covers not only the acts committed in prosecution of the common object but also any act that the members of the assembly knew to be likely to be committed. I am therefore of opinion that Page, J., correctly laid down to the jury the laws in this portion of his charge. It is the interpretation which has consistently been put on the section by this Court and I see no reason to differ from it.

Mr. Chatterjee has then urged that the learned Judge mis-directed the jury in that portion of his charge where he stated :—

"If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob and if necessary to kill and death resulted from their acts, if that be so, you are bound to find a verdict of guilty." Learned Counsel contends that the implication in that portion of the charge is that one person stood outside the room (which was the defence set up by the accused). He contends that the learned Judge should have specifically put to the jury that they should consider whether the man who stood at the door could be affixed with the same intention as those who entered the room, and whether he could be held to know that murder would be done.

The accused's case in his statement is that he was the man who stood outside.

The answer to this argument must I think depend on the facts of the case. The evidence shews that three men entered the Post Office and the 4th stood on the

(19) 5 W. R. Cr. 45 : B. L. R. F. B. 443 (
(38) 11 C. W. N. 1085 at p. 1089 (1907).
(47) 25 C. W.N. 24 (1920).

THE KING-EMPEROR v. BARENDRA KUMAR GHOSE.

step. He was within a foot or two of the three who actually entered the Post Office door. This man was according to the evidence armed with a pistol and the accused who contends that he was this man also admits he was so armed. In view of his proximity to the other three and the fact he was also armed it is difficult to see how the learned Judge could have differentiated his case from the other three or asked the jury to do so and separately consider it.

Mr. Chatterjee has next contended that the learned Judge omitted to put the defence of the accused to the jury beyond making a mere reference to the statement of the accused.

He argues that sec. 297 applies to High Courts.

Sec. 297 provides that in cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence and laying down the law by which the jury are to be guided.

Now it is difficult to see what evidence the learned Judge could have put to the jury on behalf of the accused. The accused himself had examined no witnesses. Mr. Chatterjee, however, argues that here was evidence to support the case of the accused that a live-cartridge came out of his pistol and he says this evidence was the finding of a live-cartridge. But there is no evidence on the record to prove where this live-cartridge was found. The prosecution were unable to put into the box the man who found it as he could not be found and the defence opposed any other evidence as to the finding of the live-cartridge. Nor is there any evidence that this live-cartridge, Ex. X, fitted the accused's pistol. No attempt was made by the accused to examine Mr. Todd, the gun-maker on this point. There is no evidence therefore to connect this live-cartridge with the present case and clearly no evidence on the point for the learned Judge to put to the jury. Another point which Mr. Chatterjee contends should have been put to the jury is that Mr. Bavin had deposed that the accused was severely beaten after his arrest and the packer denied he was beaten. Mr. Chatterjee contends that the contradiction should have been put to the jury to shew the untrustworthiness of the packer's evidence.

The difficulty here is that the accused himself never suggested he had been beaten nor indeed does Mr. Bavin. Mr. Bavin states that accused was in a state of collapse and had bruises on him. That is not the same thing as saying that he had been beaten. Mr. Chatterjee then suggests that the learned Judge should have drawn the jury's attention to the fact that Sarkar's evidence contradicts the packer. The evidence has been put before us and I am bound to say I do not see that Sarkar's evidence does contradict the packer. Mr. Chatterjee says he did put this to the jury. If so, the jury had the argument in their mind. Learned Counsel then argues that the learned Judge did not put to the jury the argument and comments that he (Counsel) had advanced in support of the accused's case. But it seems to me that it is imposing an impossible task on the Judge to ask him to repeat again to the jury every argument and comment put forward either by the defence or the prosecution's Counsel.

The jury had these arguments in their mind, for the defence had in this case the right of reply. The contention that the Judge should in such circumstance endeavour to repeat to the jury the arguments they had just heard is imposing on him an impossible mnemonic feat and

which could only confuse the jury for it is difficult to see how the Judge could put them exactly as the Counsel did. The probable result of such an attempt could only be an inaccurate version of what Counsel said. Sec. 297 provides that the Judge must put the evidence for the accused to the jury and so far as I can see this is what the learned Judge did. I cannot find that, beyond his own statement which was put to the jury, there is any evidence on his behalf which could have been put to the jury and which was not put. Putting the accused's case to the jury cannot possibly mean putting to the jury every argument and comment of the learned Counsel for the defence. A charge to the jury must be read as a whole and also in the light of the question raised by Counsel during the conduct of the trial. The Crown case was that there were four men one of whom stayed outside and did not fire and that accused was one of those that entered and fired. The accused's case was that there were three men one of whom stayed outside. The learned Judge did put this case of the accused to the jury. See pp. 20-22

Mr. Chatterjee then argues that the learned Judge was bound to read the sections of the Code to the jury.

Now the law on murder is contained in secs. 299, 300, 301 and 302 and I am prepared to say that to read these sections to a number of lay-men would be to convey nothing to them and to hopelessly confuse them. Then again with regard to sec. 34 apparently Mr. Chatterjee argues that this section should have been read to the jury and they should have been left to put their own construction on it.

Seeing that it had taken learned Counsel some three days to argue what the section does mean it seems at the best doubtful if anything would have been gained by reading it to the jury. The learned Judge put to the jury in simple language what he considered was the principle which the section contained and this to my mind is the proper way of putting the law to the jury.

In view of the above finding it is unnecessary to consider what course the Court should adopt in the event of it being found that there had been a misdirection or error on a point of law. With regard to the sentence I do not think, bearing in mind the findings come to above, that there has been no error in law; it is open to the Court to review the sentence passed by the learned Judge in this case.

It is not contended that the sentence is an illegal one.

Cl. 25 of the Charter provides that there shall be no appeal from any sentence or order passed or made on any criminal trial before the Courts of Original Jurisdiction which may be constituted by one or more Judges of the said High Court but it shall be in the discretion of such Court to reserve any point or points of law for the opinion of the High Court.

Cl. 26 provides that on such point or points of law being reserved or on it being certified by the Advocate-General that in his judgment there is an error in the decision of a point or that a point requires to be further considered the High Court shall have full power to review the case or such part as may be necessary and finally determine such point or points of law and thereupon to alter the sentences passed and to pass such judgment and sentence as the High Court may seem right.

The expression "thereupon" would I think show that it is only where there has been an error in law that the High Court has any power to re-open, review and deal with the case. If there has been no error

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

in law I do not think there can be any power to deal with the case further. Otherwise the position would become this. An accused person who could obtain a certificate that there had been an error in law or that the law required to be further considered even though unsuccessful could obtain an appeal on the severity of his sentence while the accused person in whose favour a certificate could not be obtained would not enjoy the same privilege. Such an anomalous position could not be contemplated.

A little further consideration would shew that what the Advocate-General would in this view of the law be doing when he granted a certificate would be granting leave to appeal to the High Court against an order which cl. 25 expressly says is not appealable.

In the view which I take of the meaning of cl. 26 I am supported by the case of *King-Emperor* v. *Upendra Nath Das* (1). That case was similar in many respects to the present case. In that case which was also a capital sentence case a certificate had been granted by the Advocate-General that certain points of law had been wrongly decided by the trial Judge (Stephen, J.) and hence that the Jury had been misdirected.

The Full Bench decided that the certificate of the Advocate-General was misconceived and that no error of law had in fact been made. The learned Chief Justice Sir Lawrence Jenkins concluded his judgment as follows :—

"In this view of the case it is not within my power to re-open the case and I regard myself as not entitled to express any opinion on its merits. In fact I am not in a position to deal with the merits; for they have not been discussed before us, nor have those conditions been established on which alone they could be considered by us.

"Our powers are circumscribed for we can only act in conformity with cl. 26 of the Letters Patent. If there was no misdirection or other error as certified the certificate was misconceived and we have no power to interfere. If the merits of the case or the sentence are to be further considered, then that must be not by this Court, but by some other authority vested with the requisite power."

Woodroffe, J., remarked: "With the merits we are not concerned until it is established that there has been an error in law which opens out the case for our judgment. The same ground precludes me from dealing with the question of sentence which may arise on the facts above stated and the possibility if the verdict be correct of the act having been committed without premeditation on a sudden access of passion. This is, however, a matter for the Crown to consider. I can only hold no error of law has been shown which entitles me to re-open a verdict or to consider a sentence which has been already passed."

Mookerjee, J., concluded his judgment with these words: "In the view I take no error of law has been established and consequently the Court is not called upon to express an opinion as to the propriety of the conviction and sentence although as Woodroffe, J., has pointed out if the Court could examine the case on the merits, there might be matters for careful consideration."

Two cases have been brought to my notice in which on a certificate from the Advocate-General the Full Bench did interfere with the question of sentence

(1) 19 C. W. N. 653; s. c. 21 C. L. J. 377 (1914).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

[*Rex* v. *Sheikh Talet* (176) and *Emperor* v. *Narayan Raghunath Palki* (189)].

But an examination of these two cases makes it at once apparent that they are distinguishable and in fact support my opinion. In the case of *Rex* v. *Sheikh Talet* (176), it was found that evidence had been wrongly admitted. This mis-reception of evidence was held to be a point of law. Then the case was re-opened and reviewed. The Court excluded the inadmissible evidence and dealt with the case.

In the other case, *Emperor* v. *Narayan Raghunath Palki* (189), the same point arose. It was held that inadmissible evidence had been admitted and the Court dealt with the whole case on the evidence properly admitted. The same principle was followed in *O'Hara's* case (35). I am aware of no case in which the Courts where it has found the certificate misconceived has dealt with the case and interfered with the sentence.

In my opinion therefore the certificate in this case has been misconceived and the application must fail.

Certain other points and incidents have arisen during the hearing of this case and in the course of the trial. These points have not been argued by Counsel and form as far as I know no part of the case of either party. In these circumstances I do not think it necessary that I should discuss them and I have confined myself to the case of the parties as presented to me in Court.

PAGE, J.—I should have felt it to be my duty to state in my own words what I conceive to be the meaning and effect of sec. 34 and the kindred sections of the Indian Penal Code, were it not that I have had an opportunity of reading the judgments which have been delivered by my brothers Richardson, Ghose and Cuming.

In more felicitous language, and with greater analytical power, than I could command they have expressed my own view as well of the law as of the facts to which it is to be applied.

To re-state their arguments in different language would be a work of supererogation.

At the trial I found myself unable to accept the construction which Stephen, J. had placed upon sec. 34 in *Nirmal Kanta Roy* v. *King-Emperor* (9). With great respect to the learned Judge I stated—and I adhere to what I then said—that if sec. 34 bore the meaning attributed to it by Stephen, J., the section would prove to be a menace and not a safeguard to the community. The case of *Nirmal Kanta Roy* v. *King-Emperor* (9), at any rate so far as it relates to the construction of sec. 34, must now be regarded as having been incorrectly decided.

Notwithstanding the exhaustive argument of Counsel for the accused I have been unable to persuade myself that the issue of law presents any real difficulty, and the decision of this Court follows in the wake of a long and almost unbroken series of judicial pronouncements in the Calcutta High Court and other High Courts in India. With respect the facts I will content myself with saying that if the charge was sound in law, and the jury accepted the evidence which was adduced before them, the issue of fact, in my opinion, was as simple an one as ever was tried. The jury found an unanimous verdict; it was adverse to the accused, and there was ample evidence to support it.

In these proceedings the Court has decided that there was no mis-direction or

(35) I. L. R. 17 Cal. 642 (1890).
(176) 10 C. L. J. 18 (1909).
(189) I. L. R. 32 Bom. 111 (1907).
(9) I. L. R. 41 Cal. 955: s. c. 18 C. W. N. 723 (1914).

THE KING-EMPEROR *v.* BARENDRA KUMAR GHOSE.

non-direction as set out in the certificate of the learned Advocate-General. The certificate, therefore, is misconceived, and, in my opinion, the jurisdiction of this Court is exhausted, and the matter is at an end.

Certain other questions relating to procedure and the conduct of Counsel who had appeared for the accused were canvassed at some length before us, but as to them I express no opinion. With great respect I take leave to postpone consideration of these matters until they can effectively be determined. In my opinion, this is not a suitable occasion, and this Court is not the proper tribunal for disposing of them.

There is only one other matter to which I desire to refer. That Judges exercising Original Civil or Criminal Jurisdiction should be compelled to transact business without the assistance of shorthand writers is false economy, and an anachronism which I trust in the near future will come to an end. But shorthand writers are not infallible, and these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive: It is not to be criticized or circumvented; much less is it to be exposed to animadversion.

Postscript.

As I was seriously ill when judgment was given and had no notice of the statement which Mookerjee, J., thought it right to make as to what he would or might have done if Counsel had sought an interview with him, I desire to place on record that it was well-known that the two Counsel who came to my chamber were appearing for the accused Ghose, who might have been prejudiced if they had withdrawn from the case at the last moment. I understood that Counsel were anxious to obtain my advice in the difficult position in which they were placed, and that they proposed to advise the accused to plead guilty to the charge of murder if, having regard to the alleged facts disclosed in the depositions, I thought that the offence did not merit the infliction of the extreme penalty, I told them that I could give them no information as to what might happen at the trial; that they must make up their own minds as to whether they should conduct the defence or not, but that if they were satisfied that the accused was guilty, while it was their duty by cross-examination to test the evidence of the witnesses they were not entitled to set up a substantive case, such as an *alibi*, in opposition to the case for the Crown.

It now appears that after a conference with the accused these Counsel came to the conclusion that the accused possessed a sound defence, and that they conducted the defence at the trial upon that assumption, and in accordance with instructions which they had received from the accused without regard to what had passed at the interview in my chamber. The question raised by Mookerjee, J., who presided in this Court, after having received the same information which I possessed before the trial, would seem to be an ethical rather than a legal one, about which more than one view may legitimately be held. But as, in my opinion, it is not germane to any issue in this case, I think that the question is not one which may properly be discussed in these proceedings and I say no more about it.

Messrs. K. K. Dutt & Co., Solicitors for the Prisoner.

Mr. Gooding, Solicitor for the Crown.

P. K. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 183 OF 1923.

C. C. GHOSE, J.
CUMING, J.
1923,
24, April

RAMAN BEHARI ROY,
Petitioner,
v.
THE KING-EMPEROR,
Opposite Party.

Indian Penal Code (Act XLV of 1860), sec 415, sending an insured cover falsely purporting to contain currency notes and causing addressee to sign a receipt for the cover, if constitutes "cheating."

Accused sent an insured cover purporting to contain eight Government Currency Notes of Rs. 100 each, but the addressee on opening the same found no currency notes in it:

Held—*That it is difficult to say that the person deceived has been induced to deliver any property to any other person or to consent that the said other person should retain any property, or that the person deceived has been induced to do or omit to do anything which he would not have otherwise done, and which act or omission has caused or was likely to cause damage or harm to that person in body, mind, reputation or property. All that the person deceived has been induced to do is that he has signed a receipt acknowledging the delivery of a cover. He has not acknowledged by that the receipt of any sum of money alleged to be contained in the cover. That being so, the charge of cheating has not been brought home to the accused.*

This was a Rule on the Deputy Commissioner of Sylhet, against an order of conviction of the Petitioner.

The facts will fully appear from the judgment.

Babus Manmotha Nath Mukerjee and *Nikunja Behari Ray* for the Petitioner.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This Rule was issued calling upon the Deputy Commissioner of Sylhet to show cause why the conviction of the Petitioner and the sentence passed upon him should not be set aside on the ground that on the facts alleged by the prosecution, no offence under sec. 417, I. P. C. has been made out. We have heard Mr. Manmotha Nath Mukerjee in support of the Rule and Mr. Orr on behalf of the Crown and for the reason given below, we are of opinion that Mr. Mukerjee's contention must prevail.

The facts alleged by the prosecution, shortly stated, are as follows:—It is alleged that the accused sent to one Nobin Chandra Choudhury an insured cover purporting to contain eight Government Currency Notes of Rs. 100 each. The envelope in question, it appears, was handed over by the accused in person to the Post Master at Nilamsbazar Post Office on the 16th November 1920. The cover was received at the Beliaghata Post Office on the 18th November 1920, and was delivered to an agent of the said Nobin Chandra Choudhury. On the addressee opening the envelope, the same was found to contain a letter advising the despatch of a sum of Rs. 800 and several bits of waste paper. No Government Currency Notes was found inside the cover. Thereupon the Post Master of the Beliaghata Post Office was communicated with by the addressee and Police were also called in.

These facts have been found to be correct by the learned Sessions Judge and, as stated above, the argument on behalf of the Petitioner is that assuming that these facts are correct, no offence under sec. 417, I. P. C. has been made out.

Now, in order to find out the ingredients of the offence of cheating, we must turn to sec. 415, I. P. C. The ingredients by that section are:—

RAMAN BEHARI ROY *v.* THE KING-EMPEROR.

(1) Deception of any person.

(*a*) Fraudulently or dishonestly inducing that person

(*i*) to deliver any property to any person; or

(*ii*) to consent that any person shall retain any property; or

(*b*) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Now, in this case, having regard to the facts found, it is difficult for us to say that the person deceived has been induced to deliver any property to any other person, or to consent that the said other person should retain any property, or that the person deceived has been induced to do or omit to do anything which he would not have done or omitted, if he were not so deceived, and which act or omission has caused or was likely to cause damage or harm to that person in body, mind, reputation or property. All that the person deceived has been induced to do is that he has signed a receipt acknowledging the delivery of a cover. He has not acknowledged by that the receipt of any sum of money alleged to be contained in the cover. That being so, we are unable to say that the charge of cheating has been brought home to the accused in the circumstances which appear on the record before us.

The result, therefore, is that the Rule is made absolute. The Petitioner will be discharged from his bail bond and the fine, if paid, will be refunded.

J. N. R. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD ATKINSON.
LORD SHAW.
LORD PHILLIMORE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

1923,
Heard, 19 and 20, April.
Re-heard by Full Board, 18, October.
Judgment, 14, November.

BRIJ NARAIN RAI, Appellant, *v.* MANGLA PRASAD, Respondent.

Hindu law—Mitakshara—Joint family property Mortgage by father as managing member to pay previous mortgages—Latter, if "antecedent debts"—"Antecedent debts," what are—Son's pious obligation to pay off father's debt, if arises in father's lifetime—Right of creditors of father to execute decree against ancestral property—Conflicting principles, equally supported by authority—Stare decisis.

Where the managing member of a joint Mitakshara family, being the father of the other members, executed a mortgage of joint ancestral property in order to pay off two mortgages previously executed by him on the same property:

Held—*That the later mortgage having been executed to pay off an "antecedent debt" bound the estate.*

The managing member of a joint undivided Mitakshara family cannot alienate or burden joint ancestral property qua *manager except for purposes of necessity.*

If he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

There is no rule that this result is affected by the question whether the

BRIJ NARAIN RAI v. MANGLA PRASAD.

father who contracted the debt or burdened the estate is alive or dead, and observations to the contrary in SAHU RAM CHANDRA *v.* BHUP SINGH (1), *which were not necessary for the judgment in that case, cannot be supported.*

If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

This was an appeal from a decree, dated the 14th August 1919, of the High Court at Allahabad, which affirmed a decree, dated the 23rd December 1915, of the Subordinate Judge of Ghazipur.

The suit was filed by their mother on behalf of her minor sons Mangla Prasad and Jamna Prasad for a declaration that a mortgage executed by their father and a decree obtained on that mortgage were void as against them.

The father Sita Ram and his sons were members of a Hindu joint family governed by the Mitakshara law. On the 12th December 1905 and again on the 19th June 1907, Sita Ram mortgaged the joint and ancestral family property. The evidence did not disclose the purpose for which the money was borrowed.

On the 4th March 1908, Sita Ram executed the mortgage in suit in order to pay off the earlier mortgages. The mortgagees—represented in this appeal by the Appellant—brought a suit on this mortgage and obtained an *ex parte* decree on the 27th November 1912, and on the 13th March 1915 the present suit was filed. The Subordinate Judge held that the sons were not bound by the decree of 1912 and his decision was affirmed by the High Court on appeal (Tudball and Rafique, JJ.).

The Appellant applied for leave to appeal to His Majesty in Council and in granting a certificate the learned Judges of the High Court (Grimwood Mears, C. J. and Banerji, J.) stated as follows :—

"The value of the subject-matter of the suit and of the proposed appeal exceeds Rs. 10,000, but this Court affirmed the decision of the Court below. We have therefore to see whether the case involves a substantial question of law. The question of law which arises is what constitutes antecedent debt so as to justify a transfer of joint family property by the manager of the family in the case of a Hindu family governed by the Mitakshara law. This Court has applied in this case the observations of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1). The Madras High Court in the Full Bench case of *Armugham Chetty* v. *Muthu Koundan* (4) have taken a different view, and so have the Judicial Commissioner of Oudh in the case of *Ramman Lal* v. *Ram Gopal* (14). The Patna High Court has held the same view as that adopted by this Court in the present case and the judgment of the learned Judge of the Patna High Court was passed in the case of *Sukhdeo Jha* v. *Jhapat Kamat* (15). There is thus a conflict of opinion as to what was intended by their Lordships of the Privy Council to be laid down in the case of *Sahu Râm Chandra* v. *Bhup Singh* (1) and what is the effect of the observa-

(1) L. R. 44 I. A. 127: s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).

(1) L. R. 44 I. A. 127: s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).
(4) I. L. R. 42 Mad. 711 (F. B.) (1919).
(14) 21 Oudh Cases 200.
(15) [1920] Pat. 67; 5 P. L. J. 120 (1920).

BRIJ NARAIN RAI *v.* MANGLA PRASAD.

tions made by their Lordships in that case. It is desirable that the question, which is one of general importance, be authoritatively settled. We therefore certify that this case fulfils the requirements of sec. 110 of the Code of Civil Procedure."

The appeal was argued before the Judicial Committee on 19th and 20th April 1923 and was re-argued before a Full Board on 18th October 1923.

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Appellant.—It is fully established that in the absence of immorality the sons cannot impugn their father's alienation of the family property for the discharge of an antecedent debt.

Nanomi Babuasin v. *Modun Mohun* (2).

Further it is settled law that if a decree has been passed against a father in regard to his debt, that decree can be enforced against his sons even during their father's life-time.

Suraj Bunsi Koer v. *Sheo Pershad Singh* (16).

In the present case there is no connection between the debt for which there was a new mortgage and the prior antecedent debts, except that the latter were discharged out of the new mortgage.

In that way the present case is distinguishable from *Sahu Ram Chandra* v. *Bhup Singh* (1).

There the incurring of the debt was the creation of the mortgage itself and there was no antecedency either in time or in fact. The High Court have erroneously construed the judgment in *Sahu Ram Chandra* v. *Bhup Singh* (1) to confine the definition of an antecedent debt to a debt which has not been secured on joint family property.

That view is opposed to the whole tenor of Hindu law. See *Khallilul Rahman* v. *Gobind Pershad* (17), Mayne's Hindu Law, para. 321.

If the construction placed by the High Court on *Sahu Ram's* case (1) were correct, the only conclusion that can be drawn is that the lender makes the loan with no expectation of ever being repaid.

A reasonable construction has been taken in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (3), *Armugham Chetty* v. *Muthu Koundan* (4) and *Ramman Lal* v. *Ram Gopal* (14).

The following cases show that sons are under an obligation to pay their father's debts even in his life-time.

Girdharee Lall v. *Kantoo Lall* (5), *Deendyal Lall* v. *Jugdeep Narain Singh* (6), *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (16), *Hurdey Narain Sahu* v. *Rooder Perkash Mitter* (18), *Nanomi Babuasin* v. *Modun Mohun* (2), *Bhagbut Pershad* v. *Girja Koer* (7), *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (8). *Mahabir Pershad* v. *Markunda Nath*

(1) L. R. 44 I. A. 127: s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).
(2) L. R. 13 I. A. 1: s. c. I. L. R. 13 Cal. 21 (1885).
(16) L. R. 6 I. A. 88: s. c. I. L. R. 5 Cal. 148 (1879).

(1) L. R. 44 I. A. 127: s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).
(2) L. R. 13 I. A. 1: s. c. I. L. R. 13 Cal. 21 (1885).
(3) I. L. R. 41 Mad. 136 (1918).
(4) I. L. R. 42 Mad 711 (F. B.) (1919).
(5) L. R. 1 I. A. 321; 14 B. L R. 187 (1874).
(6) L. R 4 I. A. 247: s c. I. L. R. 3 Cal. 198 (1877).
(7) L. R. 15 I. A. 99: s. c. I. L. R 15 Cal. 717 (1888).
(8) L. R. 16 I. A. 1 (1889).
(14) 21 Oudh Cases 200, 208.
(16) L R. 6 I. A. 88: s. c. I. L. R. 5 Cal. 148 (1879).
(17) I. L. R. 20 Cal. 328, 337 (1892).
(18) L. R. 11 I. A. 28 (1883)

BRIJ NARAIN RAI v. MANGLA PRASAD.

Sahai (9), *Sripat Singh Dugar* v. *Tagore* (10), *Badri Prasad* v. *Madan Lal* (11), *Laljee Sahoy* v. *Fakeer Chand* (19), *Govind Krishna* v. *Sakharam* (12), *Dattatraya Vishnu* v. *Vishnu Narayan* (20), *Ramasami Nadan* v. *Ulaganatha Goundan* (13) and *Chidambara Mudaliar* v. *Koothaperumal* (21).

The following cases dealing with the same question have come before the Board since the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1):—*Narain Prosad* v. *Sarnam Singh* (22), *Jogi Das* v. *Ganga Ram* (23) and *Chet Ram* v. *Ram Singh* (24).

Reference was also made to *Kandasami Gounden* v. *Kuppu Mooppan* (25).

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The facts in this case may be very shortly stated. On the 4th March 1908, Sita Ram granted a mortgage for Rs. 11,000 in favour of Raja Narain Brij Rai and Jagdish Narain Rai. The mortgage was secured on ancestral and joint property of which Sita Ram was at that time manager, the other members of the joint family being his two sons, minors. In 1912 the mortgagees brought a suit on the mortgage and obtained a decree *ex parte*. In 1913 the present suit was filed by the mother on behalf of her two minor sons (the elder has since become major) to have it declared that the mortgage was not binding on them and that the decree granted was so far as they were concerned null and void.

The mortgage in suit purports to have been executed in order to pay off two prior mortgages on the same property of date the 12th December 1905, and the 19th June 1907, respectively.

In the suit the Plaintiffs cited as Defendants the two mortgagees and their father Sita Ram, who had granted the mortgage. Sita Ram did not appear to defend. Jagdish Narain Rai made over his interest to his brother Raja Narain Brij Rai, who appeared to defend and pleaded that the mortgage in question having been granted to pay off an antecedent debt of the Plaintiffs' father, it was binding on the estate.

The Subordinate Judge found as facts:

(1) That the property was ancestral and joint.

(2) That the money raised under the mortgage was to the extent of Rs. 10,265 employed in paying off the earlier mortgages.

(3) That the sons had not been properly represented when the *ex parte* decree of 1912 was granted.

He then found in law that the Plaintiffs' sons were not bound by the decree of 1912, and he accordingly set aside the decree of 1912 so far as the sons were concerned; he made no further declaration. The Defendant appealed. The learned Appeal Judges affirmed the findings of fact of the Subordinate Judge with the variation that they found that the whole Rs. 11,000 had been employed in paying off the earlier mortgages; but in view of

(1) L. R. 44 I. A. 127: s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).
(9) L. R. 17 I. A. 11 (1889).
(10) L. R. 44 I. A. 1: s. c. I. L. R. 44 Cal. 524; 21 C. W. N. 442 (1916).
(11) I. L. R. 15 All. 75 at p. 79 F. B.) (1893).
(12) I. L. R. 28 Bom. 383 (1904).
(13) I. L. R. 22 Mad 49, 63 (F. B.) (1898).
(19) I. L. R. 6 Cal. 135, 139 (1880).
(20) I. L. R. 36 Bom 68 (1911).
(21) I. L. R. 27 Mad 326 (1903).
(22) L. R. 44 I. A 163: s. c. I. L. R. 39 All. 500; 21 C. W. N. 990 (1917).
(23) 21 C. W. N. 957 (P. C. (1917)
(24) L. R. 49 I. A. 228: s. c. 27 C. W. N. 150 (1922).
(25) I. L. R. 43 Mad 421 (1919).

BRIJ NARAIN RAI *v.* MANGLA PRASAD.

what had been said by this Board in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) decided after the date of the judgment under appeal, they remitted to the Subordinate Judge to find whether the earlier mortgages were incurred to discharge obligations not only previously incurred but incurred wholly irrespective of the joint family property. The learned Subordinate Judge set out additional evidence as to the two earlier mortgages. On this evidence being taken up by the learned Judges of the Court of Appeal, they came to the conclusion that it was impossible to say for what precise purpose the money raised by the two earlier mortgages had been used, or that the debt then incurred was incurred wholly irrespective of the family property. They accordingly dismissed the appeal. Appeal was then taken to the King in Council.

The Defendant admits that the *ex parte* decree is not binding on the minors in respect that they were not properly represented, but contends that there ought to have been a declaration that under the circumstances the property became bound and is liable to be taken in execution.

In the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) the suit was brought upon a mortgage 27 years old for Rs. 200, and Rs. 15,000 was demanded in respect of the principal and accrued interest. It was pleaded that the Rs. 200 had been borrowed for family necessity, but this contention was negatived in fact. It was, therefore, a simple case of a debt having been constituted by way of mortgage on the family estate by the father manager and been allowed to swell to gigantic proportions, no money having been paid thereon. The creditors had put forward the universal proposition that if debt was found to incumber the estate, it was necessary for the other members of the family who wished to affirm its non-efficiency to prove that it was incurred for immoral purposes. If they failed to do so, then the incumbrance must stand without further question. This view was negatived by the High Court, and in order to allow the point to be settled leave was given to appeal to the King in Council. The appeal was heard *ex parte*. At the appeal it became clear that there was in no sense an antecedent debt. The incumbrance itself was the debt, the money being advanced as the incumbrance was granted. In the course of the judgment, however, Lord Hobhouse's opinion in *Nanomi Babuasin* v. *Modun Mohun* (2) was cited, and commenting on this it was said :—

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

The learned Judges interpreted that to mean that a mortgage *per se* could not be an antecedent debt, for a mortgage is obviously a security which is not apart from the security of the estate over which it is constituted. If, therefore, it could not be shown that an anterior mortgage had been incurred in respect of an antecedent debt unconnected with the estate, then the anterior mortgage could not be held to be debt antecedent to the subsequent mortgage, and that subsequent mortgage

(1) L. R. 44 I. A. 127 : s. c. I. L. R. 39 All. 437 21 C. W. N. 698 (1917).

(2) L. R. 13 I. A. 1 : s. c. I. L. R. 13 Cal. 21 (1885).

BRIJ NARAIN RAI *v.* MANGLA PRASAD.

could not stand though its proceeds were entirely used to pay off the prior mortgage.

Before the present case came up to their Lordships, the expression used in the case of *Sahu Ram Chandra* (1) had come before the consideration of the High Court in Madras in the cases of *Vinjamampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (3) and again in *Armugham Chetty* v. *Muthu Koundan* (4), where the question was referred to a Full Bench. In the latter case the pleader had gone the whole length of saying that no mortgage could ever be an antecedent debt the payment of which was capable to support a new mortgage. In both cases the Madras Court came to the conclusion that the judgment of the Board in *Sahu Ram's* case (1) ought not to be so interpreted.

Upon this appeal when their Lordships were satisfied that there was this discrepancy of opinion between the judgments of the High Court of Allahabad in this case and that of Madras in the others, they thought it advisable to have the question argued before a Full Board, which has been done. Their Lordships have had the advantage of a very full and able argument in which many authorities have been quoted. It is to be regretted that this case also is *ex parte*, but their Lordships are satisfied that the whole of the authorities bearing on the question have been fairly brought to their notice.

It cannot be denied that the law on the subject of what binds an estate when the manager of the joint family estate is the father, and the other members are the sons, is in a state which is somewhat illogical and in the absence of binding authority could not be accepted. On the one hand it is settled law that the manager as such cannot bind the estate at his own free will and without any compelling cause so as to bind the reversionaries. He can bind it for necessity, the necessity being the necessity of the family, and so far there is no difficulty in principle, though the question of whether in any particular instance there was a necessity, may, like other questions of fact liable to be involved in a decree, be difficult to decide. But then there comes in the further doctrine that debt has been contracted by the father, and the pious obligation incumbent on the son to see his father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt. It may become liable by being taken in execution on the back of a decree obtained against the father, or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought. It is more than apparent how in practice these two principles may clash, nor is this in any sense a new discovery. Nothing clearer could be said than what was said by Lord Hobhouse delivering the judgment of the Board in *Nanomi's* case (2) already quoted:—

"Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the

(1) L. R. 44 I. A. 127; s. c. I. L. R. 39 All. 437; 21 C. W. N 698 (1917)

(3) I. L. R. 41 Mad. 136 (1918).

(4) I. L. R. 42 Mad. 711 (F. B.) (1919).

(2) L. R. 13 I. A. 1: s. c. I. L. R. 13 Cal. 21 (1885).

BRIJ NARAIN RAI *v.* MANGLA PRASAD.

joint estate, their Lordships think that there is now no conflict of authority."

It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop. On the one hand there is the general rule of the Mitakshara law that the manager cannot burden the estate for his own purposes. This is set forth at some length in the judgment in *Sahu Ram's* case (1). On the other hand there is the obligation of the son to discharge his father's debts, based on the doctrine of pious duty, but perhaps reflecting a remanet, as suggested by Sadasiva Ayyar, J., in the case reported in 42 Madras at page 730, from the older laws of Manu under which the son had no interest during the father's lifetime. It is enough to say that both principles are firmly established by long trains of decision, and it certainly occurs to the view that the term "antecedent" debt represents a more or less desperate attempt to reconcile the conflicting principles. For after all, if looked at straight in the face, what position could be more anomalous than this. A father, who is manager, borrows a like sum from A and B. To A he gives a mortgage on the family estate containing a personal covenant. To B he gives a simple acknowledgment of loan. B sues and gets a decree; on this decree execution can follow and the estate can be taken. A, suing upon his mortgage, cannot recover. It seems to have been felt that if the debt for which a mortgage was given was in any proper sense antecedent, then it, so to speak, escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity.

In such a matter as the present it is above all things necessary, *stare decisis*, not to unsettle what has been settled by a long course of decisions. Their Lordships entirely agree with the views of the learned Chief Justice in the Full Bench Madras case. They think that the case of *Sahu Ram* (1) must not be taken to decide more than what was necessary for the judgment, namely, that the incurring of the debt was there the creation of the mortgage itself and that there was there no antecedency either in time or in fact. Moreover, if proper attention is paid to the word "incurred," they think that it will be seen to be a proper interpretation of the sentence which has caused the doubts.

There are, however, some observations in *Sahu Ram's* case (1) which are not necessary for the judgment but which their Lordships are bound to say that they do not think can be supported. Founding upon them the learned Counsel in this case argued in the Court below that no liability of the sons, based on the pious obligation to pay a father's debt, could be made available to the creditor while the father was still alive. Here again, if the point was open, there would be much to be said in favour of a position which seems consonant with common sense. But their Lordships are satisfied that a long train of authorities have settled the question. Instances of sale being permitted when the father for whose debt the sale was made was still alive may be found in the cases reported as follows:—

Girdharee Lall v. *Kantoo Lall* (5), *Deendyal Lall* v. *Jugdeep Narain Singh* (6), *Nanomi Babuasin* v. *Modun*

(1) L. R. 44 I. A. 127: s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).

(5) L. R. 1 I. A. 321; 14 B. L. R. 187 (1874).

(6) L. R. 4 I. A. 247: s. c. I. L. R. 3 Cal. 198 (1877).

BRIJ NARAIN RAI *v.* MANGLA PRASAD.

Mohun (2), *Bhagbut Pershad* v. *Girja Koer* (7), *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (8), *Mahabir Pershad* v. *Markunda Nath Sahai* (9) and *Sripat Singh Dugar* v. *Tagore* (10).

It is true that the point was not actually taken so far as appears in any of these cases, but when a long series of cases extending over a long period of time where the parties were represented by eminent Counsel is decided in a way in which if a plea that was evident had been taken and upheld the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad. The plea, however, was actually taken in *Badri Prasad* v. *Madan Lal* (11) and was rejected by a Full Bench. In *Govind Krishna Gujar* v. *Sakharam Narayan* (12), Chandavarkar, J., says :—

"The law is now well established that under the Hindu law the pious obligation of a son to pay his father's debts exists whether the father is alive or dead."

The point was again taken and negatived in *Ramasami Nadan* v. *Ulaganatha Goundan* (13).

Their Lordships may sum up the propositions which they would wish to lay down as the result of these authorities as follows :—

(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity.

(2) If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.

Applying these propositions to the present case, their Lordships consider that the present mortgage was raised in order to pay an antecedent debt, namely, the two older mortgages and consequently binds the estate.

The result will be that the appeal will be allowed and the decrees of the Courts below set aside with costs and a declaration made that the mortgage of the 4th March 1908 affects the estate which may be brought to sale.

Their Lordships will advise His Majesty accordingly.

The Respondents will pay the costs of the appeal.

Solicitor: *Mr. Douglas Grant* for the Appellant.

G. D. M.

(2) L. R. 13 I. A. 1 : s. c. I. L. R. 13 Cal. 21 (1885).

(7) L. R. 15 I. A. 99 : s. c. I. L. R. 15 Cal. 717 (1888).

(8) L. R. 16 I. A. 1 (1888).

(9) L. R. 17 I. A. 11 (1889).

(10) L. R. 44 I. A. 1 : s. c. I. L. R. 44 Cal. 524; 21 C. W. N. 442 (1916).

(11) I. L. R. 15 All 75 at p. 79 (F. B.) (1893).

(12) I. L. R. 28 Bom. 383 at p. 389 (1904).

(13) I. L. R. 22 Mad 49 at p 63 (F. B.) (1898).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 3042 OF 1921.

BUCKLAND, J. 1923, 19, November. | CHANDMUL MULCHAND v. S. & C. NORDLINGER.

Award—Reasons given by arbitrators in the award, erroneous on a point of law, if an error of law apparent on the face of the award—Arbitration clause, stipulation for survey of goods before award is made—Award, if valid when made before such survey—Seller's duty to prove that goods are of contract quality.

In a contract for the sale and purchase of goods, it was agreed that "in the event of any dispute arising as to inferiority of quality, defects or differences in the goods, the same shall be referred . . . to the Bengal Chamber of Commerce." A dispute having arisen as regards the quality of the goods, the parties referred the same to arbitration. The award was in these terms: "We have considered the paper and as buyers . . . . are unwilling to produce the bales required for inspection, their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of the contract." The buyers brought this suit to set aside the award.

Held—*That ordinarily in a dispute between a buyer and a seller with reference to the quality of goods, it is the duty of the seller to prove that the goods are of the quality contracted for.*

Held therefore—*That there being an error of law on the face of the award, the award was bad and should be set aside.*

CHAMPSEY BHARA & CO. v. JIVRAJ BULLOO SPINNING AND WEAVING CO., LTD. (1), HODGKINSON v. FERNIE (2) *and* LANDAUER v. ASSER (3) *followed.*

Where the arbitration clause provided that "the Chamber shall arrange for survey in accordance with its rules, that surveys shall be held on the actual goods and not on shipment samples . . . ." and there having been no such surveys, the arbitrators made their award:

Held—*That the award made by the arbitrators must be deemed to have been made without jurisdiction and was invalid.*

(1) [1923] A. C. 480: I. L. R. 47 Bom. 578.

(2) 3 C. B. N. S. 189 (1857).

(3) [1905] 2 K. B. 184 at p. 195.

The facts of the case will appear from the judgment.

Messrs. B. C. Mitter, N. N. Sarkar, Langford James and *A. K. Roy* for the Plaintiffs.

Messrs. A. N. Chaudhuri, R. C. Bonnerjee and *J. N. Sinha* for the Defendants.

The JUDGMENT OF THE COURT was as follows:—

BUCKLAND, J.—This is a suit for a declaration that an award dated the 3rd September 1921 made by the Bengal Chamber of Commerce is invalid and inoperative.

On the 2nd January 1918 the parties to this suit entered into an agreement containing terms under which they would conduct business with each other, and amongst other terms the second provides that "in the event of any dispute arising as to inferiority of quality, defects or differences in the goods, the same shall be referred within 90 days of the arrival of the goods in Calcutta to the Bengal Chamber of Commerce unless a special agreement exists on the subject between the said parties, and no claim will be entertained if made after 90 days from date of arrival of goods." The latter part of the same clause provides that "the Chamber shall arrange for survey in accordance with its rules, that surveys shall be held on the actual goods and not on shipment samples, and that all survey reports, accompanied by samples, signed and sealed by the surveyors, showing the basis on which their award has been

CHANDMUL MULCHAND v. S. & C. NORDLINGER.

made must be forwarded to the sellers whenever the award has been given against them." On the 7th December 1920 the parties entered into a contract whereby the Plaintiffs agreed to buy from the Defendants 60 bales finished *Dhootis* of *rangin* descriptions at prices stated in para. 1 of the plaint. The goods in due course arrived and disputes arose with reference to the number of counts and lengths of the *Dhootis*. The parties accordingly went to arbitration and on the 1st March 1921 there was submitted to the Bengal Chamber of Commerce Tribunal an application signed by the Plaintiffs applying for the "appointment of two arbitrators and the issue of an award for cancellation of the contract or allowance or such other relief as the arbitrators may think fit to award upon the under-mentioned complaint and upon investigation of all facts arising out of the contract." On the same form against the printed title "Buyer's Complaints" are the words "see letter dated the 1st March," and against the printed title "Seller's Remarks" some five lines of typed matter are succeeded by a copy of a letter dated the 15th November 1920 from the Defendants to the Plaintiffs. This is succeeded further type-written matter which is signed by the Defendants. At the conclusion appear the words: "The survey should be held on the goods and not on the shipment samples." For some reason or other which is not clear, a further document had to be, or, at all events, was filed before the Bengal Chamber of Commerce. It purports to be a brief memorandum of agreement made on the 5th April between the parties and recites that disputes have arisen between the parties per Buyer's Statement of 1st March 1921 submitted with Application Form No. 1 and as per Seller's Statement of 1st March 1921 submitted with Application Form No. 1, and then proceeds to say: "The matters in dispute are referred to the Tribunal of Arbitration of the Bengal Chamber of Commerce to be determined in accordance with the rules for the time being of the said Tribunal as far as such rules be applicable to the submission." This document which bears an eight annas stamp is signed by the parties. In due course the arbitration was held and on the 3rd September 1921 the award was communicated to the parties over the signature of the Registrar of the Bengal Chamber of Commerce Tribunal of Arbitration and is in the following terms:—

"We have considered the papers and as buyers Messrs. Chandmul Mulchand are unwilling to produce the bales required for inspection, their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of the contract.

Buyers to pay cost of this reference, amounting to Rs. 101."

It is now contended that the award should be set aside, firstly, for an error of law apparent on the face of it and secondly on account of the arbitrators having exceeded their jurisdiction in that they made an award without first having held a survey of the goods in question.

The first point, therefore, which I have to consider is whether or not there was an error of law apparent on the face of the award.

The most recent decision on this subject is that of the Judicial Committee of the Privy Council in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ld.* (1). There, in approval of the statement of the law of Mr. Justice Williams in *Hodgkinson* v. *Fernie* (2),

(1) [1923] A. C. 480; I. L. R. 47 Bom 578
(2) 3 C. B N. S. 189 (1857).

which is quoted in the judgment of the Board, "an error in law on the face of the award is taken to mean that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous." The passage quoted from the judgment in *Hodgkinson* v. *Fernie* (2) also shows how very narrow is the compass which, in fact, is limited to the award itself or matter incorporated in it, within which the error upon which the award may be impeached is to be found.

In this case there is no note appended by the arbitrator and I have to look at the award itself alone. It is contended that the words "as the buyers Messrs. Chandmul Mulchand are unwilling to produce the bales required for inspection, their claim cannot be upheld" state reasons for the award which are erroneous in law.

With reference to consideration of the reasons stated by arbitrators in an award as grounds for impeaching it, the passage from the judgment of the Judicial Committee itself indicates that reasons stated by an arbitrator for his award are matters to be considered and in this connection learned Counsel has also drawn my attention to *Landauer* v. *Asser* (3). In that case the umpire in his award said: "I decide that as the parties to the contract, dated 3rd November 1903, were by the terms thereof principals thereto, their interest and liability in insurance is defined to be the value of the invoices plus 5 per cent. etc." This led to the award being set aside, and the concluding passage from the judgment of Mr. Justice Kennedy indicates the ground, for he says: "My view is that as the award wrongly decides that in point of law under the contract Messrs. Asser have a title in the sum in dispute, it is bad on point of law and must be set aside."

I may therefore consider whether or not in this case the arbitrators' reasons for the award are sufficient or good in law. In my judgment they are not. The Plaintiffs were the buyers: the Defendants were the sellers. The contract related to 60 bales. There was a dispute as to quality. The mere fact that the buyers were unwilling to produce the bales required for inspection is not by itself a sufficient reason for making an award against them. I do not desire to go further than I should having regard to the strict limitations laid down by the authorities as to what may be considered in a case such as this, but, ordinarily, where there is a dispute between a buyer and a seller with reference to quality, it could be the duty of the seller to prove that the goods were of the quality contracted for. No question such as this might have arisen and it might have been extremely difficult for the Plaintiffs to succeed had no reasons been stated for the award. But in view of the reasons stated for the award, in my opinion, the Plaintiffs are entitled to impeach it and I hold that the award is bad upon the face of it.

The other question that has been argued is as to the arbitrators' having exceeded their jurisdiction. This is based upon the contention that it was the duty of the arbitrators before making any award to survey the goods. This contention is met by learned Counsel for the Defendants by the submission that the original agreement of the 2nd January 1918 did not contain the submission under which the arbitration was held, for which the subsequent documents to which I have already referred must alone be looked at. Incident-

(2) 3 C. B. N. S. 189 (1857).
(3) [1905] 2 K. B. 184 at p. 195.

CHANDMUL MULCHAND *v.* S. & C. NORDLINGER.

ally I may observe that notwithstanding the cross-examination of the record-keeper of the Bengal Chamber of Commerce I have no doubt that the copy of the agreement of the 2nd January 1918 which has been produced by the Defendants was before the arbitrators. Learned Counsel's cross-examination, in the course of which he put a number of questions suggesting fraud against some individual or individuals whom he did not name, was not pressed to the extent of making a definite charge though I pointed out to him that if he were going to argue anything of the sort it would be his duty to do so. Why a subsequent document in the form of a submission had to be signed or filed before the Chamber of Commerce has not been made clear. One may possibly conjecture that it was required, among other reasons, because the copy of the agreement which had been produced before them was not stamped, though the copy in the hands of the Defendants does bear a stamp. Be that as it may, it is clear that according to the original agreement the parties intended that there should be a survey of the goods and that any award made by the arbitrators should be upon the basis of such survey. The subsequent application was not signed by both parties, and I am relegated to the agreement of 5th April which incorporates the points in dispute by reference to the parties' statements of the 1st March 1921 submitted with the application form bearing that date. In the remarks offered by the Defendants it is stated that the survey shall be held on the goods shipped and not on the shipment samples. The language does not merely suggest that a survey is necessary but takes it as a matter of course that there will be such a survey, the gist of the observation relating to what should be surveyed. I do not think there can be any question but that there was a common agreement between the parties which was never rescinded or varied in that respect, that there should be a survey by the arbitrators of the goods out of which the disputes arose and that that must be taken to have been a term of the submission. That being so, unless the arbitrators held their survey they were not entitled to make an award and the award made by them must be deemed to have been made without jurisdiction.

In the result, the suit must succeed and I declare that the award, dated the 3rd September 1921, is invalid and inoperative. The Plaintiffs are entitled to the costs of the suit on Scale No. 2.

Mr. Sushil C. Sen (Messrs. Dutt & Sen), Solicitor for the Plaintiffs.

Messrs. Leslie & Hinds, Solicitors for the Opposite Party.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 2325 AND 2420 OF 1920.

RANKIN, J.
BUCKLAND, J.
1923,
Heard,
23, March.
Judgment,
29, March.

MANINDRA CHANDRA NANDI, Plaintiff, Appellant,
v.
KAULAT SHEIKH, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 29 agreement to pay enhanced rent without consideration, whether enforceable—Compromise—Enhancement, if allowable when cost and labour of provement borne by tenant - Sec 52, scope and object of—Claim for additional rent for excess area, how far tenable when landlord fails to prove what the area was for which the rent was originally reserved and what were the original conditions of the tenancy—Entries of area and rate on back of dakhilas, *if warrant inference of contract of assessment on basis of measurement—Onus.*

In a suit for additional rent for excess

MANINDRA CHANDRA NANDI *v.* KAULAT SHEIKH.

area, the landlord sought to prove the area for which rent had been previously paid by some entries on the back of some dakhilas *showing areas and rates. The landlord also claimed enhancement of rent on the ground that the land had improved and that the tenant had agreed to his demand for enhancement:*

Held—*That apart from proof, with or without the aid of a custom, of a term in the original contract of tenancy that the tenant should hold at a rent varying from time to time according to the quality or user of the lands, this ground of claim for enhancement is untenable in the absence of proof of* bonâ fide *dispute and the compromise thereof as affording consideration for an agreement as to excess area or as justifying an enhancement of rent contrary to sec. 29.*

It may not be laid down as an abstract and universal proposition applicable to all cases and all circumstances that it is inequitable to grant enhancement where all the cost and labour of improvement had been borne by the tenant, for the tenant may conceivably have been so overpaid for his labour by its results that part of the latter should be attributed after a certain time to the land whereon he laboured. But in the present case there was no evidence to deal with any sensible case made by the landlord to that effect.

That, the question of the original conditions of the tenancy arises also when the claim to alteration of rent for excess area is considered under sec. 52.

Entries of area and rate on the back of dakhilas *cannot be treated as though they were the vital words in the operative part of a written instrument of tenancy.*

The landlord has to prove that there is an excess in area and he does not prove this unless he proves what the area in fact was for which the rent was originally reserved. This involves proof of the terms of the original settlement and whether it was by any and if so by what process of measurement. The statement of area in a dakhila *does not prove measurement or the area actually let out or whether the subject-matter of the contract was a definite or ascertainable tract of land. Besides, on the mere proof that a tenant's rent has been calculated at some date in the past upon the supposition that his holding is of a certain size, no contract can be inferred that he is liable at any time to re-assessment upon the actual area.*

When a letting upon the basis of a measurement has been proved, the tenant has primâ facie *to show that the rent was a consolidated rent for all the land within specific boundaries.*

Per RANKIN, J.—Primâ facie *sec. 52 would seem to be concerned with cases of alteration of area and not miscalculation of area: nor is it easy to suppose that it intended to provide an exceptional form of relief against mutual mistake.*

GOURI PATTRA *v.* REILY (1), SURJA KANTA *v.* BANESWAR (2), RAJENDRA LAL *v.* CHUNDER BHUSAN (3), RAJKUMAR *v.* RAM LAL (5) *and* NILMANI KAR *v.* SATI PROSAD GARGA (10) *followed.*

RATAN LAL BISWAS *v.* JADU HALSANA (4), LAKHHI NARAIN *v.* SRIRAM CHANDRA (6), AKBAR ALI *v.* HIRA BIBI (7), DHRUPAD CHANDRA *v.* HARI NATH (8) *and* KESHO PRASAD SINGH *v.* TRIBHUAN (9) *referred to and discussed.*

(1) I. L. R. 20 Cal. 579 (1892).
(2) I. L. R. 24 Cal. 251, 255 (1896).
(3) 6 C. W. N. 318 (1901).
(4) 10 C. W. N. 46 (1905).
(5) 5 C. L. J. 538 (1907).
(6) 15 C. W. N. 921 (1911).
(7) 16 C. L. J. 183 (1912)
(8) 22 C. W. N. 827 (1918).
(9) 3 P. L. J. 276 (1917).
(10) I. L. R. 48 Cal. 556 : s. c. 25 C. W. N. 230 (F. B.) (1920).

MANINDRA CHANDRA NANDI *v.* KAULAT SHEIKH.

These were appeals preferred on the 7th of September 1920 against the decree of Babu Satish Chandra Basu, Additional Subordinate Judge of Zillah Maldah in Rajshahi, dated the 12th of June 1920, affirming the decree of Babu Kiran Chandra Mitra, Munsif, 2nd Court at Maldah, dated the 15th of August 1919.

The facts briefly stated are as follows:—The Maharajah of Kasimbazar brought the present suits for additional rent for excess area and also enhancement of rent on the ground that the rate of rent hitherto paid was lower than the rates prevailing in the locality. The Plaintiff alleged in one of the suits that the land which had been formerly partly mulberry had now become wholly mulberry and in the other suit that the land which had been mulberry had now become wholly orchard and that in both the suits the areas stated in the *dakhilas* were less than their actual areas. The Plaintiff claimed rent for the years 1322 to 1324 in each case and the first ground of claim was that the tenants had agreed to his demand in or about 1321. The Munsif of Maldah disallowed both claims and appeals to the Additional Subordinate Judge of Rajshahi were dismissed. Hence the Plaintiff preferred the present second appeals to the High Court.

Babus Dwarkanath Chakrabortty, Hemendra Nath Sen, Ram Charan Mitra, Ram Chandra Majumdar and *Sarat Kumar Mitra* for the Appellant.

No one appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

RANKIN, J.—These two second appeals (Nos. 2325 and 2420 of 1920) arise out of two suits for increased rent (Nos. 1484 and 1495 of 1918) brought by the Maharaja of Kasimbazar against Kaulat Sheikh and Lagnu Mandal respectively. The Plaintiff claimed additional rent for excess area and also enhancement of rent on the ground that the rate of rent hitherto paid was lower than the rates prevailing in the locality. The Munsif of Malda disallowed both claims and appeals to the Additional Subordinate Judge of Rajshahi have been dismissed by him with costs.

In Kaulat's case the tenancy has hitherto stood as comprising an area of 1 bigha 8 cottahs 8 chattaks bearing a *jama* of 14 annas 9 pies. The Plaintiff claimed that this should be found to be a tenancy of 2 bighas 1 cottah bearing a *jama* of Rs. 2-12-7½.

In Lagnu's case the tenancy has hitherto stood as of 10 bighas 15 cottahs bearing a *jama* of Rs. 15-6-0. The Plaintiff claimed that this should be 13 bighas 15 cottahs 1 chattack at a *jama* of Rs. 26-12-9.

The Plaintiff's case is that the whole of Kaulat's land is now mulberry land and the whole of Lagnu's land is now orchard. That the land originally settled with Kaulat was partly mulberry land but chiefly paddy land and that of Lagnu was mulberry land. The plaint sets forth the "prevailing rates" per bigha as these:

Paddy 14 annas.
Mulberry Rs. 1-5-9.
Orchard ,, 1-15-2.

The Plaintiff's claim is for the years 1322-1324 in each case. The first ground of claim was that the tenants had agreed to his demand in or about 1321. Apart from proof, with or without the aid of a custom, of a term in the original contract of tenancy that the tenant should hold at a rent varying from time to time according to the quality or user of the lands, this ground of claim is in the present case quite untenable and the findings of the Courts below are in no way incorrect. I see no proof of *bonâ fide* dispute and the compromise thereof as affording consideration for

MANINDRA CHANDRA NANDI *v.* KAULAT SHEIKH.

an agreement as to excess area or as justifying an enhancement of rent contrary to sec. 29. The landlord claims by agreement to have got all he can possibly claim.

The question of the original conditions of the tenancy arises also when the Plaintiff's claim to alteration of rent for excess area is considered under sec. 52. The difficulty here is the plentiful lack of evidence. Save that the holdings were not in existence in 1266 the only evidence which is of use to the Plaintiff is the mention of the areas in the *karchas* on the back of the *dakhilas*. In Kaulat's case there seem to be eight of such indorsements, the earliest being 1311. In Lagnu's case there seem to be three only, the earliest being 1320. The details are as follows :—

Kaulat's case :—

Mulberry land : 7½ cottahs—Rate per bigha Rs. 1-5-9.—Total Re. 0-8-3.

Crop bearing land : 1 bigha 1 cottah.—Rate per bigha Re. 0-6-0.—Total rent Re. 0 6-6.—Total rent—Rs. 0-14-9.

Lagnu's case :—

Mulberry land :—10 bighas 15 cottahs—Rate per bigha Rs. 1-4-7.—Total rent Rs. 15-6-0.

These are short particulars written on the back of rent receipts : nothing more. The question is how much can be distilled from them and in answering that question they cannot be treated as though they were the vital words in the operative part of a written instrument of tenancy.

There is no evidence that the lands were originally settled, or at any time re-settled, after any measurement. There is no evidence that the tenants have overstepped any previous boundaries. There is no evidence that any waste lands lay adjacent to these lands. There is no written instrument creating or re-affirming either tenancy; no mention anywhere of boundaries or that the land was within certain boundaries.

The learned Subordinate Judge has dismissed the Plaintiff's claim by reason of the insufficiency of his own evidence. He has not dealt with or relied upon any evidence for the defence as to this matter. The question therefore is whether on the face of the *dakhilas* he was bound to infer such conditions of tenancy as would entitle the Plaintiff to succeed; and if not, whether he has properly applied the law in considering the problem.

The Respondents, who seem to be small cultivators, have not appeared to contest these appeals but we have had the great advantage of an argument by Babu Dwarkanath Chakrabortty on behalf of the Appellant.

The Courts below have been led to their conclusions by a consideration of the case of *Gouri Pattra* v. *Reily* (1). This case has often been followed and so far as I know has never been dissented from in this Court. The facts as they appeared to Prinsep and Beverley, JJ., were these. Areas were specified in rent receipts and zemindari papers. There was no proof that the lands had ever been measured until recent proceedings under Chap. X had resulted in a measurement. The holdings were very old holdings. There was no trace of any sort of description by boundaries. There was a custom under which remissions of rent had been granted for fallow land. I cannot find from the report that the rent receipts showed the total rent as worked out by applying a certain rate to the area given : otherwise *Gouri Pattra's* case (1) and the cases now under consideration appear to me to be alike in all material respects. The decision was that the landlord has to prove that there is an excess; that he does not

(1) I. L. R. 20 Cal. 579 (1893).

MANINDRA CHANDRA NANDI *v.* KAULAT SHEIKH.

prove this unless he proves what area of land was originally let. This involves proof of the terms of the original settlement and whether it was by any and if so by what process of measurement. The statement of area in a *dakhila* does not prove measurement: it does not prove that the land originally let was in fact so many bighas: it does not prove or disprove that the subject-matter of the contract was a definite or ascertainable tract of land.

Surja Kanta v. *Baneswar* (2) repeats that the landlord must prove "for what quantity of land the Defendant is paying rent." *Rajendra Lal* v. *Chunder Bhusan* (3) is a decision addressed to the question of the *terminus a quo*: it holds that the landlord must prove the area of the tenure at its inception—not the area of the land at some intermediate stage after fluvial action may have lessened it but the area with reference to which the rent had been assessed or adjusted.

Leaving aside the case of *Ratan Lal Biswas* v. *Jadu Halsana* (4), where there was a finding that the tenant was holding the same lands without any variation in the boundaries, the case of *Rajkumar* v. *Ram Lal* (5) re-affirmed the principle that even if it is proved that the original rent was settled with reference to a quantity of land let out—as distinct from the case of a consolidated rent for land within specified boundaries—even then, the landlord must first prove what the original area was and with reference to what standard that area was determined. For this purpose a statement of areas in zemindari papers and rent receipts was held insufficient. In *Lakhhi Narain* v. *Sriram Chandra* (6), we come across a case where the landlord was able to prove measurement at the inception of the tenancy according to a known standard and that the rent was assessed thereon. The *kabuliyats* mentioned the area as well as the rent. I do not gather that they mentioned any boundaries. In these circumstances (I understand the decision to lay down) the onus was on the tenant to show that the rent was a consolidated rent for an area within specified boundaries: otherwise excess area was completely proved. This case does not affirm that there is a presumption against the rent being a consolidated rent apart from the circumstances proved in that case. Indeed the two cases previously cited [*Ratan Lal* v. *Jadu* (4) and *Rajkumar* v. *Ram Lal* (5)] seem to show that there is no initial presumption either way.

In *Akbar Ali* v. *Hira Bibi* (7), it was proved that in 1301 the lands had been measured and that the rents had then been adjusted at the old rates according to that measurement. Some years later upon a re-measurement it was found that the measurement of 1301 had been very badly done and had much understated the areas. It was held in second appeal that the finding that in 1301 the rents had been adjusted according to that measurement excluded the theory that the parties intended to settle such and such a piece of land, be the area what it may. The case was therefore held to be such that "the area for which rent has been previously paid" was less than the area actually occupied at the time of the claim, though the area actually occupied was the same throughout.

(2) I. L. R. 24 Cal. 251, 255 (1896).
(3) 6 C. W. N. 318 (1901).
(4) 10 C. W. N. 46 (1905).
(5) 5 C. L. J. 538, 541 (1907).
(4) 10 C. W. N. 46 (1905).
(5) 5 C. L. J. 538 (1907).
(6) 15 C. W. N. 921 (1911).
(7) 16 C. L. J. 182 (1912).

MANINDRA CHANDRA NANDI *v.* KAULAT SHEIKH.

This decision was not apparently intended as narrowing the rule in *Gouri Pattra's* case (1). Nevertheless it marks a certain change in the current of authority. In *Akbar Ali's* case (7) the tenants were clearly intended to go on occupying their holdings as they stood in 1301. For these holdings the rent was miscalculated because the area was under-measured. The phrase of Banerjee, J., in *Rajendra* v. *Chunder* (3) by which he paraphrases the words of sec. 52 is cited but apparently without reference to its real intention. "The area with reference to which the rent previously paid had been assessed or adjusted" meant the area of the tenure as originally created as distinct from the area of any intermediate year in which the size of the holding may have been lessened by fluvial action. The whole point of *Gouri Pattra's* case (1) was that a rent receipt might very well show that, upon a rough estimate that the land was of such and such size, a rent of so much may have been imposed and accepted; but unless there was a measurement and an assessment on the basis of measurement there was no presumption that the land was not an ascertained tract of a size differing from the area stated. The statute says "the area for which rent has been previously paid." I think it quite possible that it means that. *Primâ facie* sec. 52 would seem to be concerned with cases of alteration of area not miscalculation of area: nor is it easy to suppose that it intended to provide an exceptional form of relief against mutual mistake. I find it difficult to think of the tenant in *Akbar Ali's* case (7) saying or meaning, "I will take so many bighas, be the actual piece of land what it may," though there is no difficulty in seeing that the rents were re-adjusted according to the measurement. What the bargain was is this:—"Now at last we both know what the extent of my land is: we agree to it and we agree that for it I shall pay you so much per bigha being 10 rupees." Still there was a measurement and an intention to pay according to actual area.

Now *Akbar Ali's* case (7) was followed by *Dhrupad Chandra* v. *Hari Nath* (8). The facts were in dispute but as found they were these. There had been a measurement to which the tenants were parties in 1227 and a *chitta* of that year recorded them. It was invariably consulted whenever a transfer took place. A rent roll was prepared from it in 1305 giving the area and annual rent. The area as there recorded gave exact and minute quantities running to *karas* and *krantis*. The area at the time of suit was in excess. There was thus proof of actual measurement and of assessment of rent upon the measurement and it was held that the burden lay upon the tenant to prove that the rent was a consolidated one for an area within specified boundaries. In saying quite correctly that it was not for the landlord to prove how the excess area came to be held, the Subordinate Judge made a remark that it must be due either to encroachment or to erroneous or fraudulent measurement on the previous occasion. The case seems to have raised no new question of law and no question whatever as to the correct presumption in the absence of any proof of measurement. But Richardson, J., states two ways as open to a landlord, generally speaking, to prove an increase in "the area for which rent has been previously paid." The first is the simple case

(1) I. L. R. 20 Cal. 579 (1892).
(3) 6 C. W. N. 318 (1901).
(7) 16 C. L. J. 182 (1912).
(8) 22 C. W. N. 327 (1918).

MANINDRA CHANDRA NANDI *v.* KAULAT SHEIKH.

where he proves that the tenant has overstepped original boundaries. The second is by proving that the rent was fixed at a rate per unit of area and that "in fact and substance the agreement was that the tenant should pay at that rate for all the land of which he was put in possession according to its true area" and by further proving that the existing rent is less than the rent payable under such agreement. This is the reasoning upon which the learned Vakil for the Appellant chiefly insists in the present cases. Now a landlord who can prove such a contract is entitled to additional rent by virtue of his contract and without the aid of any statutory provision. No doubt a landlord anxious to bring *jungle* and waste lands into cultivation may well make such a contract. It accords well with primitive notions of rent as a share of the produce. There have been times when cultivating tenants were hard to get. Moreover I do not doubt that many holdings now hemmed in by land grabbing neighbours were originally taken on some such terms. Still there are the very conditions with reference to which the very old holdings in *Gouri Pattra's* case (1) were considered. When all is said, it can hardly be true throughout Bengal to-day that on the mere proof that a tenant's rent has been calculated at some date in the past upon the supposition that his holding is of a certain size a contract can be inferred that he is liable at any time to re-assessment upon the actual area. This is to read the Act into the contract, not to apply the Act to the contract. How far such a view may take us is I think well illustrated by the Patna case, *Kesho Prasad Singh* v. *Tribhuan* (9). "The *jamabandi* of 1272, if it recites a certain rent for a certain area at a certain rate per bigha, is evidence of a contract and the learned Judge must take that evidence into consideration with the other evidence in the case and determine whether the tenancy was created on a consolidated rental. The landlord may ask the Judge to find on the strength of the *jamabandi* that the original contract was that the rent would vary with the area. If upon a consideration of the evidence adduced by the landlord the Judge declines to believe this and he finds that notwithstanding the *jamabandi* and the rent receipts the tenant has succeeded in showing that the original *jama* was a consolidated one, then the landlord cannot succeed. And again in my opinion it is not incumbent upon the landlord to prove that there was an actual measurement or there has been a practice of measurement." Now whatever may be thought of the decision in *Akbar Ali's* case (7), it is clear that nothing was then inferred in the absence of proof of measurement. Measurement was proved in the cases of *Lakhhi Narain* v. *Sriram Chandra* (6) and *Dhrupad Chandra* v. *Hari Nath* (8). Chatterjea, J., in the Full Bench case of *Nilmani Kar* v. *Sati Prosad Garga* (10) both at the beginning and the end of his judgment seems to me to re-affirm the law of *Gouri Pattra's* case (1). I take it to be the settled rule of this Court that when a letting upon the basis of a measurement is proved the tenant has *primâ facie* to show that the rent was a consolidated rent for all the land within specific boundaries, but that in the absence of such proof the mere production of such *dakhilas* as those now in evidence does not suffice to throw any onus on the tenant. The position

(1) I. L. R. 20 Cal. 579 (1892).
(9) 2 P. L. J. 276 (1917).

(1) I. L. R. 20 Cal. 579 (1892).
(6) 15 C. W. N. 921 (1911).
(7) 16 C. L. J. 192 (1912).
(8) 22 C. W. N. 827 (1918).
(10) I. L. R. 48 Cal. 556: s. c. 25 C. W. N. 290 (F. B.) (1920).

MANINDRA CHANDRA NANDI *v.* KAULAT SHEIKH.

then is simply that the landlord has failed to establish the fact of excess area because he has failed to show with sufficient certainty what the area in fact was for which the rent was originally reserved. There is no reason whatever forbidding a landlord from proving, if he can, a contract of the nature indicated in *Dhrupad Chandra's* case (8) but entries of area and rate in *dakhilas* or *jamabandis* do not suffice to prove this by themselves in the absence of further material throwing light upon the original conditions of a holding whose origin is beyond the reach of direct evidence.

The remaining question is as to whether the Plaintiff is entitled to enhancement of rent. The only case made as to this rests upon the allegations that the tenant Kaulat has converted or improved paddy land into mulberry land and that Lagnu's mulberry land has been made orchard. The Plaintiff appears to have claimed for the higher class of land at the prevailing rate therefor in each case. The learned Subordinate Judge has held it to be inequitable to grant enhancement as all the costs and labour of the improvements had been borne by the tenants. No doubt as an abstract and universal proposition applicable to all cases and in all circumstances there is room here for qualification or for criticism. A tenant may conceivably have been so over-paid for his labour by its results that part of the latter should be attributed after a certain time to the land whereon he laboured. I see no ground for thinking that in these cases the learned Judge was called upon by the evidence before him to deal with any sensible case made by the landlord to that effect. For all that appears, the suggestion of such a theory now is quite in *nubibus*. It is to be presumed that the Courts below are well aware that enhancement of rent is equitable or inequitable in all the circumstances of each case and the fact that as in duty bound they indicate the general considerations that weigh with them, in no way warrants the conclusion that their discretion was not properly exercised upon the facts before them.

(8) 22 C. W. N. 827 (1918).

In my judgment these appeals fail and should be dismissed.

BUCKLAND, J.—I agree.

J. N. R. *Appeals dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 375 OF 1921.

RANKIN, J.
B. B. GHOSE, J
1923,
5, July.

MOHINI MOHAN ROY, Defendant, Appellant,
v.
RAMDAS PARAMHANSA, Plaintiff, Respondent.

Covenant to pay an annual sum by vendee to vendor, so long as vendee and his family retained the land, if enforceable against purchaser from vendee—Covenant, if runs with the land—Suit, of a Small Cause Court nature, brought in Munsif's ordinary jurisdiction and dismissed by him—Appeal, if lies—Decree on appeal without jurisdiction and liable to be set aside in revision—Civil Procedure Code (Act V of 1908), sec. 115—High Court, if may treat memorandum of appeal as application for revision—Previous decrees of Small Cause Court and Civil Court, if res judicata.

The Plaintiff's predecessor-in-title executed a conveyance of his putni *and* jamai *right in a certain mouza in favour of the Defendant's predecessor-in-title and contemporaneously with it the latter executed an* ekrarnama *in favour of the former covenanting on behalf of himself and his heirs and legal representatives so long as he or they should hold the land to pay to the Plaintiff and his legal representatives the sum of Rs. 20 annually for the* sheba *of Jugal Kishore Thakur. The Defendant purchased the land conveyed to the vendee from a purchaser from the latter:*

MOHINI MOHAN ROY *v.* RAMDAS PARAMHANSA.

Held—*That the covenant did not run with the land and bind the Defendant.*

There is no such thing as between a vendor and a purchaser as a covenant to pay money running with the land.

That the Plaintiff's suit to recover upon the covenant was of a nature cognisable by the Small Cause Court, and no appeal lay from the Munsif's dismissal of the suit, though it was tried by him in his ordinary jurisdiction; and although a second appeal against a decree of the District Judge passed on appeal from the decision of the Munsif was barred by sec. 102 of the Civil Procedure Code, the High Court could treat the memorandum of appeal as an application for revision and set aside the decree of the District Judge which was passed without jurisdiction

SHANKARBHAI *v.* SOMABHAI (2), INDRA CHANDRA MUKHERJEE *v.* SRISH CHUNDER BANERJEE (3), GANGADHAR *v.* SEKHARBASHINI (4), ADURAM HALDAR *v.* NAKULESWAR ROY (5) *and* BAIKUNTA NATH GOSWAMI *v.* SITA NATH GOSWAMI (6) *referred to.*

That assuming that the suit was not of a Small Cause Court nature, a decree for money upon the covenant made in a previous suit instituted in the Small Cause Court did not operate as res judicata, *nor did the decision of the High Court refusing to interfere with that decree in revision.*

A subsequent decree in a suit instituted in the ordinary Civil Court as for rent also did not operate as res judicata.

This was an appeal against the decree of the District Judge of Nadia, dated the 4th January 1921, reversing that of the Munsif of Ranaghat, dated the 12th April 1920.

The facts as well as the findings material to this report will appear from the following portions of the judgment of the Lower Appellate Court :—

"This appeal arises out of a suit for recovery of Rs. 60 at Rs. 20 per annum from 1323 to 1325 B. S. with interest of Rs. 14 at 12½ per cent. per annum on the basis of an *ekrarnama*, dated 5th Chaitra 1297 B. S.

The Plaintiff's case was that he as a *shebait* of idol Jugal Kishore Thakur sold one anna 13 gandas share of a *putni* and certain other *jamai* lands to one Prasanna Kumar Ghose by a *kobala*, dated 5th Chaitra 1297 B. S. and Prasanna Kumar executed an *ekrarnama* on the same date in his favour agreeing to pay Rs. 20 per annum for the *sheba* of the said idol.

The executors to the estate of Prasanna Kumar subsequently sold the 16 annas properties including the said purchased shares to the Defendant by a *kobala*, dated 27th Magh 1306 B. S. The amount due to the idol from 1323 to 1325 not having been paid by Defendant, the Plaintiff brought this suit.

The Defendant's main contention was that the covenant in the *ekrarnama* was a personal one and he was not liable to pay the amounts stipulated therein as he had no notice of the said agreement.

The learned Munsif has dismissed the suit. The only point for decision is whether the Plaintiff can recover the amount claimed from the Defendant on the basis of his alleged *ekrarnama* executed by Prasanna Kumar, and predecessor-in-interest of the Defendant.

Plaintiff previously brought two suits for similar reliefs against heirs and representatives of Prasanna Kumar and also against this Defendant in Small Cause

(2) I. L. R. 25 Bom. 417 (1900).
(3) I. L. R. 40 Cal. 539 (1913).
(4) 20 C. W. N. 967 (1916).
(5) 29 C. L. J. 48 (1918).
(6) I. L. R. 38 Cal. 421 (1911).

Court and obtained decrees against them. The Defendant moved High Court over the grounds similar to those taken in this case for setting aside the decree, but he was unsuccessful. Ex. 6 will show that the Plaintiff got a decree against this present Defendant for the amounts due from 1315 to 1317 but that suit was brought as a rent suit. Plaintiff again sued this Defendant for the amount due for 4 years from 1319 to 1322 in Small Cause Court and obtained a decree.

The learned Munsif found that as the Plaintiff's claim is for an amount which is an interest in the landed properties, the suit cannot be tried in Small Cause Court and as such the Small Cause Court decrees are of no use to the Plaintiff as they were passed by Courts having no jurisdiction to try the same . . . . The learned Munsif has held that it is merely a money suit and upon construction of the *ekrarnama* he has found that the covenant in the *ekrar* was a personal one with Prasanna Kumar and Defendant is not bound by that . . . The *ekrarnama* clearly shows that the amount of Rs. 20 per annum is not a right to or interest in the immoveable property as contemplated by Exception No. 11 of Sch. 2 of the Provincial Small Cause Courts Act IX of 1887. It is only an amount due to the Plaintiff by virtue of a covenant running with the land sold by Ex. A *kobala* which was a part of the same transaction, *viz.*, the *ekrarnama*. The consideration of Ex. A *kobala* was only Rs. 204. It may be that in consideration of the payment of this sum of Rs. 20 per annum for the *sheba* of the idol, the consideration for the *kobala* was a small one and the vendee of the Plaintiff undertook to pay this amount annually to make amends for the small amount of consideration. So the covenant in Ex. A to pay Rs. 20 per annum to the Plaintiff was neither an interest in the land nor a rent but some compensation to be paid by the holder of the land. In this view of the case I think that the amount agreed to be paid is really realisable as compensation by a suit in Small Cause Court from any person who will hold the land. The Defendant having purchased the land from the executors to the estate of Prasanna Kumar is, therefore, bound to pay the said amount. In my opinion Small Cause Court decrees and High Court judgment operate as *res judicata.*

Even if judgment of High Court does not operate as *res judicata* and even if it be conceded for the sake of argument that the suit is not triable by Small Cause Court, still the said judgment of High Court may be acted upon as an authority for holding that the Defendant has got constructive notice of the covenant in Ex. A and he is bound by it. . . . . . . The High Court having considered all the facts and circumstances of the case held in Ex. 4 judgment that the Defendant had constructive notice of the terms of the *ekrarnama* as it and the *kobala* were one and the same transaction. Then again the *ekrarnama* very distinctly shows that the executant Prasanna Kumar not only bound himself and his family but also the future holders of his zemindary by private transfer responsible for the amount stipulated therein. I therefore hold that either on the basis of the High Court judgment or independently of that on the basis of Ex. 1 *ekrarnama* the Defendant is liable to pay the amounts claimed by the Plaintiff."

Babus Amarendra Nath Bose and *Upendra Narain Bagchi* for the Appellant.

Babu Satindra Nath Mukherjee (for *Babu Tarakeswar Pal Chowdhury*) for the Respondent.

MOHINI MOHAN ROY *v.* RAMDAS PARAMHANSA.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—In this case, the Defendant appeals from a decision of the District Judge of Nadia reversing a decision of the Munsif of Ranaghat. The Plaintiff brought the suit for a sum of money as due to him by the terms of a document called *ekrarnama*. That document is dated the 28th March 1891 and contemporaneously with it on the same day there was a conveyance of certain land by the predecessor-in-title of the Plaintiff to the predecessor of the Defendant. The terms of the *ekrarnama* have been discussed in the judgments of the Courts below and the first question is the question of construction. It is to be observed that the conveyance contains no reference whatever to any such covenant as I am now about to read from the *ekrarnama*. The *ekrarnama* which was executed by the Defendant's predecessor-in-title was as follows :—"When you expressed your desire to sell your share of the *putni* and *jamai* right in mouza Goid, village Salua Parga Ukhara, I had promised before you that, if the above share was sold to me by you, I and my heirs and legal representatives shall pay you and your legal representatives for the *sheba* of the Jugal Kishore Thakur the sum of rupees twenty yearly, year after year." Later on, these words occur: "Therefore, I make this *ekrar* that, by the grace of Jugal Kishore Thakur as long as there shall be any member in my family and as long as I shall have zemindari right in the above mouza, I and my heirs and legal representatives shall pay you and your legal representatives for the *sheba* of the Thakur the sum of rupees twenty per year." The conveyance of the same date contains no covenant to an equivalent effect and there is no recital whatever in it of this *ekrarnama*. Now, what has happened is this :—The purchaser of the property who made the promise contained in the *ekrarnama* conveyed this land to the present Defendant. The present Defendant is a purchaser from him. The Plaintiff accordingly brought the suit against the Defendant and he brought it upon the ground that the present Defendant was bound by the promise of the man who had sold the land to him. The Plaintiff says that the promise of the predecessor-in-title of the Defendant was intended to bind everybody who would come to own that land and that the covenant runs with the land.

Now, in this case, it will be simplest to begin by stating the legal position of the parties. The position of the Defendant in the face of a claim of that sort is that he is a person who is sued upon a claim which is unfounded in law. There is no such thing as between a vendor and a purchaser as a covenant to pay money running with the land. In the case of assignment of lease as between any one who may become interested in the term and any one who becomes interested in the reversion it is possible to talk of a covenant running with the land. At common law no covenant ever ran with the reversion. By the statute law, some covenants may run with the term and some with the reversion and the nature of the covenants that can be said in loose language to run with the land has been described in the case-law and in the Conveyancing Acts and made more or less precise. The present covenant is not one which can run with the land as it is in no way a covenant to pay rent. There is no lessor or lessee, there is no term and there is no reversion. There is no charge on the land. The position of a purchaser of land whose predecessor became bound

MOHINI MOHAN ROY *v.* RAMDAS PARAMHANSA.

by a restrictive covenant is dealt with upon the principle of *Tulk* v. *Moxhay* (1). If there is a restrictive covenant and the purchaser takes with notice of it, then the person in whose favour the covenant is made can restrain the purchaser from acting contrary thereto. The present case is far removed from anything of that sort. When one looks at the terms of the *ekrarnama*, and at the way in which these two documents of the same date were kept separate, it is abundantly plain that the vendor had a mind to sell the land with a clean title and that, as a part of the consideration, he took a personal covenant from the purchaser which was intended to bind the latter and his family and them only so long as they held the land. There is, therefore, upon the merits, no substance in the case against the Defendant and there never was.

Now, the position in this case is only half dealt with when the merits are dealt with. It appears that, in the protracted series of suits—mostly but not all brought in the Small Cause Court, these parties have litigated upon this matter and the Defendant has had very poor success. The present appeal is complicated by the further consideration that this suit was not brought in the Small Cause Court.

An objection has been taken by the Plaintiff's pleader to the effect that, under sec. 102 of the Code, there is no second appeal because the suit was of a nature cognizable by the Small Cause Court. I propose to deal with the case on both assumptions; but my opinion is that the suit is simply a suit for a sum of money giving a bad reason why the Defendant is bound by the covenant. That being so, I see nothing in Art. 4 or Art. 11 of the second Schedule to the Provincial Small Cause Courts Act to take away the jurisdiction of the Small Cause Court.

If that be the true view, then the fact that the case was tried by the Munsif in his ordinary jurisdiction does not take away the prohibition of an appeal contained in the Small Cause Courts Act. Authority for that is cited to us from *Shankarbhai* v. *Somabhai* (2) which has been followed in this Court in the case of *Indra Chandra Mukherjee* v. *Srish Chunder Banerjee* (3). The result, therefore, on this view is that the first appeal was without jurisdiction. The second result but for sec. 102, C. P. C., would be that this appeal would lie to set aside the decree made without jurisdiction on the first appeal. That would be on the well-known doctrines that are laid down in such cases as *Gangadhar* v. *Sekharbashini* (4) and *Aduram Haldar* v. *Nakuleswar Roy* (5). But, in this case, there is a further complication that there is a special prohibition against a second appeal. In that view, an objection has been taken by the Plaintiff that this appeal is incompetent. In my opinion, on the assumption which I think to be right that the case is cognizable by the Small Cause Court, the present appeal is not competent, and is barred by sec. 102, C. P. C. But it is open to the Appellant to ask us to treat his memorandum of appeal as an application in revision and to set aside the order made without jurisdiction. This has been done before now. One instance my learned brother points out to me is the case of *Baikunta Nath Goswami* v. *Sita Nath Goswami* (6). The question is whether on this assumption we shall exercise our revisional power. *Primâ*

(1) 2 Ph. 774 18 L. J. Ch. 83; 13 Jurist 89 (1848).

(2) I. L. R. 25 Bom. 417 (1900).

(3) I. L. R. 40 Cal. 539 (1913).

(4) 20 C. W. N. 967 (1916).

(5) 29 C. L. J. 48 (1918).

(6) I. L. R. 38 Cal. 421 (1911).

facie when a Court is faced with a decree which is made without jurisdiction, it is a very strong thing not to interfere in revision, because otherwise all sorts of troubles may arise. The decree which is a nullity may be contested hereafter by a suit and that may give rise to infinite difficulties. We have, therefore, to see whether there is any valid reason why the decree under appeal should not be set aside. As to that the position is this :—If there was no appeal to the District Judge, the Plaintiff who was non-suited by the Munsif might have applied in revision under sec. 25 of the Small Cause Courts Act to this High Court. Now it may be that if we had been of opinion that the Plaintiff's case was a very good one on merits we would not necessarily in the circumstances of this case have felt bound now to give leave to apply in revision to set aside the decree of the learned Judge of the Court below. That is the position on that hypothesis. We think that the decree of the Court of Appeal below is without jurisdiction. We are satisfied that it is wrong on the merits and we propose apart from any question of *res judicata* to interfere.

The other view may also be considered. It may be said that the case is not cognizable by the Small Cause Court. In that event, what is the position? The position then is this : There is a second appeal and we are entitled to deal with the case upon the facts found. Now, the only case on that footing which the Plaintiff can make is the case of *res judicata* and, on the footing that the case is not cognizable by the Small Cause Court, what is the Plaintiff's case for *res judicata*? It appears that the first suit to which the present Defendant was a party, was a Small Cause Court Suit of 1901. Well, if the Small Cause Court was not competent to try this case, there is no *res judicata.* It so happened that in that first suit an application in revision came up to this High Court and two learned Judges for reasons which do not appeal to me refused to interfere with the decree of the Court below holding that the Defendant was liable. I am quite prepared to pay respect to that decision so far as it contains propositions not inconsistent with other decisions. But that judgment is in no way *res judicata* any more than the Small Cause Court Judge's judgment in connection with which it arose. The next suit was one of 1909 which was a suit in the ordinary Civil Court - a decree dated the 26th April 1901 being made for rent. I entirely demur to the proposition that this case can be governed by any result of a suit for rent. The next case was one of 1916 brought in the Small Cause Court and there it is perfectly true all points appear to have been canvassed. The Defendant was then held liable but on the assumption that the suit was not cognizable by the Small Cause Court, the Judge was not entitled to try the suit. So there is no *res judicata.* Whichever way, therefore, we look at this matter, inspite of the tangle arising from the procedure adopted in this case and from the procedure adopted in the previous litigation, we see our way to decide this case according to our opinion on the merits. We propose to do so treating the memorandum of appeal presented to this Court by the Defendant as an application in revision and set aside the decree of the learned District Judge with costs in that Court as having been made without jurisdiction. The Defendant is entitled to recover his costs in this Court from the Plaintiff. We assess the hearing fee at two gold mohurs.

B. B. GHOSE, J.—I agree.

N. G.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

VISCOUNT FINLAY.
LORD ATKINSON.
MR. AMEER ALI.
1923,
Heard, 16, 19 and 20, March.
Judgment, 15, May.

RAJA INDRAJIT PRATAP BAHADUR SAHI,
Appellant,
v.
AMAR SINGH and ors,
Respondents.

Civil Procedure Code (Act V of 1908), Or 41, r. 27 (b) and Or. 47, r. 1—Appeal—Gap in the evidence—Fresh evidence discovered pending appeal —Party, if may apply for its admission in appeal —Power of Appellate Court to admit fresh evidence suo motu *and on the prayer of parties—Power of Judicial Committee to admit fresh evidence—Rules of procedure, proper function of.*

Where fresh evidence to fill up a gap in the record is discovered pending appeal in circumstances which, if no appeal was pending, would have given the party a right to apply for review under Or. 47, r. 1 of the Civil Procedure Code, the proper course for the party (a review being out of question) is to apply for the admission of additional evidence either under the general principles of law or under the specific provisions of Or. 41, r. 27, which lays down that the Appellate Court may for any other substantial cause (viz., other than *those particularly specified*) *allow such evidence or documents to be produced or witnesses to be examined*

Both in the cases of SREEMANSHUNDER DEY *v.* GOPAULCHUNDER CHUCKERBUTTY (2) *and* KESSOWJI ISSUR *v.* THE GREAT INDIAN PENINSULA RAILWAY (1), *the Judicial Committee were dealing with the power of the Appellate Court in India* suo motu *to require evidence to be produced for the purpose of enabling the Court to pronounce judgment. They did not refer to the right of one or other of the parties to produce evidence which he considered essential for the determination of the action.*

There is no restriction on the powers of the Judicial Committee to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out.

"Rules of procedure are not made for the purpose of hindering justice."

This was an appeal from a judgment and decree, dated the 25th June 1919, of the High Court of Judicature at Patna, which affirmed a judgment and decree, dated the 29th April 1916, of the Additional Subordinate Judge of Gaya.

The main questions for determination on this appeal were—(1) whether the present suit was barred by limitation, and (2) whether on the proper construction of documents the estate mentioned in a mokarari *pattah*, dated the 30th May 1880, as Damodarpur Lakhawar, meant the said village alone or included within it its two dependencies, namely, Lakhawar Khas and Lakhawar Makhlut Faridpur (Malpur).

The lower Courts had decided both questions against the Appellant.

The facts which gave rise to the litigation may be shortly stated as follows:—The Appellant was the Raja of Tamkuhi, and the Defendant No. 2, Respondent, the Rani of Tikari. On the 5th April 1868, the Tikari Raj granted a Ticca (Ex. L) for a term of 15 years of 7½ annas out of the entire 16 annas of Mauza Damodarpur Lakhawar original with dependencies for an annual rental of Rs. 757 in cash and 15 maunds of rice. Subsequently on the 15th September 1875, the Tikari Raj granted a Ticca (Ex. G) for a term of 13 years of 8½ annas of the entire 16 annas of Mauza Damodarpur Lakhawar original with dependencies at an annual rental of Rs. 749-12-0 in c. s and 15 maunds of rice.

It was admitted by the parties that these two leases comprised Damodarpur

(1) L. R. 34 I. A. 115: s. c. I. L. R. 31 Bom. 381; 11 C. W. N. 721 (1907).

(2. 11 M. I. A. 28; 7 W. R. P. C. 10 (1866).

RAJA INDRAJIT PRATAP BAHADUR SAHI v. AMAR SINGH.

Lakhawar and its two dependencies named above. The total of the annual rent in cash was Rs. 1,506-12-0.

On the 23rd January 1880, the Tikari Raj granted "a Ticca Settlement (Ex. 15) of the whole and entire 16 annas of Mauza Lakhawar Khas, Lakhawar Makhlut Damodarpur, Lakhawar Makhlut Faridpur, Mahal Supi, Pargana Okri, District Gaya, original with dependencies," at an annual rental of Rs. 1,507 in cash and 30 maunds of rice, in favour of Harihar Narain Singh.

In 1875, the Raja of Tamkuhi brought a suit (No. 181 of 1875) against the Rani of Tikari to recover possession of 16 annas of the villages and properties mentioned in the schedules attached to the plaint. The villages now in question, namely, Lakhawar Damodarpur, Lakhawar Khas and Lakhawar Makhlut Faridpur, were included in the claim. The suit was settled by a compromise, under which a mokarari *pattah*, dated the 30th May 1880, was executed by the Raja of Tikari in favour of the Raja of Tamkuhi. The portion of the *pattah* describing the property granted was in the following terms :—

"Therefore I have let out in perpetual mokarari . . . . the whole and entire 16 annas of each of Mauzas Mohamedpur and Mohamedpur Khurd and Nanakpur Belgari, Pargana Sanaut, Mahal Nemsar, Station Shibnagar. Lakhari Khurd Danabhiga, Mahal Sansa, Pargana Ikil, Hanswar, Pargana Maher, Damodarpur Lakhawar, Sitarampur. Betia, Pargana Bhelawar, Lat Nergawan and Narauh, Mahal Hatwa, Pargana Sanat appertaining to the said Lat Shibnagar and 7½ annas of exact of Mauzas Jarna, Pargana Mahar Lal Lado and Basantpur, Pargana Mahar Lal Lado, Mauza Ghatra, Pargana Pahra, appertaining to Lat Deokali, original with dependencies, the name of each Mauza with Tauzi number and Sudder Jama, Pargana, District, Sub-Division and Thana whereof are given at the foot hereof and at the foot of this document there is a schedule giving the names of these Mauzas."

Tauzi No 218.	Name of Lot.	Name of Mauza with that of Pargana.	Sudder Jama.	Sub-Registry Office.	Collectorate
			Rs. p.		
	Lot Margaon.	Damodarpur Lakhawar, Pargana Okri.	14,161 11 0	Jehanabad.	Gaya

The schedule attached to the said *pattah* of the 30th May 1880, specified that the grantor was in receipt of the annual rental of Rs. 1,506-12-0 in respect of "Damodarpur Lakhawar," and the grantee was put in possession of the mokarari villages in the following manner described in the deed :—

"I have put the said Raja Krishna Pertap Bahadur Shahi in possession of the said Mokarari villages, in the following manner that a Hukumnamah directing the Tikadars of those Mokarari Mauzas to pay Tika rent to the said Raja Krishna Pertap Bahadur Shahi has been written and made over to him and I have authorized the said Raja Saheb the Mokararidar to realize in full the Tika rent in my place from the Tikadars of the said Mauzas. After the expiry of the term of the Tika, he shall bring them into his Seer possession and shall enter upon possession thereof."

On the 29th April 1893, a suit (No. 170 of 1893) was filed in the Court of the Subordinate Judge of Gaya by certain co-sharers of Mahal Lakhawar against the Raja of Tikari and the Raja of Tamkuhi

and others. It was stated in the plaint that "Mauza Damodarpur Lakhawar, Lakhawar Khas and Lakhawar Makhlut Faridpur, formed the milkiat" of the Raja of Tamkuhi. The latter filed a written statement in which he stated that he was a mokараridar of Mauza Damodarpur Lakhawar, Lakhawar Khas and Lakhawar Faridpur, from the Raja of Tikari, and that he had been in possession thereof for a long time. These statements were not controverted in the written statement filed on behalf of the Raja of Tikari.

In 1914 the Settlement Officer made enquiries with the object of preparing the *khewat* or proprietary register, when the present Plaintiffs for the first time put forward the claim that they were the lessees of the two dependencies, namely, Lakhawar Khas and Lakhawar Makhlut Faridpur. After a prolonged investigation and examination of the evidence produced by the parties the Assistant Settlement Officer delivered judgment on the 16th April 1915, holding that the claim of the Plaintiffs was unfounded, and concluding it in terms following:—

"The village papers produced in support of the Jagir or Babu Janki Prasad are undoubtedly forged ones and no reliance can be placed upon these papers. It is also said that Tamkuhi Raj got Mokarari of only one village Damodarpur Lakhawar and in the Mokarari documents, dated 30th May 1880, copy of which has been produced before me on behalf of Sumer Singh and others, I find that only Damodarpur Lakhawar has been mentioned in the Mokarari deed. This Mokarari document was executed in favour of Raja Krishna Pertap Sahi Singh of Tamkuhi by Raja Ran Bahadur Singh. It is argued before me by Babu Dasrath Lal, pleader, on behalf of Tamkuhi Raj that Damodarpur Lakhawar is the Mashhoor Nam (Mashoor Nam) which comprises Lakhawar Khas and Malpur. This is also evidence from the deposition of Ramdhani Lal taken before the Munsif Court, Gaya, dated 17th June 1913. He says that Damodarpur is also called Sapurad and Malpur. The above three villages were given in Thica lease to Tanu Babu by Raja Krishna Pertap Sahi of Tamkuhi and in the Thica document the three villages are mentioned." . . . .

"Taking all the above facts into consideration I am of opinion that the Mokarari right granted to Amar Singh and others is undoubtedly a fraudulent transaction and that Janki Pershad Singh was never the Jagirdar in respect of the two Mauzas, namely, Lakhawar Khas and Malpur. The Tamkuhi Raj is in possession of the three villages and *khewat* of Mokarari (Part III) will be prepared in name of Raja Inderjit Pratap Sahi, under Tauzi No. 3898."

The Plaintiffs-Respondents filed the present suit in the Court of the Subordinate Judge of Gaya. In their plaint the Plaintiffs stated that by the *pattah*, dated the 30th May 1880, the Appellant had obtained the mokarari lease of one village only, that is, of Mauza Damodarpur Lakhawar. They further alleged that in 1888 the Raja of Tikari granted a Jagir to one Babu Janki Prasad Singh of the said two dependencies, Lakhawar Khas and Lakhawar Makhlut Faridpur, for the term of his life and that on the death of the said Jagirdar in July 1910, the said dependencies reverted to the Rani of Tikari, and that she had granted a mokarari *pattah* of the two dependencies to the Plaintiffs on the 24th January 1914.

The Plaintiffs therefore claimed the following reliefs:—

(1) That it might be declared that the

Plaintiffs were the Mokararidars of the disputed Mauzas as specified below and that the Defendant No. 1 had no concern whatsoever, either in his capacity as Mokararidar or in any other capacity, with the Mauzas, the subject-matter of this suit.

(2) That on the adjudication of the above fact the Plaintiffs might be declared entitled to possession without any obstruction offered on behalf of the Defendant No. 1 and in case of necessity they might be put in possession.

(3) That mesne profits from the date of the institution of the suit up till peaceful possession might be determined and awarded to the Plaintiffs as against the Defendant No. 1.

(4) Costs in Court with interest up till realization might be awarded as against the person and property of the Defendant No. 1.

The Appellant, who was Defendant No. 1, denied the claim of the Plaintiffs and filed a written statement. He pleaded, among other things, that he was the mokararidar of Damodarpur Lakhawar including the two dependencies which were claimed by the Plaintiffs. He also pleaded that he had been in adverse possession of the two villages in dispute for more than 12 years prior to the institution of the suit and that the Plaintiffs' claim was therefore barred by limitation.

The Rani of Tikari, who was Defendant No. 2, also filed a written statement in which she stated that she had put the Plaintiffs in possession of the villages in dispute as mokararidars, and that she had been unnecessarily joined as a Defendant in the suit.

The Additional Subordinate Judge of Gaya framed the following issues on the pleadings :—

1. Has this suit been under-valued? Is the court-fee paid sufficient?

2. Is the suit barred by limitation?

3. Are the Plaintiffs estopped from asserting their rights as mokararidars in respect of the villages in suit?

4. Were the villages in suit let out in mokarari to the ancestor of the Defendant No. 1?

5. Are the Plaintiffs entitled to get possession?

6. Are the Plaintiffs entitled to get mesne profits? If so, how much?

7. What reliefs, if any, are the Plaintiffs entitled to?

8. Whether the Plaintiffs are Furzidars of the persons named in para. 5 of the written statement of Defendant No. 1?

After examining the evidence the Additional Subordinate Judge delivered judgment on the 29th April 1916. He found all the issues in favour of the Plaintiffs, with the exception of the 1st and the 6th issues holding that the Plaintiffs were entitled to possession of the villages in suit, but without any mesne profits.

As already stated the case of the Plaintiffs was that from May 1888 till July 1910 the two villages or dependencies in dispute were in possession of Babu Janki Prasad Singh under a grant (Ex. 18) from the Raja of Tikari. They produced the grant, but the learned Additional Subordinate Judge found that it was a forgery. He said as follows :—

"I cannot believe this life' Jagir of Janki Prasad and Ex. 18. In my opinion that document Ex. 18 is a got-up one for the purpose of this case after the judgment of the Khanapuri Officer in the settlement proceeding. I do not also believe the collection papers of the time of Janki."

The lower Appellate Court has practically affirmed the above finding.

In support of his case the Appellant

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RAJA INDRAJIT PRATAP BAHADUR SAHI *v.* AMAR SINGH.

relied upon Exs. L, G and 15 referred to in paras. 3 and 4. He also contended that the *pattah* (Ex. H), dated the 30th May 1880, expressly contained the words "with dependencies" in the body of the document, and that those words were applicable to Damodarpur Lakhawar. He also relied upon Ex. 14A which showed that Damodarpur Lakhawar with its two dependencies was entered in that document, as one revenue unit. The Appellant also relied upon a number of other documents and the acts and conduct of the parties which showed that the Appellant had been in possession of the villages in dispute as a mokararidar under his *pattah*, dated the 30th May 1880.

The learned Subordinate Judge was of opinion that the mokarari *pattah*, dated the 30th May 1880, was unambiguous, and that under sec. 94 of the Indian Evidence Act no evidence was admissible to show that Damodarpur Lakhawar included its two dependencies. He held that the suit was not barred by limitation in the following words:—

"Harihar Narain got his Thika of the three villages from the 7 anna Raj, and became a tenant under him. As against him the 7 anna Raj could have no cause of action of a suit for possession, so long as his Thika lease lasted. If he did not pay any rent to the Raj, and attorned to a third party, that would give the Raj cause of action for a rent suit, and not for a suit for possession of the Thika villages against him. There is no evidence that he attorned to the Defendant No. 1 or his predecessor to the knowledge of the 7 anna Raj. On the contrary, the evidence in this case shews that the 7 anna Raj used to get a set-off of the advance of Peshgi money and interest every year. Under these circumstances I think limitation can never run before 1311, *i.e.*, from after the Thika lease of Harihar Narain."

In the result the Additional Subordinate Judge made a decree allowing the claim of the Plaintiffs with costs, and from that decree the present Appellant appealed to the High Court of Judicature at Patna. The appeal was heard by Coutts and Das, JJ., and the former delivered judgment, the latter concurring, on the 25th June 1919. The learned Judges of the High Court agreed with the Subordinate Judge in holding that the mokarari deed, dated the 30th May 1880, was unambiguous, and that it granted the lease of only one village, namely, Damodarpur Lakhawar. They admitted that the learned Subordinate Judge had made a mistake in discussing the effect of Exs. L, G and 15, but they were of opinion that it was unsafe to act upon those Exhibits. In the course of his judgment Mr. Justice Coutts said as follows:—

"Mr. Hasan Imam relies strongly on these documents and his main contention on them is based on the fact that the sum of the Jamas fixed in Exs. L and G is almost the same as the Jama fixed in Ex. 15. In Ex. G the Jama of Damodarpur Lakhawar was fixed at Rs. 757 and 15 maunds of rice, the Jama in Ex. L was fixed at Rs. 749-12-0 and 15 maunds of rice and in Ex. 15 the Jama was fixed at Rs. 1,507 and 30 maunds of rice; that is to say, the sum of the Jamas in Exs. G and L is only 4 annas less than the Jama fixed in Ex. 15. From this similarity of Jamas we are asked to conclude that Mauza Damodarpur Lakhawar included the three Mauzas. In discussing this matter the learned Subordinate Judge had obviously made a mistake and it is an undoubted fact that the Jamas are almost identical." . . . "We are entirely in the realm of speculation as

to how the Jama was arrived at, we have no evidence to assist in and it would be exceedingly unsafe under the circumstances to attempt to come to any conclusion based on this similarity of Jamas."

In other respects the High Court generally affirmed the findings of the Additional Subordinate Judge. Shortly before concluding his argument for the present Appellant, his Counsel filed an application praying for the admission of additional documentary evidence, but his application was rejected. The High Court therefore made a decree dismissing the appeal of the Defendant No. 1 with costs, and from that decree the present appeal was preferred.

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Appellant.

Messrs. A. M. Dunne, K. C. and *W. Wallach* for the Respondents.

The arguments were directed towards the evidence.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The facts of this litigation are set out in detail in the judgments of the Courts in India; it is consequently not necessary to state them here at any length. The suit relates to two villages, named respectively Lakhawar Khas and Lakhawar Faridpur, lying within Mahal Margaon, appertaining to the Tikari estate in the Province of Behar. It appears that in 1843 there was a Government survey of Mahal Margaon, in the course of which a Khasra map was prepared by the Amin of these two villages along with another called Lakhawar Damodarpur. The map is Ex. 14 in this case, and the memorandum on the back is marked 14A.

In the middle of the nineteenth century the Tikari estate belonged to one Raja Mode Narain Singh. He died somewhere in the year 1856 or 1857 without any male issue, leaving him surviving two widows named respectively Rani Asmedh Koer and Rani Sunit Koer, a brother's son, Ran Bahadoor Singh, and a sister's grandson, Krishna Pratap Sahai, the ancestor of the present Appellant often named in these proceedings as the Raja of Tamkuhi. On Raja Mode Narain Singh's death, in the absence of any direct male heir, natural or adopted, his widows took possession of the estate for their lives. Ran Bahadoor Singh, who, under the circumstances, was the reversioner, appears, however, to have acquired possession by some arrangement with the widows.

In 1875 Raja Krishna Pratap Sahai brought a suit against Ran Bahadoor Singh and the two widows of Raja Mode Narain Singh, for recovery of the whole estate, on the allegation that he had been adopted by the widows subsequent to the death of the Raja under authority given by him in his life-time. This suit was dismissed by the Subordinate Judge; from his decision an appeal was preferred to the High Court of Calcutta. Whilst the appeal was pending the parties came to a settlement and an *ekrarnama* was executed by Krishna Pratap in which were embodied the terms of the compromise. This document is marked Ex. 20, and bears date the 30th of May 1880. By the terms of this agreement Raja Krishna Pratap Sahai undertook to withdraw all claims to the estate, in consideration of the grant to him by Ran Bahadoor Singh, of a Mokarari settlement of certain villages set out in detail in that document. Pursuant to this agreement Ran Bahadoor Singh, by a *pattah* of even date, granted to Krishna Pratap Sahai, the mokarari of

the villages named in the *ekrarnama* and set out specifically in the grant. The *pattah* recites the agreement already referred to and then proceeds to describe the properties demised thereunder. One of these is named as Damodarpur Lakhawar.

The controversy in the present suit relates solely to the question, what does Damodarpur Lakhawar denote?

It should be noted here that the rental fixed for the Mokarari was Rs. 2,701 per annum.

Raja Krishna Pratap Sahai, the grantee, appears to have taken possession, under the *pattah*, of the properties conveyed to him thereunder by Ran Bahadoor Singh. The Plaintiffs' claim that under the designation of Damodarpur Lakhawar only one village was granted to Raja Pratap Sahai and that the grantor retained possession of the other two, *viz.*, Lakhawar Khas and Lakhawar Faridpur, and that they on the 24th January 1914, obtained a grant of the same from the present owner of the 7½ annas share of the Tikari estate within whose property these villages lie; and they ask, as against the first Defendant, the representative of Raja Krishna Pratap Sahai, recovery of possession of these two villages with mesne profits. The Defendant No. 2 is the present possessor of the 7½ annas share and she supports the Plaintiffs' claim.

The contesting Defendant, on the other hand, alleges that "in the mofassil all the three villages are known by the name of Damodarpur Lakhawar," that they were "measured together" (in the survey of 1843) and that all three were entered under the name of Damodarpur Lakhawar in the zemindari office of the Tikari Raj; and he claims that what was granted to Raja Krishna Pratap under that name was not one village only but all the three bearing the common designation of Lakhawar. He further alleges that the grantee and his heirs have ever since been in possession of the three villages and that the present suit has been falsely instituted against him. As already stated the sole question at issue between the parties is, what does the name Damodarpur Lakhawar denote; in other words, whether it refers to only one village or to the three villages together.

This is an action in ejectment; in the proceedings under sec. 145 of the Criminal Procedure Code in 1912 the Defendant was found to be in possession of the villages in dispute, against the claim of the Plaintiffs; and in the cadastral survey proceedings taken under the provisions of the Bengal Tenancy Act of 1885 they again failed to establish their allegation. Their failure in those proceedings led in fact to the institution of the present action in August 1914. The onus thus lay heavily on the Plaintiffs to show that the Defendant was not in possession of these properties by virtue of the title he alleges. And this they could easily have done, in order to shift the onus, by proving that the rent for the two mouzahs was paid separately into the estate office, and that the three villages were separately entered in the estate records. Their Lordships have not observed in the judgments of the Courts in India a reference to this aspect of the case.

In both the Courts the matter in controversy has been dealt with as involving a simple construction of the words of the *pattah*. Both the Subordinate Judge and the learned Judges of the High Court of Patna have found that the three properties form separate mouzahs, that the two disputed villages are not appurtenant hamlets (*dakhilis*) of Damodarpur, that consequently what was granted under

RAJA INDRAJIT PRATAP BAHADUR SAHI *v.* AMAR SINGH.

the *pattah* was only one village specifically named in the grant. They put aside the documentary evidence adduced by the Defendant of the dealings with the three mouzahs as a composite property, mainly on the ground of a lacuna in the evidence which made the transactions look suspicious.

The Subordinate Judge decreed the Plaintiffs' claim, and his decree has been affirmed by the High Court, though it has held he had fallen into error on several findings of fact.

The present appeal to His Majesty is from the judgment and decree of the High Court.

In dealing with this case it is necessary to bear in mind two undisputed facts. First, that in the survey of 1843 the lands of the three mouzahs were measured together. The learned Judges of the High Court find it impossible to say why this was done. But Ex. 14A, the memorandum on the khasra map prepared by the Amin for purposes of the regular survey, which was to follow, contains the explanation. The three mouzas were measured together, as the lands were intermixed (*makhlut*). In this circumstance may be found the key to the whole history of these villages. Though the areas found on measurement are given separately, all three bear the same number in the Collector's register.

The Appellate Court thinks that this is due to the fact that the three villages appertain to one mahal. This explanation seems hardly well-founded. Besides, were this the correct view, all the other villages described in Ex. 14A which also bear the name of Lakhawar would have borne one and the same number. Their Lordships have no doubt that the three *Makhlut* villages bearing one number in the Collector's register were regarded as one composite revenue unit. The revenue assessed on these mouzahs appears also to be a consolidated amount.

As stated already the grant was made on the 30th May 1880. In it the name of the property is given as "Damodarpur Lakhawar." In the schedule which contains the details of the mouzahs the names of the Thikadars (lessees), who were in possession at the time and the *Jama* at which settlement was made are set out. The particular property forming the subject of the grant is described thus: "Damodarpur Lakhawar, Pargani Okri, Mahal Sufi, District Gaya."

Twelve years before, *viz.*, on the 5th April 1868, Rani Sunit Koer, the second widow of Raja Mode Narain Singh, had granted to one Ram Sahai, whose name appears as lessee in the list attached to the potta of 1880, a lease of 7½ annas share of 6 mouzahs for 15 years at a yearly rental of Rs. 757. In this document also the property is described as Damodarpur Lakhawar. On the 15th September 1875, Raja Ran Bahadoor himself granted to one Mohar Singh a *pattah* for 13 years in respect of the remaining 8½ annas share of the same villages at a rental of Rs. 749—thus making a total of Rs. 1,506 for both shares. On the 23rd January 1880, shortly before the compromise in the suit of 1875 Ran Bahadoor Singh gave to one Harihar Narain Singh, whose name also appears in the list attached to the *pattah* of the 30th May 1880, a usufructuary lease for 15 years. In the *kabuliyat* executed by Harihar Narain Singh, the component parts of Damodarpur Lakhawar are for the first time specifically set out. It recites that he had "obtained a Thika settlement of the whole and entire 16 annas of Mouza Lakhawar Khas, Lakhawar Makhlut Damodarpur, Lakhawar Makhlut Farid-

RAJA INDRAJIT PRATAP BAHADUR SAHI *v.* AMAR SINGH.

pur, Mahal Sufi, Pargana Okri, District Gaya, original with dependencies, on a fixed and consolidated Jama of Cos. Rs. 1,495," together with certain other items, amounting in the aggregate to Cos. Rs. 1,507. After giving other details it goes on to state that :—

"Under the Order of the authority for the time being, resting with me the Thikadar, on payment of Cos. Rs. 10,800 as *zarpeshgi* bearing interest at 8 annas per cent. per mensem, according to Katowli Satawa [*i.e.*, usufructuary mortgage] account given below, and Rs 501, as *zarpeshgi* bearing no interest, to be set off at the end of the term, from Sarkar Raja Ran Bahadur Singh . . . . . . for a term of 15 years, I shall take and hold possession of the leasehold properties. . . . . ."

A schedule is attached to this document showing the annual rental of the properties of which Harihar Narain Singh had obtained the lease, the deductions to be made therefrom on account of interest, the amounts to be deducted on account of principal, and the balance remaining therefrom, which was to be paid to the Mokararidar, the grantee under the *pattah* of 1880. This document would go to show that what was granted in 1880 referred to all the three villages which were grouped under the one name of Damodarpur Lakhawar, and would be conclusive on the point in controversy. But both the Subordinate Judge and the learned Judges of the High Court think, as already mentioned, that there was a gap in the evidence which the Defendants had failed to supply and that, therefore, the story that the grant included all three mouzahs could not be true. On this point the Subordinate Judge expresses himself thus :—

"Thus the grantor of the lease as shown by Ex. 15 makes a clear profit of about Rs. 6,000 by way of interest over the Peshgi money received, and he takes about Rs. 8,000 more as Peshgi money than that in Exbts. L and G ; under such circumstances simply because the rental in Exbt. 15 happens to be Rs 1,507 and 30 mds. of rice almost equal to what there is in Exbts. L and G it cannot follow that the same profit accrued to the landlord, and therefore the same property was leased out in Ex. 15 as in Exbts. L and G. In fact the landlord for apparent larger profits might have reduced the rent and might have granted three villages by Ex. 15 and, as the profit was not so much before he took larger rent and granted only one village and 7½ annas of Ampathua for almost the same rent."

The learned Judges of the High Court take a similar view. They say :—

"Now there is evidence to show that the portion of the jama which was to be set off in favour of the Tikari Raj against the *zarpeshgi* was actually set off, but there is nothing to show that any corresponding set-off was ever made by the Tikari Raj in favour of the Tamkuhi Raj (the Appellant). The only conclusion to be drawn from this is the conclusion drawn by the learned Subordinate Judge, *viz.*: that the Tikari Raj was getting the benefit of the set-off and that the Tamkuhi Raj was not in possession of the three Mouzas but of only one. Even if the Tamkuhi Raj did take the whole of the cash rent from the Ticcadar, however, this also would show nothing. Under his Mokarari the Raj of Tamkuhi was to get a clear profit of Rs. 1,151-12 a year after deduction of Mokarari rent. Now the highest amount that in any year was ever payable by Harihar Narain to the Tikari Raj was Rs. 708-10, so that even if the Tamkuhi Raj took the whole of this sum it was less than the whole amount to which it was entitled under the Mokarari, and the fact of taking it all would not in any way show that it had possession of the Mouzas in suit."

The conclusion of the Indian Courts being thus based on the absence of evidence on the part of the Defendant to show what arrangement had been made by Ran Bahadoor Singh in respect of the demands of Harihar Narain Singh, who held the usufructuary mortgage, the Ap-

pellant tried to trace further transactions to elucidate the gap to which the Subordinate Judge and the High Court referred, and on which practically the case was decided. It appears that before judgment was delivered by the High Court he traced, after diligent search, certain documents contemporaneously executed by Ran Bahadoor Singh by which he had made effective provision for meeting the demands of the usufructuary mortgagee and the claims of the Mokararidar; and obtained copies from the registry office where the documents executed by Ran Bahadoor Singh were registered, and applied to the Appellate Court for their admission as material evidence in proof of his case. One of these documents is the *Hukumnamah* (authority) addressed by Ran Bahadoor Singh to Harihar Narain Singh which bears date the 31st May 1880. The other is a *Tunkhah* or authorisation addressed by Raja Ran Bahadoor to one Telkhari Singh dated the 24th January 1880. Telkhari Singh appears to have been a lessee of certain mouzahs belonging to Ran Bahadoor Singh and the direction to him is in these terms :—

"Whereas Harihar Narayan Singh, son of Babu Mukha Singh resident of Bishunpore Pandui Pergunnah Ekil District Gaya by occupation zemindar has been granted a lease for a term of 15 years in respect of 16 annas of Mouza Khas Lakhwar Lakhwar Makhlut Damodarpore Lakhwar Makhlut Faridpore Mahal Sufi Pergunnah Ekil Distt. Gaya original with dependencies at an annual Jama of Rs. 1,507 of company's coins, in cash Mal with Abwab and 30 Maunds of sunned rice from 1296 to 1310 for a consideration of Rs. 10,878 as an advance bearing interest at the rate of -/8/- per mensem as per *Katwa Satwa* Account and Rs. 561 as advance bearing no interest to be set off against the rent of the last year of the term. And Rs. 5,520-11 as is the interest on the said advance bearing interest from November 1287 to 1295 the period of dispossession and the payment of that amount is necessary. Therefore it is written to you that you should pay the said Rs. 5,520 as per details out of the rental in respect of Bhekhdharaut Mahal Sufi Perg. Bhelawar the leasehold village, year after year to the said lessee (Harihar Narayan Singh) after obtaining receipt."

The *Hukumnamah* directed to Harihar Narain Singh bears date the 1st June 1880, namely, the day after the mokarari *pattah* of the 30th May 1880, in favour of Raja Krishna Pratap Sahai. The document runs thus :—

"To

"Sri Harihar Narayan Singh, son of Mukhi Singh, resident of Mouzah Bishunpur Pandul, Pergunnah Ekil, District Gaya and Thikadar in respect of 7 annas 6 pies out of the entire 16 annas of the Mouza Damodarpore Lakhawar and Lakhawar Khas, Pergunnah Okri and of 8 annas 6 pies of the said villages in all 16 annas of the said villages by occupation zemindar."

Then it goes on to say :—

"Whereas the 16 annas of Mouza Damodarpur Lakhwar and Lakhwar Khas original with dependencies together with Mouza Mohamadpur Khurd and Mohamadpur Kalan and Manikpur Bahari bearing an annual fixed Jama of Rs. 2,701-12, half of which is Rs. 1350-14 as according to the currency have been given in perpetual mokarrai commencing from 1288, from generation to generation, from progeny to progeny, from heirs to heirs, from successor to successors without any provision for forfeiture, cancellation and resumption from the Sirkar of this estate, in favour of Raja Krishna Pertap Bahadur Sahi, son of Raja Kharga Bahadur Sahi, resident and proprietor of Raj Reyasat Tamkohi, Pergunnah Sidhua Jobna, District Gorakhpore under a Mokurrari deed dated this day. Hence it is given to you in writing that you should pay and deliver Rs. 1507 mal (rent) with cesses in cash and 30 Maunds of Arwa rice the rent of the said Mouza due from you, commencing from 1296 Fasli to 1310 Fs. up till the terms of your Thika, to the officers of Raja Krishna Pertap Sahi, Mokurraridar from year

RAJA INDRAJIT PRATAP BAHADUR SAHI *v.* AMAR SINGH.

to year, from season to season, from kist to kist in accordance with the conditions and terms of kistbandi embodied in Thika Kabuliyat. And in case of the non-payments of the rentals specified to the extent of cash as set forth above."

There can be no question as to the genuineness of these documents. They appear to have been duly registered on their execution, the copies produced have been obtained from the registry office under the rules and regulations framed by authority. The only question is whether they can be admitted as evidence. If they are admissible they place beyond dispute the fact that the grant was in respect of all three villages which are known under the composite name of Damodarpur Lakhawar. But the learned Judges have held that they had no jurisdiction under r. 27, Or. 41 of the Code of Civil Procedure Act, 1908, to admit in evidence these documents.

R. 27 runs as follows :—

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if:—

(*a*) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(*b*) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, *or for any other substantial cause*, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

The matter does not come under cl. (*a*). With regard to cl. (*b*) the High Court construed the rule with the assistance of the decision in *Kessowji Issur* v. *The Great Indian Peninsula Railway* (1), that it implies a prohibition against the admission of additional evidence except where the Appellate Court has itself discovered some inherent lacuna or defect, and required evidence to fill up the gap or remedy the defect. They have apparently not considered the question that the suitor may be entitled for any "substantial cause" to apply to the Court for the admission of such additional evidence. The case of *Kessowji Issur* v. *Great Indian Peninsula Railway* (1), on which the learned Judges have relied, was peculiar in its character. A suit had been brought on the Original Side of the Bombay High Court against the Great Indian Peninsula Railway to recover damages for injuries sustained in consequence of an accident occasioned by the laches of the officials of the railway. The suit had been decreed by the Court of first instance; the Railway Company then, on discovery of some new evidence, applied for a review of judgment b fore the learned Judge who had decreed the claim; he refused the application. Then the Company filed an appeal and applied to the High Court in its Appellate Jurisdiction for leave to produce the same evidence they had presented to the first Court and which had been rejected. The High Court not only gave permission to the Appellants in that case to produce the evidence, but extended the permission to other evidence. As this Board pointed out, the procedure adopted by the Appellate Court was quite irregular. In the course of their judgment the Board laid stress on the limitations to the power of an Appellate Court to require additional evidence on their own motion to supplement what had been produced by the parties. In their Lordships' opinion *Kessowji's* case (1) has no bearing on the present debate. In this connection it may be useful here to refer

(1) L. R. 34 I. A. 115: s. c. I. L. R. 31 Bom. 381; 11 C. W. N. 721 (1907).

(1) L. R. 34 I. A. 115: s. c. I. L. R. 31 Bom. 381; 11 C. W. N. 721 (1907).

to the remarks of Lord Westbury in the case of *Sreemanchunder Dey* v. *Gopalchunder Chuckerbutty* (2), where, dealing with the power of the Appellate Court to require additional evidence under the provisions of the cognate section, sec. 355, in the Civil Procedure Code of 1859, he said as follows :—

"When the matter came up by appeal to the High Court, the High Court was dissatisfied with the decree below, and made remarks upon the reasons given by the Court and the dealing with the evidence taken in it; the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be exercised very sparingly, because, where it is done not at the instance of the parties but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible (which appears to be the case here) that the new original inquiry by the High Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice."

Both in the case of *Sreemanchunder Dey* v. *Gopalchunder Chuckerbutty* (2) and *Kessowji Issur* v. *Great Indian Peninsula Railway* (1) their Lordships were dealing with the power of the Appellate Court to require evidence to be produced for the purpose of enabling the Court to pronounce judgment. Those cases did not refer to the right of one or other of the parties to produce evidence which he considered essential for the determination of the action. Under Or. 47, r. 1, which reproduces sec. 623 of the Civil Procedure Code, Act XIV of 1882, a party has a right to apply for a review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in r. 1. In the present case an appeal had been preferred and a review, therefore, was out of the question; and the Defendants took the only and proper course, *viz.*: to apply to the High Court, which was in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of r. 27, which lays down that the Appellate Court may for any other substantial cause (*viz.*: other than those particularly specified) allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. As the application is now before their Lordships for the admission of the documents to which reference has already been made, it is desirable to observe that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out. It is only necessary to refer to p. 289 of Mr. Bentwich's "Privy Council Practice" where he has set out the cases in which the power has been exercised.

Their Lordships, therefore, have admitted the two documents in respect of which the application is made, and on these two documents they have no doubt that Ran Bahadoor Singh, by the words "Damodarpur Lakhawar," denoted all the three villages, and that he purported to give, and gave in mokarari all three of them to the grantee. On the whole, therefore, their Lordships are of opinion that

(1) L. R. 34 I. A. 115; s. c. I. L. R. 31 Bom. 381; 11 C. W. N. 721 (1907).

(2) 11 M. I. A. 28; 7 W. R. P. C. 10 (1866).

the decrees of the Courts below should be set aside and the Plaintiffs' suit dismissed. The Appellant will be entitled to his costs both here and in the Courts in India, and their Lordships will humbly advise His Majesty accordingly.

Solicitor: *Mr. Hy. S. L. Polak* for the Appellant.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1923,
Heard, 6, March.
Judgment, 6, March.

MIRZA ABID HUSAIN KHAN (substituted for Mirza Sadiq Husain) and anr., Appellants,
v.
AHMAD HUSAIN and ors., Respondents.

Civil Procedure Code (Act V of 1908), sec. 110—Claim for annuity charged on property—Appealable value

By no reasonable method of valuation can an annuity of Rs. 125 per annum *be worth Rs. 10,000, and the appealable value required by sec. 110 of the Civil Procedure Code is not satisfied by showing that the property upon which the annuity is charged is of the required value, the section applying to the value of the annuity sought to be recovered and not to the value of the property upon which that annuity is charged.*

RADHAKRISHNA AYYAR v. SUNDARASWAMIER (1) *explained.*

This was an appeal from a decree of the High Court of the Judicial Commissioner, dated 2nd April 1919, reversing as against the Appellant a decree of the District Judge of Lucknow, dated the 22nd November 1917, which had reversed a decree of the Subordinate Judge of Barabanki, dated the 31st July 1916.

The suit in which these decrees were passed was brought by the 1st Respondent for a declaration that a maintenance allowance of Rs. 250 per annum to which he claimed to be entitled created a charge on two villages, Dadra and Raipur, and that he and his representatives were entitled to get the same annually from the persons in possession of those villages, and for arrears of the same allowance.

The chief questions in this appeal were whether that allowance had been or should be charged on these villages so as to be payable by the Appellants as purchasers of them, and if so, whether the 1st Respondent was entitled to maintain the suit, and to a declaration that the maintenance allowance and the charge therefor will enure for the benefit of his representatives.

The villages in question were in Oudh, and all proprietary rights in their soil were confiscated to the British Government by Lord Canning's proclamation on the 15th March 1858.

Before this, these villages seem to have been held by one Mahammed Ayaz, ancestor of the Respondents Nos. 1—3. On his death his eldest son Sarfaraz Ali succeeded to the possession of the villages, but in or about the year 1845 was evicted for non-payment of revenue, and his younger brother Khuda Baksh, father of the 1st Respondent, paid up the arrears and got the *kabuliyat* of the villages, and he apparently allowed maintenance at the rate of Rs. 250 per annum to his elder brother, Sarfaraz Ali. Khuda Baksh, however, joined in the mutiny of 1857, and the lands as already stated were forfeited.

(1) L. R. 49 I. A. 211; s. c. 27 C. W. N. 1 (1922).

In or about the year 1858, Sarfaraz Ali on payment of a fine for Khuda Baksh's conduct, was allowed to engage for the revenue of the villages and was given a *kabuliyat* for them for three years.

Shortly after this, the 1st Respondent made a claim against Sarfaraz Ali for these villages, but that claim was finally rejected by the Judicial Commissioner on or about the 27th January 1865. The last part of his judgment was as follows: The financial Commissioner . . . . . decrees the proprietary rights in Mauzas Dadra and Raipur to the Appellant Sarfaraz Ahmad, the maintenance to be granted to Respondent Ahmad (1st Respondent in this appeal) to be equal to that assigned to Sarfaraz Ahmad.

The parties appear to have acted on the last sentence as a valid award of maintenance to 1st Respondent against Sarfaraz, and there followed further proceedings which resulted in an order by the Extra Assistant Commissioner on the 22nd October 1866, "that a decree for Rs. 250 annually in cash be passed against the Defendant (Sarfaraz Ahmad)."

Sarfaraz Ahmad died about 1868, and thereafter the allowance of Rs. 250 a year appears to have been paid by his son Riaz Ahmad, who got possession of his whole estate or on his account by his mortgagee in possession, Agha Hassan.

On 25th August 1882, the 1st Respondent sued Riaz Ahmad described as zemindar, and Agha Hassan as mortgagee of the village of Dadra. He set out some of the above facts and alleged that the decree for Rs. 250 had been passed "on the basis of zemindari right," but he only asked for and got a decree for payment of Rs. 250.

It appears that after this the said Agha Hassan Khan, in execution of a decree obtained on his mortgage, purchased the share of Riaz Ahmad in the estate left by Sarfaraz Ahmad, including the villages in question. Riaz Ahmad appears to have ultimately taken a half share in that estate, the other half share having gone to Fazl Ahmad, the other son of Sarfaraz Ahmad, whose representatives are the Respondents Nos. 2 and 3. The Appellants are the representatives of Agha Hassan Khan.

The allowance appears to have been paid to the 1st Respondent till about the year 1913, when it fell into arrear, and on the 6th August 1914, the 1st Respondent brought the present suit against the 2nd and 3rd Respondents and the Appellants, and he afterwards added as Defendants the 4th and 5th Respondents as purchasers from the 1st and 2nd Respondents of their share in Raipur.

The 1st Respondent on the 17th April 1916, through his pleader, stated that he did not plead or rely on any custom.

The suit was heard by the Subordinate Judge who gave judgment and passed a decree as claimed against all the Defendants, *i.e.*, the Appellants and the Respondents other than the 1st Respondent. In his judgment he held that the decree of January 1865, created an under-proprietary right which gave a charge to the 1st Respondent and his representatives on the villages.

Against this decision appeals were brought to the Court of the District Judge who allowed the appeal of the Appellants and limited the 1st Respondent to a personal decree against the 2nd and 3rd Respondents.

In his judgment he held that the decree of 27th January 1865 was a personal decree only and gave no charge. He pointed out that whatever proprietary rights Khuda Baksh, the 1st Respondent's father, had in the villages in question, he

lost at the mutiny under Lord Canning's proclamation and that there had been no re-grant whatever to Khuda Baksh or the 1st Respondent, his son. The maintenance he considered to have been granted merely as an act of grace. To the suggestion that the question of charge was *res judicata* against the Appellants by reason of the decree of 1882, he replied (1) that the Appellants were not litigating under the same title, (2) that in that litigation there was no claim to a charge. It was admitted before the District Judge that the decree of January 1865, did not create any under-proprietary right or any right that was transferable.

The 1st Respondent appealed to the Court of the Judicial Commissioner who allowed the appeal as against the Appellants and passed a decree against them for Rs. 250 and declared that the liability for payment of Rs. 125 per month would be charged on the half share of the villages held by the Appellants.

In his judgment he referred to the decree of 27th January as contemplating an allowance, payable out of the profits of the estate to the junior member (in accordance with the family custom by which one son inherited and the other only got an allowance) and heritable. He thought, however, that as no charge had been specifically created by that decree, the Respondents Nos. 4 and 5 as purchasers to whom no notice was proved to have been given were not liable but the Appellants could not escape liability by reason of the suit of 1882. He thought it desirable to create a charge for the future and appeared to have no doubt of his power to create such a charge.

From this decree the Appellants appealed to his Majesty in Council.

Mr. W. Wallach for the Respondents raised the preliminary objection that the appeal was not competent because the amount or value of the subject-matter did not involve directly or indirectly any claim to property of the value of Rs. 10,000 or upwards.

Sec. 110, Civil Procedure Code, 1908.

Benoy Lal Roy Chowdhury v. *Kamalapati Banerjee* (2).

Messrs. L. DeGruyther, K. C. and *E. B. Raikes* for the Appellants.—The value of the property on which the annuity is charged is more than Rs. 10,000 and indirectly there is a claim involving more than that sum. *Radhakrishna Ayyar* v. *Sundaraswamier* (1).

Their Lordships' Judgment was delivered by

Lord Atkinson.—In this case the annuity which is sought to be enforced is only Rs. 125 *per annum*. By no reasonable method of valuation can an annuity of Rs. 125 *per annum* be worth Rs. 10,000. The 110th section of the Code of Civil Procedure, 1908, applies to the value of the annuity which is sought to be recovered, not to the value of the property upon which that annuity of Rs. 125 is charged. Their Lordships think it right to call attention to the fact that the decision in the case which has been referred to, *Radhakrishna Ayyar* v. *Sundaraswamier* (1), apparently proceeded upon supposed admission, which admission, it now appears, was really not made. In that case, too, the rent was Rs. 1,500 odd *per annum*, and there was nothing inconsistent or irrational in holding that the value of that rent was over Rs. 10,000. It was not seven years' purchase, whereas it is impossible that the annuity about which the controversy in

(1) L. R. 49 I. A. 211; s. c. 27 C. W. N. 1 (1922).
(2) 13 C. L. J. 505 (1911).

MIRZA ABID HUSAIN KHAN *v.* AHMAD HUSAIN.

this case has arisen can be worth Rs. 10,000. Their Lordships are therefore of opinion that the appeal is incompetent, and they will so humbly advise His Majesty. The Appellants will pay the costs of the appeal.

Solicitors: *Messrs. Watkins & Hunter* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the 1st Respondent.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

Re: S. C. Cr. SUIT No. 9193 OF 1921.

C. C. GHOSE, J.
1923,
21, November.

THE EAST INDIAN RY. Co., Petitioner,
v.
KANAI LAL, Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 115—High Court's power of revision—Indian Railways Act (IX of 1890), sec. 77—Small Cause Court's decision that notice is unnecessary before suit, if an error on a point of jurisdiction

The Opposite Party sued the Petitioner in the Calcutta Small Cause Court to recover a sum of money in respect of a package which had been lost in transit from Bikaneer to Howrah. The Petitioner contended that the Court had no jurisdiction to try the suit inasmuch as no notice of claim under sec. 77 of the Indian Railways Act, 1877 had been given. The Court held that on the facts of the case notice was unnecessary, and decreed the Opposite Party's claim. The Petitioner applied to the High Court under sec. 115 of the Civil Procedure Code:

Held—*That if there was an error in the decision of the suit by the Small Cause Court, it was an error on a point of law and that the High Court ought not to interfere under sec. 115 of the Civil Procedure Code.*

"It is a strong thing to say that the Court, by holding that a notice under sec. 77 of the Railways Act on the facts of the case is unnecessary, did assume a jurisdiction which had not been vested in it by law."

AMEER HOSSAIN *v.* SHEO BAKSH (3), BALKRISHNA *v.* VASUDEVA (4), AMRITRAV KRISHNA DESHPANDE *v.* BALAKRISHNA GUNESH (6) and C. D. M. HINDLEY *v.* JOYNARAIN MARWARI (1) *referred to.*

The facts of the case will appear from the judgment.

Mr. Langford James for the Petitioner.

Sir B. C. Mitter for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

C. C. GHOSE, J.—This is an application under sec. 115, C. P. C., and it has arisen under the following circumstances:—On the 13th June 1920, the Opposite Party delivered to the Jodhpur-Bikaneer Ry. at Bikaneer Station for carriage to Howrah as passenger's luggage 12 packages, 7 of which were placed in the guard's van. At Howrah the Opposite Party received all the said packages save one of those placed in the guard's van, which had been lost in transit. On the 26th April 1921, the Opposite Party instituted a suit in the Calcutta Small Cause Court for the recovery of a sum of Rs. 981-4 in respect of the package which was lost against the East Indian Ry. Company. On the 7th February 1923, the suit was decreed in favour of the Opposite Party, although the Petitioner Company had taken the point that no notice of suit under sec. 77 of the Rail-

(1) 24 C. W. N. 288 (1919).
(3) I. L. R. 11 Cal. 6 (P. C.) (1884).
(4) L. R. 44 I. A. 261: s. c. I. L. R. 40 Mad. 793; 22 C. W. N. 50 (1917).
(6) I. L. R. 11 Bom. 488 (1887).

THE EAST INDIAN RY. CO. v. KANAI LAL.

ways Act* had been given. The Petitioner Company now contends that the learned Judge in the Small Cause Court had exercised a jurisdiction not vested in him by law in entertaining and decreeing the suit against the East Indian Ry. Company in the absence of a notice under sec. 77 of the Railways Act. The Petitioner Company applied to my learned brother, Mr. Justice Greaves, on the 20th August 1923, and obtained a rule under sec. 115, C. P. C., against the Opposite Party and this rule has now come on for hearing before me.

On behalf of the Petitioner Company considerable stress has been laid on the case of *C. D. M. Hindley* v. *Joynarain Marwari* (1) and on the case of *The Assam Bengal Ry. Co., Ld.* v. *Radhika Mohan Nath* (2) and it has been contended that usurpation of jurisdiction by the Small Cause Court by holding that a notice under sec. 77 of the Railways Act is unnecessary can be revised by this Court under sec. 115, C. P. C.

Sir Binode Mitter for the Opposite Party has contended that the present is not a case of usurpation of authority, nor is it a case of a conscious violation of a rule of law and that therefore, on the authority of the decision of the Privy Council in *Ameer Hossain* v. *Sheo Baksh* (3), the present rule ought to be discharged.

(1) 24 C. W. N. 288 (1919).

(2) Decided by Richardson and B. B. Ghose, JJ., on the 28th August 1922. Unreported.

(3) I. L. R. 11 Cal. 6 (P. C.) (1884).

* A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.

It is well settled that where a Court has jurisdiction to determine a question and it has determined that question, it cannot be said to have acted illegally or with material irregularity, simply because it has come to an erroneous decision. The leading case on this subject is the case of *Ameer Hossain* (3), cited above, and following this decision it has been held that the High Court will not interfere under sec. 115, C. P. C., merely because the lower Court had wrongly decided that a suit was barred by limitation, or that it was barred as *res judicata*, or because the lower Court had proceeded upon an erroneous construction of the sections of an Act, or had misunderstood the effect of a document in evidence, or had excluded evidence which it ought to have admitted. The Privy Council in the case of *Balkrishna* v. *Vasudeva* (4), observed as follows:—"It will be observed that sec. 115 applies to jurisdiction alone, the irregular exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact, in which the question of jurisdiction is not involved." There is no doubt that conflicting views of the scope and effect of sec. 115 are to be found in the cases in the reports and in these latter days I do not feel called upon to reconcile these conflicting views. I ought to add that my attention has been drawn to the case of *Jannoitzer* v. *Mohanand Chatterji* (5). The passages in the judgments which are specially relied upon are these:—

Per Jenkins, C. J.—"I wish to reserve for consideration, should it ever hereafter arise, the question whether re-

(3) I. L. R. 11 Cal. 6 (P. C.) (1884).

(4) L. R. 44 I. A. 261; s. c. I. L. R. 40 Mad. 793; 22 C. W. N. 50 (1917).

(5) Decided by Jenkins, C. J. and Woodroffe, J., on the 21st January 1904. Unreported.

jection or admission of evidence may not be in some peculiar circumstances an illegality or material irregularity, as for instance, where it is in direct contravention of some statutory provision." *Per* Woodroffe, J.—"Thus where a Court acts upon an unstamped document, where the legislature says that it is not to be acted upon at all, or on an unregistered document where registration is required, the Court has, I think, no option but to follow the mandatory provisions of the legislature, and if it does not follow such mandatory order, then it acts illegally."

No doubt there are these observations, but the real question is whether the judgment of the Small Cause Court Judge is revisable by me on the facts of the present case under the first part of sec. 115, C. P. C. On this point I desire to adopt the observations of West, J., in the case of *Amritrav Krishna Deshpande* v. *Balakrishna Ganesh* (6) :—"Now, jurisdiction, according to the exact conception of it formed by the Roman lawyers, consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it and in pronouncing upon them. An enquiry into whether the jurisdiction exists is not an exercise of jurisdiction over the case itself, but an investigation of another question altogether, that of whether the considerations of cognizance are satisfied. There is in the determination of such a question no adjudication in the stricter sense, no ascertainment of jural relations and command consequent thereon. This enquiry, therefore, may properly be reviewed in many cases, where, when the exercise of a true jurisdiction in the fuller sense has taken place, no appeal or even review may be possible. If the objection that might have been raised as a preliminary one is not in fact raised until the hearing of the case has proceeded to a certain stage, the enquiry thus provoked is not thereby changed in its character. It is only in a second intention of the Court that "jurisdiction" is used in speaking of such an enquiry as an exercise of jurisdiction; objections affecting jurisdiction must relate either to the person, the place or the character of the suit. If a Court has competence in these respects, it may exercise jurisdiction and does exercise it whether correctly or erroneously in dealing judicially with a cause placed before it. Jurisdiction again has two closely related but distinguishable senses. It means sometimes authority, sometimes the exercise of the authority and this either in investigation or by way of command. Where the law speaks of exercise of jurisdiction, or failing to exercise jurisdiction, it means using or failing to use authority in entering on an enquiry and carrying it to a judicial conclusion. The exercise of jurisdiction is not declined when such a conclusion has been arrived at, merely because, had the decision on a particular point been different, further questions would have had to be disposed of."

In my judgment, the present is not like the class of cases referred to by Woodroffe, J. Nor is it like the case where it has been held that if a Court wrongly decides that a suit is of a civil nature and entertains the suit on that basis, the decision is open to revision under sec. 115, C. P. C., for no Civil Court is competent to entertain a suit which is not of a civil nature. On the facts of the present case and on the judgment of the learned Small Cause Court Judge, I feel great doubt whether I can say that the Court had no jurisdiction to entertain this

(6) I. L. R. 11 Bom. 488 (1887).

THE EAST INDIAN RY. CO. v. KANAI LAL.

suit. No doubt the Court has said that notice under sec. 77 of the Railways Act on the facts of this case is unnecessary, but I think it is a strong thing to say that the Court by holding that a notice under sec. 77 of the Railways Act on the facts of this case is unnecessary did assume a jurisdiction which had not been vested in it by law. It may be said that this case is on the border line, but on the best consideration that I am able to give, I am inclined to think that if there is an error at all in this case, it is an error on a point of law and that no question of jurisdiction properly arises on the present application.

The result, therefore, is that this rule must be discharged with costs.

Messrs. Morgan & Co., Solicitors for the Petitioner.

Mr. S. C. Mitter, Solicitor for the Opposite Party.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 141 OF 1923.

MOOKERJEE, J.
CHOTZNER, J.
1923,
Heard, 12 and 13, July.
Judgment, 13, August.

SYED ABDUL ALIM ABED, Appellant,
v.
BADARUDDIN AHMED and ors., Respondents.

Land Acquisition Act (I of 1894), sec. 18, question of genuineness or otherwise of Will, if to be decided by the Improvement Tribunal in reference under, when probate proceedings pending in High Court—Apportionment case, desirability of staying, pending disposal of probate case—Indian Succession Act (X of 1865), sec. 187, probate of a Mahomedan Will, necessity of—Inherent power of Court to stay one of two cross-suits.

In a reference to the Improvement Tribunal under sec. 18 of the Land Acquisition Act in an apportionment case, *one of several Mahomedan claimants, at whose instance the reference was made, made an application for stay of the proceedings pending the disposal by the High Court of certain probate proceedings. The President of the Tribunal refused the application for stay and held that the genuineness and validity of the alleged Will should be tried by the Tribunal, but refused to give the applicant time for production of the original Will, and dismissed the case:*

Held—*That the reference should not have been dismissed without an opportunity being given to the claimant to secure the production of the original Will which had been lodged in the High Court. Such a course was rendered imperative by reason of the possibly far-reaching effect of decisions upon questions of title by Land Acquisition Tribunals.*

RAMACHANDRA RAO v. RAMACHANDRA RAO (1), BALORAM v. SHAMSUNDER (2) *and several other cases referred to.*

Though it is not obligatory in the case of a Mahomedan Will to take probate, probate may be obtained of a Mahomedan Will.

SHAIK MUSA v. SHAH ISSA (7) *and other cases referred to.*

The Court has inherent power to postpone the hearing of a suit pending the decision of a selected action and to make an order for the stay of cross-suits on the ground of convenience. This inherent power is not to be exercised capriciously or arbitrarily, it is to be exercised to facilitate that real and substantial justice for the administration of which alone Courts exist.

(1) I. L. R. 49 I. A. 129: s. c. I. L. R. 45 Mad. 320; 26 C. W. N. 713 (1922).
(2) I. L. R. 23 Cal. 526 (1896).
(7) I. L. R. 8 Bom. 241 (1884).

SYED ABDUL ALIM ABED *v.* BADARUDDIN AHMED.

KRISHNA KINKAR *v.* PANCHU RAM (11), CHINNUSAMI *v.* HARIHAR BHADRAL (12), HUKUMCHAND *v.* KAMALANAND (13) *and other cases referred to.*

For several reasons the proceedings in the Tribunal should be stayed pending the disposal of the probate proceedings by the High Court. In the first place, it is not the primary function of the Improvement Tribunal to investigate controverted questions of title and adjudicate upon testamentary disputes. In the second place, there is every likelihood of a more comprehensive and searching investigation of the matters in issue by the High Court in its testamentary jurisdiction than by the Tribunal. In the third place, the probate Court can issue citations upon all persons claiming to have any interest in the estate of the deceased, who may not be parties in the apportionment proceedings in the Tribunal.

IN RE BHABA SUNDARI DEBI (15) *and other cases referred to.*

This was an appeal preferred on the 1st of June 1923, against the decree of S. C. Banerjee, Esq., President of Calcutta Improvement Tribunal, Calcutta, dated the 26th of May 1923.

The facts are fully set out in the judgment.

Babu Dwarkanath Chakrabarti, Moulvi Nuruddin Ahmed, Babus Bepin Chandra Mallik, Kushiprasun Chatterjee and *Pramathanath Banerjee* for the Appellant.

Babus Mahendra Nath Ray, Baranashibasi Mookerjee and *Ramaprasad Mookerjee* for the Respondent No. 1.

Babus Brajalal Chakrabarti, Hiralal Chakrabarti and *Pares Chandra Mitra* for the Respondent No. 2.

(11) I. L. R. 17 Cal. 272 (1889).
(12) I. L. R. 16 Mad. 380 (1893).
(13) I. L. R. 33 Cal. 927, 932 (1905).
(15) I. L. R. 6 Cal. 460 (1880).

The JUDGMENT OF THE COURT was as follows :—

This is an appeal under sec. 3 of the Calcutta Improvement Appeals Act, 1911, from the decision of the President of the Tribunal pronounced under sec. 77 (1), (6) of the Calcutta Improvement Act, 1911. This section provides that for the purpose of determining the award to be made by the Tribunal under the Land Acquisition Act, 1894, questions relating to the determination of the persons to whom compensation is payable or the apportionment of compensation may be tried and decided, in the absence of the Assessors, if the President of the Tribunal considers their presence unnecessary, and when so tried and decided, the decision of the President shall be deemed to be the decision of the Tribunal

In the case before us, a portion of premises No. 13, Panditia Road was acquired by the Calcutta Improvement Trust by a declaration issued on the 16th November 1920 under the Land Acquisition Act. A sum of Rs. 46,200-8-10 was awarded by the Collector on account of the land, structures, statutory allowance, damages and capitalised value of the Government revenue. Thereupon three sets of persons appeared on the scene as claimants, with a view to participate in the sum awarded. The first of these was Badaruddin Ahmed who claimed to be the sole owner of the property. The second set consisted of Prafullanath Tagore and Muktakeshi Debi who are mortgagees from Badaruddin Ahmed. The third claimant, called the counter claimant in these proceedings, was Abdul Alim Abed, who claimed to be the owner. The Collector negatived the claim of the person last mentioned and awarded the compensation money to the first two claimants, mortgagor and mortgagees. Thereafter, on

the 16th August 1922 a reference was made, under sec. 18 of the Land Acquisition Act, at the instance of the counter claimant whose alleged title had not been recognised by the Collector. The reference was received in the Court of the Calcutta Improvement Tribunal on the 18th August 1922, when notices were directed to issue on the parties concerned and the case was fixed for the 19th September 1922 for appearance and for filing of written statements. The case was adjourned by the Court on ten occasions for want of time and it was finally taken up on the 21st April 1923, when it was adjourned to the 12th May for peremptory hearing. On that date, as it was laid down in the list, it was again adjourned to the 26th May. On that date, an application was made by the counter claimant for stay of the trial of the proceedings pending the disposal by the High Court of an application for the grant of Letters of Administration with copy annexed of the Will of one Omer Ali Sarkar. The President of the Tribunal refused the application for stay and held that the question of the genuineness and validity of the alleged Will should be tried by the Tribunal. The counter claimant thereupon prayed that some time should be given to him to enable him to produce the Will which had been lodged in the High Court. This prayer was refused and the President stated that even if the document had been produced, it would not have been received. The result was that what was called the apportionment case was dismissed with costs. The counter claimant has appealed to this Court and has contended that the order made by the President should be set aside, so that either the proceedings before the Tribunal may be stayed during the pendency of the probate proceedings in this Court or the question of the genuineness and validity of the Will may be investigated before the compensation money is distributed. The records of the probate proceedings have been placed before us.

It appears that the property acquired by the Calcutta Improvement Trust originally belonged to Omer Ali Sarkar who died on the 8th September 1911. The case for the Appellant is that Omer Ali Sarkar had executed a Will on the 11th May 1911. This is denied by the Respondent. Omer Ali Sarkar left a sister Abir Jan. The first claimant Badaruddin Ahmed who is the Respondent sets up title under a deed of gift said to have been executed in his favour on the 22nd June 1913 by Abir Jan, who, it is asserted, took the property by right of inheritance from her brother, the original owner. The counter claimant—Abdul Alim Abed —a grandson of Omer Ali Sarkar by a daughter Ayesha who is the Appellant sets up title as legatee under the alleged Will of Omer Ali Sarkar. On the 27th April 1923, Abdul Alim Abed made an application to this Court in its testamentary jurisdiction for Letters of Administration with copy of the Will annexed in respect of the estate of Omer Ali Sarkar. The estate was valued in accordance with statutory provisions, and an *ad valorem* fee of Rs. 2,007 was paid as prescribed in the Court Fees Act. In this application, it was stated that the person named as executor in the Will, one Samiruddin, was of unsound mind, that the applicant was a legatee under the Will and that he had attained his majority on the 30th May 1918. He claimed, under the Will, the premises No. 13, Panditia Road, and some ornaments. On the 30th April 1923, Mr. Justice Greaves ordered citation to issue to the executor under sec. 16 and a special citation to Abir Jan under

SYED ABDUL ALIM ABED v. BADARUDDIN AHMED.

sec. 69. On the 14th May 1923, Abir Jan filed caveat and the case is still under consideration. In these circumstances, the Respondents have argued that notwithstanding the pendency of the testamentary proceeding in this Court, the Tribunal may and should determine the question of genuineness and validity of the Will. But before we deal with this matter, we must first consider whether the order of dismissal should stand.

We are of opinion that the order of dismissal of what is called the apportionment case should be discharged. The case had been adjourned repeatedly as the Court had no time to take it up. Till the matter was taken up for disposal, no application for stay need or could have been made. As soon as the application was made, it was promptly rejected. In these circumstances an opportunity might well have been afforded to the counter claimant to secure the production of the original Will which had been lodged in this Court and was not in his custody. A considerable sum of money was in controversy, and the procedure should have been so moulded as to enable the parties to obtain an adjudication of the points in dispute.

Such a course was rendered imperative by reason of the possible far-reaching effect of the decisions upon questions of title by Land Acquisition Tribunals. It was pointed out by the Judicial Committee in *Ramachandra Rao* v. *Ramachandra Rao* (1) that where a dispute as to the title to receive the compensation has been referred to the Court under the Land Acquisition Act, a decree therein renders the question of title *res judicata* in a suit between the parties to the dispute or those claiming under them. This negatived what had been regarded as the accepted view in a long series of decisions in the Indian High Courts, such as *Baloram* v. *Shamsunder* (2) and *Trinayanee* v. *Krishnalal* (3). A similar tendency to extend the operative effect of adjudications by Courts of Special Jurisdiction, is exhibited by the decisions in *Sheo Prasan* v. *Ram Nandan* (4) and *Badar Bee* v. *Habib Merican Noordin* (5) though the contrary view might be supported by a reference to a series of decisions in the Indian High Courts, *Lalit Mohan* v. *Radharaman* (6). Caution was accordingly necessary and we are not prepared to uphold the order of dismissal made by the President.

The question which next requires consideration is, whether, in the events that have happened, the Tribunal should proceed to investigate the question of genuineness of the alleged Will, while the matter is under examination by this Court in its testamentary jurisdiction. We have been reminded that there is no provision of the law which renders it obligatory in the case of a Mahomedan Will to take probate, and that after due proof, such Will is admissible in evidence, notwithstanding that the grant of probate has not been obtained. The leading authority on the point is the judgment of Sir Charles Sargent, C. J., in *Shaikh Musa* v. *Shah Issa* (7) which construed sec. 187 of the Indian Succession Act; this was accepted as good law in *Sakina Bibi* v. *Mahomed Ishaque* (8) and *Mahomed Yusuf* v. *Hargovan Das* (9). On the other hand,

(1) L. R. 49 I. A. 129: s. c. I. L. R. 45 Mad. 320; 26 C. W. N. 713 (1922).

(2) I. L. R. 23 Cal. 526 (1896).

(3) 17 C. W. N. 835n (1910).

(4) L. R. 43 I. A. 91: s. c. I. L. R. 43 Cal. 694; 20 C. W. N. 738 (1916).

(5) [1909] A. C. 623.

(6) 15 C. W. N. 1021: s. c. 13 C. L. J. 547 (1911).

(7) I. L. R. 8 Bom. 241 (1884).

(8) I. L. R. 37 Cal. 839 (1910).

(9) 24 Bom. L. R. 753 (1922).

SYED ABDUL ALIM ABED *v.* BADARUDDIN AHMED.

it has not been denied that probate may be obtained of a Mahomedan Will. The effect of a probate so obtained was considered by the Judicial Committee in *Mirza Kurratulain* v. *Peara Saheb* (10) where Sir Arthur Wilson considered the effect of secs. 4, 59 and 88 of the Probate and Administration Act, 1881; see also *Krishna Kinkar* v. *Pānchu Ram* (11). The Respondents have urged that, in such circumstances, the proceedings should be carried on simultaneously; in other words, there may be a race between the parties in the two Courts so as to render necessary a decision of the question involved in *Chinnusami* v. *Harihar Bhadral* (12), namely, whether the judgment of a Probate Court, granting or refusing probate, is a judgment *in rem* so that the judgment of another Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the factum of the Will propounded in that Court. We are clearly of opinion that such contingency should be avoided by all legitimate means. The right course to pursue is to stay the proceedings before the Tribunal, till the probate proceedings have been terminated in this Court.

It is beyond controversy that the Court has an inherent power to postpone the hearing of a suit, pending the decision of a selected action, and to make an order for the stay of cross-suits on the ground of convenience; *Hukumchand* v. *Kamalanand* (13) and *Nandkishor* v. *Ramgolam* (14). This inherent power is not to be capriciously or arbitrarily exercised; it is to be exercised to facilitate that real and substantial justice for the administration of which alone Courts exist. If, from this standpoint, the Court is called upon to choose which proceeding should be stayed, there can be no serious controversy that the proceedings before the Tribunal should be stayed for more than one substantial reason. In the first place, it is not the primary function of the Tribunal to investigate controverted questions of title and adjudicate upon testamentary disputes. If the parties to this litigation had been Hindus governed by sec. 187 of the Indian Succession Act, read with sec. 2 of the Hindu Wills Act, the question could have been tried only by a Court of Probate. It is only because the parties are Mahomedans who are not affected by sec. 187 of the Indian Succession Act, which is not incorporated in the Probate and Administration Act, that the argument has been solemnly advanced that the Tribunal should be called upon to discharge the functions of a Court of Probate. In the second place, there is every likelihood of a more comprehensive and searching investigation of the matters in issue by this Court in its testamentary jurisdiction than by the Tribunal. In the third place, Abar Jan, who is a party to the testamentary proceedings in this Court, is not and cannot be a party to the proceedings before the Tribunal. On the other hand, the Probate Court may, in the exercise of its discretion under sec. 69 of the Probate and Administration Act, issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant is made. It was ruled in *In re Bhaba Sundari Debi* (15), that persons having an interest in the immoveable property of the deceased, such as a mortgagee of a person, who, if the testator had left no Will, would be en-

(10) L. R. 33 I. A. 244; s. c. I. L. R. 33 Cal. 116; 9 C. W. N. 938 (1905).
(11) I. L. R. 17 Cal. 272 (1889).
(12) I. L. R. 16 Mad. 380 (1893).
(13) I. L. R. 33 Cal. 927, 932 (1906).
(14) I. L. R. 40 Cal. 955, 960 (1912).
(15) I. L. R. 6 Cal. 460 (1880).

SYED ABDUL ALIM ABED v. BADARUDDIN AHMED.

titled to create the mortgage, would have such an interest in the property of the testator as to entitle him to enter caveat and oppose the grant of probate. To the same effect is the decision in *Sarbamangala* v. *Sasibhushan* (16). Again in *Sarojini* v. *Haridas* (17) a purchaser from the heir-at-law was allowed to contest the grant of probate of a Will which, if genuine, disinherited him. A similar view of the position of the purchaser from the heir had been previously taken in *Ram Chandra* v. *Ramrav* (18) and *Digambar* v. *Narayan* (19). This does not militate against the decision in *Jones* v. *Jones* (20), where, in an action as to the validity of a Will, Sir James Hannen, P., declined, apparently in the exercise of his discretion, to order the assignee of the heir-at-law to be cited as a person having or pretending an interest in the real estate affected by the Will.

On all these grounds, we are of opinion that this appeal must be allowed, the decree of dismissal made by the President set aside, and all proceedings in his Court stayed pending the disposal of the proceedings in this Court for Letters of Administration, with copy of Will annexed, to the estate of Omer Ali Sarkar. The sum covered by the award will be retained in Court until further orders. Each party will bear his own costs up to this stage.

J. N. R. *Appeal allowed.*

(16) I. L. R. 10 Cal. 413 (1884).
(17) I. L. R. 49 Cal. 235: s. c. 26 C. W. N. 113; 34 C. L. J. 373 (1921).
(18) [1896] Bom. P. J. 491.
(19) 13 Bom. L. R. 39 (1910).
(20) 7 P. D. 66 (1882).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1737 OF 1920.

NEWBOULD, J.
RANKIN, J.
1923,
15, June.

MONMATHA KUMAR RAY, Plaintiff, Appellant,
v.
JOSADA LAL PODDER and ors., Defendants, Respondents

Occupancy holding, non-transferable—Mere transfer by and sub-lease to raiyat, if gives landlord right to re-enter—Omission to pay rent whether amounts to denial of landlord's title—Court's duty when case heard ex parte.

Where a raiyat of a non-transferable occupancy holding sells it to a third person and after obtaining a sub-lease from him remains in possession of the holding the landlord is not entitled to obtain khas *possession of it in the absence of repudiation by the raiyat of his relation to the landlord as such raiyat, because mere transfer apart from any other consideration does not give the landlord any right to get a decree for* khas *possession although the raiyat does not appear and contest the suit.*

SUPERUNNESSA BIBI v. RAMDEB RAI (2) *referred to.*

A mere omission to pay rent is not a denial of the landlord's title in the absence of any evidence that the tenant ever refused to pay rent.

Even if a case is heard ex parte, *it is the duty of the Court to consider the interest of the absent party and not to pass a decree except on proof by the Plaintiff that he is entitled to that decree.*

This was an appeal against the decree of Babu Sarada Kumar Sen Gupta, Additional Subordinate Judge of Zilla Dacca, dated the 19th March 1920, modifying the decree of Babu Dwarka Nath De, Munsif,

(2) 24 C. W. N. 117 (1919).

MONMATHA KUMAR RAY *v.* JOSADA LAL PODDER.

2nd Court of that District, dated the 5th July 1919.

The facts of the case will appear from the judgment.

Babus Surendra Nath Guha and *Surja Kumar Guha* for the Appellant.

Babus Jogesh Chandra Roy, *Satis Chandra Chowdhury* and *Gopal Chandra Das* for the Respondents.

Babu Biraj Mohon Mazumdar for the minor Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit in ejectment. The Defendants Nos. 2 and 3 were the owners of a non-transferable occupancy holding under the Plaintiff. They mortgaged their interest to Defendant No. 1 who subsequently purchased that interest in execution of his mortgage decree. After that the Defendants Nos. 2 and 3 executed a *kabuliyat* in favour of Defendant No. 1 and remained in possession of the land. The Munsif gave the Plaintiff a decree on contest against the Defendant No. 1 and *ex parte* against the Defendants Nos. 2 and 3 who did not appear in the suit. The Plaintiff's title was declared and it was directed that he should recover *khas* possession of the same as against the Defendants. On appeal the findings of fact of the first Court were upheld but the decree was varied to the extent that the prayer for *khas* possession as against Defendants Nos. 2 and 3 was rejected; but it was declared that the Defendant No. 1 had no title to the disputed land as against the Plaintiff. Against this decree the Plaintiff has preferred this second appeal.

There is a considerable amount of law dealing with the question of the right of the landlord to re-enter the land of a non-transferable occupancy holding after its transfer by the tenant, but in no case has it been held that the mere transfer apart from any other consideration gives the landlord a right to re-enter when the tenant, transferor, actually remains in occupation of the land. The latest case cited on behalf of the Appellants and that which is most favourable to his contentions is that of *Rajani Kant Biswas* v. *Ekkari Das* (1). But in that case it was found that the tenant had not only transferred his holding but had also repudiated the existence of the relationship of landlord and tenant between himself and the original landlord. Here there is no such finding and what is more there is no such allegation in the plaint. In the plaint, as against the original tenants, the Plaintiff's case rests solely on the allegation of transfer and the execution of *kabuliyat* in favour of the transferee. It is now suggested that we ought on a consideration of the facts to hold that there has been an abandonment because it has been found by the Munsif that the Defendants Nos. 2 and 3 have not expressed their willingness to pay rent to the superior landlord. But a mere omission to pay rent is not a denial of the landlord's title; and there is neither the allegation nor a finding that these tenants ever refused to pay rent to the Plaintiff. The latest authority on the point is the case of *Siperunnessa Bibi* v. *Ramdeb Rai* (2) and that supports the view we take that on the facts alleged in the present case the landlord is not entitled to recover possession. It is argued that as Defendants Nos. 2 and 3 did not appear before the lower Appellate Court the decree should not have been modified in their favour. Even if a case is heard *ex parte*, it is the duty of the Court to consi-

(1) I. L. R. 34 Cal. 689: s. c. 11 C. W. N. 811 (1907).

(2) 24 C. W. N. 117 (1919).

MONMATHA KUMAR RAY *v.* JOSADA LAL PODDER.

der the interest of the absent party and not to pass a decree except on proof by the Plaintiff that he is entitled to that decree. Here the Plaintiff possibly by oversight omitted not only to prove that but even to allege the facts necessary to support the decree which he obtained in the Court of the Munsif. We therefore affirm the decree of the lower Appellate Court and dismiss this appeal with costs, one-half to Defendant No. 1 and one-half to Defendants Nos. 2 and 3.

S. C. C.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINSON.
LORD SHAW.
LORD WRENBURY.
LORD CARSON.
SIR ROBERT YOUNGER.
1923,
Heard, 1 and 2, November.
Judgment, 23, November.

THE INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD., Appellants,
v.
THE DEKHARI TEA CO., LTD., and ors., Respondents.

Indian Carriers Act (III of 1865), secs. 2, 6—"Common carriers," transporting goods "for all persons indiscriminately," who are—Conditions necessary to absolve common carrier from liability to owner—Special contract, or special means outside their ordinary methods of carriage to be employed.

A Railway Company which in ordinary course would have transported consignments of goods to a certain port over their own line, owing to break-down in a section of their own line, arranged with a Steamship Company for carriage of all goods of a particular description consigned to it for that port over a part of the way upon an agreement for division of freight which contained no other condition of any kind. The Steamship Company failed to establish that in transporting the goods in question they had employed a means of carriage over which the owners of the goods had a temporary and exclusive monopoly:

Held—*That the Steamship Company were liable to the owners of the goods for loss due to fire which broke out in their vessel, as common carriers under sec. 2 of the Carriers Act, there being in the case no special signed contract within the meaning of sec. 6 of the Act to take the case out of the operation of sec. 2, and there being nothing in the evidence to show that in the carriage of the goods, the Steamship Company were departing from their usual business and engaging on a different type of business from that of common carriers.*

Persons carry on business "for all persons indiscriminately" within the meaning of the definition of "common carriers" in sec. 2 of the Act, if (apart from danger arising, say, from the nature of the goods received) they are bound, owing to the public employment in which they are engaged, to satisfy the demands and applications for transport of goods of customers as they come and are not at liberty to refuse business.

Common carriers are answerable to the owners for safe and sound delivery of the goods they transport as such carriers.

To absolve himself of liability as such what is required in the case of a person who answers the definition of a common carrier (viz., one transporting for hire goods from place to place indiscriminately) is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that, for the contract in question, the contractor was departing from his usual business and engaging in a different type of business from that of common carrier.

These were consolidated appeals against seven judgments of the High Court of Bengal in its Appellate Jurisdiction, dated the 30th November 1921, which affirmed seven decrees of the said Court in its Original Jurisdiction, dated the 19th January 1921.

The suits were instituted by various Tea Companies against the present Appellant for damages for loss incurred by them owing to the destruction of their goods while in the custody of the Appellant Company.

Suits were also instituted against the Assam-Bengal Railway Co., but were dismissed by consent owing to lack of notice in conformity with the provisions of the Indian Railways Act.

The Respondents were in the habit of sending consignments of tea from Assam to England *viâ* Chittagong. Generally this tea was carried by the Railway Company, but on occasions there were interruptions in the Railway service, particularly in a portion known as the "Hill Section" and on these occasions arrangements were made between the Railway Company and the present Appellant for the goods to be carried by the Appellant by water between Gauhati and Chandpur so as to avoid the breach in the Railway.

Such interruptions took place in 1913 and 1915 and the above arrangement was come to between the Railway and Steamer Companies.

In November 1915, 96 chests of tea, part of a consignment of 343 chests which had been delivered to the Railway Company for transport to Chittagong, were burnt while on the Appellant Company's flat "Cauvery" at Gauhati.

The Respondents sued to recover the loss sustained. The suit came for trial before Rankin, J. and the Respondents were allowed to amend their plaint by the addition of an allegation that the Appellant Company was a common carrier.

The learned Judge held that the Appellant Company was a common carrier and that the goods had been destroyed owing to the negligence of their servants. On appeal the Appellate Court (Sanderson, C. J. and Richardson, J.) upheld the findings of the trial Judge and dismissed the appeal.

The Steamer Company appealed to His Majesty in Council.

Messrs. A. M. Dunne, K. C. and *Kenworthy Brown* for the Appellants.—Both Indian Courts have found that the tea was carried by the Appellants under an agreement with the Railway Company which provided for a special fleet for its transport and a non-stop voyage from Gauhati to Chandpur.

The Appellants do not therefore come within the definition of common carriers as provided by sec. 2 of the Indian Carriers Act, III of 1865, in that they were not carrying "for all persons indiscriminately."

Nor were they common carriers under the English law which is applicable save in so far as it may be varied by the Indian Act.

There are concurrent findings that there was no privity of contract between the Appellants and the Respondents so that it cannot be urged that the English cases, which lay down the proposition that a contractor may take upon himself the liability of a common carrier, are relevant.

Reference was made to *Johnson* v. *Midland Ry. Co.* (1), *Scaife* v. *Farrand* (2), *Liver Alkali Co.* v. *Johnson* (3), *Nugent* v. *Smith* (4) and *Hill* v. *Scott* (5).

(1) 4 Exch. 367 (1849).
(2) L. R. 10 Exch. 358 (1875).
(3) L. R. 9 Exch. 338 (1874).
(4) 1 C. P. D. 423 (1876).
(5) [1895] 2 Q. B. 371.

In any case the Appellant is not under the liability of a common carrier here as he was only bound to carry the goods tendered by the Railway Company to a fixed destination.

It is admitted that the Appellants would have been liable had they been common carriers.

Irrawaddy Flotilla Co. v. *Bugwandass* (6).

No negligence has been proved and no negligence can be presumed under sec. 106, Evidence Act, 1872.

[The Respondents were called upon to argue the question of "common carriers" before the Board heard further argument on the question of negligence.]

Messrs. Neilson, K. C. and *E. F. Spence* for the Respondents.—There are concurrent findings that the Appellants were "common carriers."

That is not a question of law, but of fact. *Brind* v. *Dale* (7) and *Belfast Ropework Co.* v. *Bushell* (8).

The Evidence does not show that by the agreement between the Railway Company and the Steamer Company the flotilla was reserved entirely for the Railway Company's goods. The carrying of the tea was in the ordinary course of the Steamer Company's business as common carriers.

Mr. Dunne, K. C. replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—These are consolidated appeals against decrees dated the 30th November 1921, pronounced by the High Court of Judicature at Fort William in Bengal. These decrees affirmed seven decrees of Mr. Justice Rankin dated the 19th January 1921.

The action was directed by the Respondents against the Assam-Bengal Railway Company as well as the present Appellants, the India General Navigation and Railway Company. It was dismissed by consent against the former, called the Railway Company, and it proceeded against the latter, called the Shipping Company.

The Plaintiffs' claim is for damages for the loss of certain tea, part of a consignment of their goods which, in November 1915, was delivered by the Respondents to the Railway Company for the purpose of transport from Assam to Chittagong for shipment to England. Consignments are in ordinary course thus taken and carried over all the Railway Company's own line without recourse to any other system of transport.

A section of the line, however, south of Lumding, in June 1915, broke down. It had broken down two years previously and arrangements had then been made for taking the goods by ships or flats from Gauhati on the Brahmaputra river down to Chandpur on the Meghna river. At the latter point the goods could again be put on rail and so reach Chittagong. This river service was performed both in 1913 and 1915 by the present Appellants. The only bargain on the subject of the goods in the present case was contained in a single letter dated the 11th June 1915, from the Traffic Manager of the Railway Company to the Agents of the Shipping Company and was to the effect that

"All tea from Upper Assam stations for Chittagong will be diverted *viâ* Chandpur and Gauhati. The division of the freight between the Steamer Company and this Railway following the precedent of 1913"

(6) L. R. 18 I. A. 121: s. c. I. L. R. 18 Cal. 620 (1891).

(7) 8 Car & P 207 (1837).

(8) [1918] 1 K B. 210

No conditions of any kind, other than that, were either produced or proved.

What happened to the goods was that they were conveyed from Bordubi Road (Assam) by rail to Gauhati. The railway having broken down the goods were there put on board the Steamship Company's flat "Cauvery" for carriage by river to Chandpur.

On the 21st December 1915, while the vessel was still lying at Gauhati, a fire broke out and certain of the tea was destroyed.

There were two questions in the case. First, whether the Steamship Company were liable to the Respondents, the owners of the goods, in damages as a common carrier; and second, whether if not so liable, they were liable at common law, by reason of the fire having been caused through their negligence. Their Lordships have not thought it necessary to deal with this second legal head of claim, the materials for which are in the evidence, because they are of opinion that the judgments pronounced by both the Courts below on the first point are clearly right, *viz.*, that the Shipping Company in the circumstances described were under the law of India common carriers and answerable to the owner in damages as per the decrees.

It was quite clearly established, to use the language of their own witness, Parrot, one of their staff: "We are undoubtedly common carriers so far as the river portion of the journey is concerned." The case for the Appellants, however, was that by reason of the special nature of the contract of carriage entered into in this case the denomination of common carriers could not apply to them nor the liability of common carriers attach.

There was considerable reference made to the law of England. Whether the result under that law would have been in any wise different from that arrived at is doubtful enough; but the reference was unnecessary, because the point to be decided arises under the law of India. The true question in the appeal simply is whether under the Carriers Act, No. 3, which received the assent of the Governor-General in Council on the 14th February 1865, the definition of common carrier there mentioned covers the Appellants *quoad*, the present transaction. That definition is to the following effect :—

"In this Act, unless there be something repugnant in the subject or context—"Common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately."

It is not denied that the Appellants were *de facto* "engaged in the business of transporting for hire property from place to place by . . . . . . inland navigation." The challenge, however, is that this was not done "for all persons indiscriminately." There is no question raised as to the goods being beyond the Appellants' carrying capacity; they, in fact, receiving a large consignment, supplied the ships or flats to carry it. So far as the words "for all persons indiscriminately" are concerned these simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him and he is answerable to the owner for safe and sound delivery.

In the present case all of these proposi-

tions are admitted; but it is said that there was here a contract of a special nature. The specialities in it were two, first that the Shipping Company did in fact assign particular flats for the considerable block of business coming to them at Gauhati by reason of the railway break-down; and secondly, that these flats were destined from Gauhati to Chandpur without calling at the ordinary intermediate ports. On the first of these points their Lordships would observe that there is no written proof in the case apart from the letter already referred to, which was simply to the effect that the rate for carriage would be the same as that charged in 1913. And as to special flats being employed there is no trace in the evidence that if there had been other customers' goods awaiting shipment for Chandpur and consigned to Chittagong, these could not and would not have been sent along with the cargo taken over from the Railway Company. In short, the idea of this portion of the river carriage being a temporary and exclusive monopoly for one single customer on special terms entirely disappears.

On the second point, *viz.*, that this was a through route, their Lordships fail to see how that circumstance decategorises the Appellants from being common carriers under the statute, or relieves them from their legal obligations as such. In order to effect such a result the particular contract would require to come up to this, that *quoad* that transaction, another and different type of business had been entered on.

When, for a particular contract, special terms are desired which involve a different category of liability, there is nothing to prevent that being secured; sec. 6 of the Indian Carriers Act can then be taken advantage of. The language of sec. 6 is as follows:—

"The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice: but any such carrier . . . . may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same."

The goods were accepted for delivery by the Appellants without any such special signed contract for limitation of liability.

What is required in the case of a person who answers the definition under the Indian Carriers Act, *viz.*, of transporting for hire goods from place to place for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier. The Judges in both Courts appear to have not only correctly looked at the case from this point of view, but to have been entirely right in their conclusion. The learned Rankin, J., puts the matter thus:—

"The only question is whether, because it was doing this particular set of journeys for the Railway Company by a special flotilla which was devoted for the time to this purpose only and which was making a through run to Chandpur, it was departing from its usual business and engaging in a different type of business, *viz.*, the business of a sub-contractor for the Railway in such special sense as to take it *quoad* these journeys out of the avocation of a common carrier. On the whole I think it was not."

Their Lordships agree that the question

is correctly thus put in law and the proper answer given in fact.

The learned Sanderson, C. J., quotes the passage just given and agrees with it, as do their Lordships; and the learned Richardson, J., puts the matter simply, thus :—

"A common carrier cannot divest himself of his responsibilities as such without satisfying the Court that in the particular transaction he acted in some other capacity, and in this case, in my opinion, the Appellant Company have not discharged the burden which lay upon them."

The above also appears correct.

As already mentioned all other points in the case have disappeared.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs.

Solicitors : *Messrs. Morgan, Price, Gordon* and *Marley* for the Appellant Company.

Solicitors : *Messrs. Sandersons* and *Orr, Dignams* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.
LORD ATKINSON.
LORD WRENBURY.
1923,
Heard, [illegible] and 9, February.
Judgment, 2. March.

THE TATA IRON AND STEEL CO., LTD., Appellants,
v.
THE CHIEF REVENUE AUTHORITY OF BOMBAY, Respondent.

Privy Council, appeal to Income Tax Act (VII of 1918), sec 51—High Court's judgment on case stated by Chief Revenue Authority, whether judgment or order Order whether final or consultative—Letters Patent (Bombay High Court), sec 39—Special leave, where statutory condition not fulfilled

No appeal lies to the Privy Council, under sec. 39 of the Letters Patent, from an order of the High Court made upon a reference by case stated by the Chief Revenue Authority under sec. 51 of the Income Tax Act of 1918.

It is not a "final judgment" within the meaning of the section, as a "judgment" means a decision obtained in an action, all other decisions being "orders"; nor is it a "final decree." It is an order but not a "final order," a decision, judgment or order made by the Court under the section being merely advisory.

The fact that the functionary who states a special case for the opinion of the Court is or is not bound to act upon it does not necessarily determine whether the order and decision of the Court is or is not merely advisory.

The Privy Council would be slow to grant special leave to appeal when the subject had been adequately dealt with in the Letters Patent.

This was an appeal from a judgment of the High Court of Judicature at Bombay (McLeod, C. J. and Shah, J.), dated the 28th February 1921, upon a reference made by the Chief Revenue Authority to the High Court pursuant to a previous order of the Court requiring a reference to be made under sec. 51 of the Indian Income Tax Act (VII of 1918). By the said judgment the decision of the Chief Revenue Authority was affirmed.

The questions at issue in this appeal shortly stated were :—

(1) Whether the High Court had any jurisdiction in view of the prohibitions contained in sec. 106 (2) of the Government of India Act and in sec. 52 of the Income Tax Act (VII of 1918) to entertain an application for an order under sec. 45 of the Specific Relief Act, 1877, for the purpose of compelling the Chief Revenue Authority to exercise its powers to refer to the High Court a question under sec. 51 of the Income Tax Act (VII of 1918).

(2) Whether, assuming there be such jurisdiction, an order could be made under sec. 45 of the Specific Relief Act, 1877, requiring the Chief Revenue Authority to refer to the High Court a question under sec. 51 of the Income Tax Act (VII of 1918) in the circumstances of the case and when the Chief Revenue Authority was of opinion that a reference to the High Court was unnecessary.

(3) Whether any appeal lies to His Majesty in Council from a decision of the High Court upon a question referred to it under sec. 51 of the Income Tax Act (No. VII of 1918).

(4) In the alternative, whether in computing the amount of the income of the business of the Appellant Company for the purpose of assessment of Indian Income Tax a sum of Rs. 28,00,000 paid by way of underwriting commission in connection with an issue of shares of the Appellant Company ought to be deducted from receipts as an expense of carrying on the business.

The facts of the case shortly summarised were as follows :—

The Appellant Company which was formed under Indian Law and had its registered office in Bombay having by resolution passed in November 1918 decided to increase its capital by issuing 70,00,000 preference shares of Rs. 100 each took steps to secure that the issue should be a success. These steps are described in the reference as follows :—

"In order that such a large number of shares might be fully taken up, the Company offered them to certain individuals (styled as underwriters) at 4 per cent. discount. The underwriters took up the shares at this rate on condition that they be in the first instance, offered to the existing share-holders at par, and that they would themselves take up such shares as would not be thus subscribed for by the share-holders, in proportion, to the total number of shares applied for by them. Thus if one of the underwriters had applied originally for 7,000 shares, and if all the share-holders took up 5,00,000 shares out of the total number of 7,00,000, he would have to take up 2,000 shares $\left(\frac{7,000 \times 2,00,000}{7,00,000}\right)$, though he would be paid the discount due on the 7,000 shares originally applied for by him, *viz.*, Rs. 28,000."

The total amount of the discount thus paid to the underwriters amounted to Rs. 28,00,000.

The accounts of the Company for the official year 1918-19 showed this sum as an item of expenses on account of underwriting commission. The Collector of Income Tax, Bombay, in arriving at the income of the official year 1919-20, which is to be computed upon the basis of the income of the preceding year, disallowed any deduction on account of this item, and assessed the Company in respect of an income of Rs. 61,81,848.

The Appellant Company appealed to the Commissioner of Income Tax, Bombay, under sec. 21 of the Income Tax Act (VII of 1918) against the assessment on the ground that the deduction of Rs. 28,00,000 should have been allowed, but the Commissioner rejected the appeal. The Appellant Company then petitioned the Chief Revenue Authority to reverse the decision of the Commissioner under sec. 23 of that Act, or in the alternative to refer the case to the High Court under sec. 51 of the Act on the question whether the deduction of the sum of Rs. 28,00,000 should be allowed.

The Chief Revenue Authority refused to interfere with the Commissioner's order, and in the exercise of his discretion

under sec. 51 of the Income Tax Act, 1918, declined to refer the case to the High Court on the ground that, as the law seemed clear and the question involved was more or less one of fact, it was unnecessary to do so.

The Appellant Company then applied to the High Court for an order to be made under sec. 45 of the Specific Relief Act, 1877, requiring the Chief Revenue Authority to refer the question to the High Court. The application was opposed on behalf of the Chief Revenue Authority, but the High Court on 12th January 1921 made an order requiring the Chief Revenue Authority to refer the case, and a reference was submitted accordingly. The point at issue was stated in the reference as being whether the item of Rs. 28,00,000 can or cannot be allowed under sec. 9 (2), IX of the Indian Income Tax Act as an item of expenditure.

The following is a summary of the principal statutory provisions relevant to the issues :—

Sec. 5 of the Indian Income Tax Act (VII of 1918) defines "income derived from business" as a specific class of income chargeable to Income Tax.

Sec. 9 (2) of the Act directs with reference to any such income that the profits of a business shall be computed after making certain allowances in respect of sums paid of which (IX) is as follows :—

"(IX) in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits."

Sec. 18 of the Act provides for the assessment by the Collector of the sum payable in respect of Income Tax, and by sec. 21 of the Act the assessee has power to apply by petition to the Commissioner for relief against the assessment.

By sec. 23 of the Act the Chief Revenue Authority may review assessments and pass such orders thereon as it thinks fit.

By sec. 51 of the Act it is provided that where a question has arisen in the course of an assessment under the Act :—

"The Chief Revenue Authority may, either on its own motion or on any reference from any Revenue officer subordinate to it, draw up a statement of the case, and refer it with its own opinion thereon to the High Court, and shall so refer any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary."

Sec. 51 (3) of the Act is as follows :—

"The High Court upon the hearing of any such case shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Revenue Authority by which the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar; and the Revenue Authority shall dispose of the case accordingly, or, if the case arose on reference from any Revenue officer subordinate to it, shall forward a copy of such judgment to such officer who shall dispose the case conformably to such judgment."

"Where a reference is made to the High Court on the application of an assessee, costs shall be in the discretion of the Court."

Sec. 52 of the said Act is as follows :—

"52. No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit, or other proceeding shall lie against any Government officer for anything in good faith done or intended to be done under this Act."

Sec. 106 (2) of the Government of India Acts (1915, 1916 and 1919) provides with reference to the jurisdiction of the High Court as follows :—

"(2) The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or of the law for the time being in force."

Sec. 45 of the Specific Relief Act, 1877.

authorises the High Court *inter alia* to make an order requiring any specific act to be done or forborne by any person holding a public office or any inferior Court of jurisdiction subject to the conditions and provisions of the section and in particular:—

(*a*) that the doing or forbearing is under any law for the time being in force clearly incumbent on such person or Court in his or its public character, and

(*b*) that nothing in the section shall be deemed to authorise the High Court to make any order which is otherwise expressly excluded by any law for the time being in force.

The reference was determined in the High Court on the 28th February 1921 when the Court (McLeod, J. and Shah, J.) gave judgment affirming the decision of the Chief Revenue Authority with respect to the allowance claimed.

Mr. Justice McLeod was of opinion that the sum of Rs. 28,00,000 was expenses incurred by the Appellant in raising fresh capital, that it was not included in any of the deductions authorised in sec. 9 (2), IX of the Income Tax Act and that it was in the nature of capital expenditure analogous to preliminary expenses on the flotation of a Company or money paid for an asset of an intangible nature such as goodwill and could not therefore be treated as expenditure (not in the nature of capital expenditure) solely incurred for the purpose of earning the profits of the Company's business. Reliance was placed in the judgment upon the principles in the *Taxes Land and Mortgage Company* v. *William Hotham* (10).

Mr. Justice Shah was of a similar opinion, and relied in addition upon the principles underlying the decision in the *Royal Insurance Company* v. *Watson* (11). He further doubted whether even if the expenditure in question was not in the nature of capital expenditure, it could be said to have been incurred solely for the purpose of earning the profits, but he did not decide the point.

The Appellant Company applied to the High Court for leave to appeal to His Majesty's Privy Council, and on the 22nd August 1921, the Court (McLeod, C. J. and Shah, J.) gave judgment, giving leave so to appeal.

The Court was of opinion that a decision of the High Court on a reference made by the Chief Revenue Authority under sec. 51 of the Indian Income Tax Act (VII of 1918) was a judgment within the meaning of cl. 39 of the Letters Patent, which the Court considered to be used in a wider sense than that in which it is used in the Civil Procedure Code.

Messrs. A. M. Dunne, K. C. and *Reginald Hills* for the Respondent raised a preliminary point as to the competence of the appeal.

Sec. 51 of the Indian Income Tax Act, VII of 1918, provides for a reference by the Chief Revenue Authority to the High Court.

The Chief Revenue Authority having refused to refer this case, an application was made by the Appellant under sec. 45 of the Specific Relief Act and a reference was ordered and made (see I. L. R. 45 Bom. 1306).

But under the Government of India Act, 1915, sec. 106, there is no power to refer revenue matters to the High Court, and that Court was not competent to act under sec. 45 of the Specific Relief Act.

Moreover sec. 52 of the Indian Income Tax Act, 1918, ousts the jurisdiction of the High Court in questions of assessment.

Under the provisions of the Income Tax

(10) [1894] L. J. Q. B. 496.

11 [1897] A. C. 1.

Act the seisin is always left with the Revenue officer. The Court is not empowered to give an order overruling the assessment; it only acts in an advisory capacity.

In any case even if there was a proper reference under sec. 51 of the Income Tax Act and the High Court has stated its opinion, no appeal lies from its decision.

[LORD DUNEDIN.—If the High Court has given a judgment, can the jurisdiction of the Privy Council be excluded?]

It has been so held under the Land Acquisition Act.

Rangoon Botatoung Co. v. *The Collector, Rangoon* (12) and *Special Officer, Salsette Building Sites* v. *Deshabhai Bezangi Motiwaka* (13).

[LORD DUNEDIN.—The fundamental fact on which appeals to this Board rest is the right of every subject to appeal to His Majesty in Council.]

In the present case the High Court was not acting in a judicial but in an advisory capacity.

Ex parte County Council of Kent (8), *Holland S. S. Co.* v. *Bristol S. N. Co.* (14), *In re Knight and the Tabernacle Permanent Building Society* (6) and *Cogstad & Co.* v. *Newsum, Sons & Co.* (15).

[LORD DUNEDIN referred to *Steele* v. *McIntosh Bros.* (16) and *Thompson* v. *Glasgow Corporation* (7).]

The right of appeal must be given by statute and no such provision exists in the Act under which this decision was given.

The decision was not a "final judgment" within the terms of sec. 15 of the Letters Patent nor was it a decision coming into the category of a judgment in the "original jurisdiction" of the High Court within the meaning of sec. 39 of the Letters Patent.

See sec. 106, sub-sec. (2), Government of India Act, 1915.

The provisions of the English Income Tax Acts are different, for by them the judgment of the Court is not merely advisory but act as a discharge of the assessment, and they expressly provide for appeals.

Sir William Finlay, K. C. and *Messrs. Bremner* and *E. B. Raikes* for the Appellants.- Sec. 15 of the Letters Patent contemplates an appeal to His Majesty in Council from every judgment.

Cl. 39 of the Letters Patent uses the words "original jurisdiction" to differentiate from "appellate jurisdiction." The jurisdiction given by sec. 51 of the Indian Income Tax Act, 1918, would be included in such "original jurisdiction."

There is a marked similarity between the English and the Indian Income Tax Act and it has never been suggested that an appeal would not lie to the House of Lords, under the former.

Under sec. 51 of the Indian Income Tax Act, 1918, the High Court has to deliver a judgment which is binding on the Revenue Authority and does in effect discharge the assessment.

The whole of the proceedings in the *Rangoon* case (12) was based on an award which is admittedly on a different footing to a judgment.

Ramachandra Rao v. *Ramachandra*

(6) [1892] 2 Q. B. 613.
(7) [1912] S. C. 300.
(8) [1891] 1 Q. B. 725.
(12) L. R. 39 I. A. 197 : s. c. 16 C. W. N. 961 (1912).
(13) 17 C. W. N. 421 (P. C.) (1913).
(14) 95 L. T. 769 (1906).
(15) [1921] A. C. 528.
(16) 7 Rettie (S. C.) 192 (1880).

(12) L. R. 39 I. A. 197 : s. c. 16 C. W. N. 961 (1912).

THE TATA IRON & STEEL CO., LTD. *v.* THE CHIEF REVENUE AUTHORITY OF BOMBAY.

Rao (17) and *Secretary of State* v. *Chelikani Rama Rao* (18).

The question at issue here is a substantial question of law which should not be excluded from the consideration of the Judicial Committee.

Walsall Overseers v. *L. and N. W. Ry. Co.* (19).

In any event if the Board are of opinion that the right of appeal has been taken away the Prerogative of the King remains and the Appellants submit that this is essentially a case in which special leave may be given under the Prerogative.

Mr. Dunne, K. C. in reply referred to *Attorney-General* v. *De Kyser's Hotel* (9).

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an appeal from a judgment of the High Court of Bombay on a question referred to it under sec. 51 of the Indian Income Tax Act, 1918. The facts out of which the appeal has arisen are shortly as follows:—For the official year 1919-1920 the Appellant Company was, by the Collector of Income Tax, assessed on a sum of Rs. 61,84,848, alleged to be income earned in the previous year, 1918-1919. The Company claimed to deduct from this assessment a sum of 28 lacs of rupees, paid by it to certain underwriters on an issue of 700,000 preference shares of the Company of Rs. 100 each, as expenditure incurred by the Company for the purpose of making profits in its business. By sec. 9, sub-sec. 1 of this Act it was provided that the tax (*i.e.*, the Income Tax) shall be payable by an assessee under the head of "income derived from business," in respect of the profits of any business carried on by the tax-payer, and by sub-sec. 2, ix, it is further provided "that an allowance is to be made in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits."

The Appellant Company claimed to deduct from the income on which they had been assessed, this sum of 28 lacs of rupees, paid to the underwriters to help to float the issue of these preference shares. The Collector of Income Tax and the Chief Revenue Authority were of opinion that the payment of the 28 lacs was in reality capital expenditure, inasmuch as it was expended to procure capital, and was not an allowable deduction from the profits of the business under the provisions of this Income Tax Act.

A reference by case stated was accordingly made by these officials to the High Court under sec. 51 of this Income Tax Act of 1918 of the question whether the expenditure of these 28 lacs could be allowed under sec. 9, sub-sec. 2, ix of this statute, as not being in the nature of capital expenditure, nor as having been incurred "solely for the purpose of earning such profits" within the meaning of this sub-section. The High Court delivered judgment on the 28th February 1921, holding that the words "any expenditure (not being capital expenditure) which had been incurred solely for the purpose of earning profits" meant profits generally and not merely profits earned in the year of assessment, but that the expenditure in this case of the 28 lacs was in the nature of capital expenditure, and therefore not an allowable deduction. From this judgment the Appellant Company have by leave of the High Court of

(9) [1920] A. C. 508.

(17) L. R. 49 I. A. 129: s. c. 26 C. W. N 713 (1922).

(18) L. R. 43 I. A. 192, 198: s. c 20 C. W. N. 1311 (1916).

(19) 4 App. Cas. 30, 36 (1878).

Bombay appealed to His Majesty in Council. On the appeal being called on for hearing, a preliminary objection was raised by the Respondent to the effect that the appeal was not competent, inasmuch as no such appeal, it was contended, lay from the decision of the High Court on a reference by case stated under sec. 51 of the statute, that such a decision is only advisory, as it is styled, and was something in the nature of an opinion for the guidance of the Revenue Authorities as to how they should deal with the question referred to the High Court.

The point thus raised, which is one of some difficulty, was very well argued by the counsel on both sides. It is admitted that no statute, Imperial or Indian, is to be found giving expressly, or by implication, a right of appeal, either with or without the leave of the High Court of Bombay, to His Majesty in Council from a decision or order made, or judgment given by the High Court under the provisions of the 51st section of the Indian Income Tax Act of 1918, neither can any such statute be found giving a general right of appeal to His Majesty in Council from the orders or judgments of any class of Courts, as the 3rd section of the English Appellate Jurisdiction Act of 1876 gives a general right of appeal to the House of Lords from the judgments or orders of the Courts therein mentioned. It has been contended, however, that a general right of appeal of a character somewhat similar to that given by the Appellate Jurisdiction Act has been given in Bombay by the 39th clause of the Letters Patent of the High Court of Bombay, dated the 28th December 1865. This 39th clause provides that any person may appeal to Her Majesty in Council. First, in any matter (not being of Criminal Jurisdiction) from any final judgment, decree or order of the High Court of Judicature at Bombay, made on appeal, and, second, from any final judgment, decree or order made in the exercise of its original jurisdiction by the High Court from which an appeal does not lie to the High Court under the 15th clause.

In their Lordships' view the words "original jurisdiction" are only used in contradistinction to the words "made on appeal" mentioned earlier in the clause; but it is quite obvious that the matters to be dealt with under the original jurisdiction are serious and important, because by the succeeding clause, namely, cl. 40, specified provision is made for obtaining the permission of the Court to appeal to Her Majesty in Council in respect of preliminary or interlocutory judgments, decrees, orders or sentences (not being matters of criminal jurisdiction) of the High Court. The granting of this permission is entirely discretionary with the Court or Judge empowered to give it. There is not an appeal as of right in these interlocutory matters, and but for the provision of cl. 40 an appeal in such matters would be incompetent. *Goldring* v. *La Banque de Hochelaga* (1).

It is not pretended that the permission in this clause referred to was ever asked for or obtained in the present case, nor was it argued that the decision was an interlocutory judgment, order, or decree within cl. 40.

In order therefore that the appeal in this case should be held to be competent, the decision and order of the High Court under sec. 51 of the Income Tax Act must come within cl. 39 of the Letters Patent. It must be either a final judgment or a final decree or a final order. Now what is a final judgment as understood in

(1) 5 A. C. 371 (1880).

THE TATA IRON & STEEL CO., LTD. *v.* THE CHIEF REVENUE AUTHORITY OF BOMBAY.

English litigation? In *Ex parte Moore* (2) Lord Selborne laid it down that to constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits.

In *Onslow* v. *The Commissioners of Inland Revenue* (3) it was determined on high authority what it is that amounts to a final judgment. The facts of the case are as follows:—By the 18th section of the Stamp Act of 1870 (34 & 35 Vic. 7) it is provided that, subject to certain regulations (irrelevant for the present purpose), the Commissioners may be required by any person to express an opinion with reference to any executed instrument upon the question whether this instrument is chargeable with any duty, and if so, what amount of duty is to be charged? The Appellants in this case requested the Commissioners to do these things, but were dissatisfied with the amount of the duty which the Commissioners assessed upon the instrument in reference to which they asked their opinion. The 19th section of the statute enables any person so dissatisfied, on payment of the duty assessed, to appeal against the assessment to the Court of Exchequer, and for that purpose to require the Commissioners to state and sign a case upon which their opinion was required and the assessment made by them, which the Commissioners are bound to do. What the Court may do upon the hearing of this case is the matter of importance. It may determine the question submitted, and if the instrument in question be in the opinion of the Court chargeable with any duty, the Court shall assess that duty. If it is decided by Court that the assessment of the Commissioners is erroneous, any excess of duty which may have been paid under this erroneous assessment, or any penalty which has been paid in respect of it shall be ordered by the Court to be repaid to the Appellants with the costs incurred by them in relation to the appeal. But if the assessment of the Commissioners be confirmed by the Court, the costs incurred by them in relation to the appeal are to be paid by the Appellant. On the 21st January 1890, the Court below decided the question submitted in favour of the Commissioners. Onslow appealed, but omitted to serve notice of appeal within the time required by Or. 58, r. 3 of the Rules of the Supreme Court of 1883. In July 1890, he applied to the Court of Appeal to extend the time for appealing, on the ground that doubts had arisen as to whether the order of the Court below was "a judgment" or an "order" within the meaning of r. 15 of the abovementioned rules. This rule ran thus: "No appeal to the Court of Appeal from any interlocutory order or from any order whether final or interlocutory in any matter not being an action shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall be brought except by leave of the Court after the expiration of one year."

Lord Esher delivered the judgment of the Court. After quoting the opinions of several authorities, which as the judgment is printed it is not easy to distinguish from portions of his own judgment, he refers particularly to opinions expressed by Cotton, L. J., in *Ex parte Chinery* (4) with which Bowen and Kay, L. JJ., had concurred. He said:—

"I think we ought to give to the words 'final judgment' in this sub-section their

(2) 14 Q. B. D. 627, 632 (1885).
(3) [1890] 24 Q. B. D. 584; 25 Q. B. D. 465.
(4) 12 Q. B D. 342 (1884).

strict and proper meaning, *i.e.*, a judgment obtained in an action by which a previously existing liability of the Defendant to the Plaintiff is ascertained and established, unless there is something to show an intention to use the words in a more extended sense."

He proceeds :—

"Bowen, L. J., says there is an inherent distinction between judgments and orders, and that the words 'final judgment' have a professional meaning; by which expression I think he meant to say, as Cotton, L. J., had previously said, that a judgment is a decision obtained in an action, and if that was his meaning, both these learned Lords Justices gave judgment to the same effect, and Fry, L. J., agree with him. A 'judgment,' therefore, is a decision obtained in an action, and any other decision is an order . . . . That in my opinion is a proper distinction, and, therefore, in the present case the decision is an order and not a judgment, and the appeal should have been brought within 21 days. Under the circumstances, however, we will, as an indulgence, extend the time for appealing."

This decision clearly establishes that the decision and an order made by the Court under the 51st section of the jurisdiction cannot be held to be a "final judgment" within the meaning of the 39th clause of the Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense.

Lord Lindley said :

"I am of the same opinion. I was at first struck by the fact that the declaration of this Court upon a case stated for the opinion of the Court of Chancery under 13 & 14 Vic. c. 35. is in several instances in that Act called a decree, which is, of course, the equivalent to the term judgment in the Queen's Bench Division. But the distinction just laid down by the Master of the Rolls is the proper one, and has my entire concurrence."

Bowen, L. J., (as he then was) also concurred. The statute to which Lord Lindley referred, provides that the Court on the hearing is to decide the question by the special case referred, and then by its decree declare its opinion upon rights involved therein, but without proceeding to administer any relief consequent upon such declaration. This declaration was, however, to have the same force and effect as if it had been made in a suit instituted by the parties by bill. It would appear to their Lordships that the ruling of the Court there was merely advisory. It is evident from this case of *Onslow* v. *Commissioners of Inland Revenue* (3) that the use of the words "determine" and "decide," or the direction that money paid in excess is to be refunded or the awarding of costs against the unsuccessful party, are not things which distinguish a judgment from an order where questions are referred to the Courts by case stated.

The word judgment is indeed popularly used in many different senses, as when one says a certain man is a man of sound judgment, meaning that he is possessed of the intellectual faculty of deciding rightly on fact or circumstances, or where even in legal matters the expression of the opinion formed in a case by a Judge who dissents from his colleagues is commonly called his judgment, though it can have no effect whatever on the determination of the suit or action in which it is delivered.

The decision appealed in this case is obviously not a "final decree" within the meaning of cl. 39 of the Letters Patent, neither can it on the ruling of case of *Onslow* v. *The Commissioners of Inland Revenue* (3) be rightly decided a "final judgment." The question remains is it a "final order," or only advisory, made by the Court in exercise of its consultative jurisdiction?

(3) [1890] 24 Q. B. D. 584; 25 Q. B. D. 465.

One must therefore ask oneself what is the nature and character of the acts which sec. 51 of the Income Tax Act authorises and empowers the High Court to do . . . It provides that if in the course of any assessment under this Act, or in any proceedings in connection therewith (save an immaterial exception) a question arises with reference to the interpretation of any provision of the Act or any rule thereunder, the Chief Revenue Authority may, either on his own motion or on reference from any officer of subordinate authority, draw up a statement of the case, and refer it with his own opinion thereon to the High Court, and shall so refer any such question on the application of the assessee unless he be satisfied that the application is frivolous. The opinion of the Revenue Authority thus dominates and conditions the right of the assessee.

Again it is the duty of the Revenue Official to make the assessment, and it is in the "*course*" of making it the question which may be referred must arise.

By sub-sec. 2 of this section, the Court may, if not satisfied with the statement contained in the case, send it back for additions or alteration. By sub-sec. 3, it is provided that on the hearing of this case the High Court shall "*decide*" the questions raised thereby, and shall "deliver judgment" thereon containing the grounds on which the decision is founded, and shall send to the Revenue Authority a copy of this judgment under the seal of the Court and the signature of the Registrar, and the Revenue Authority shall dispose of the case accordingly, or if the case arose from any subordinate Revenue Officer, shall forward a copy of this judgment to such officer, who shall dispose of the case in conformity with it. This last provision merely means that the Revenue Officer, in proceeding with the work in the course of which he was engaged when the question referred arose, shall be guided by the decision given, and shall make his assessment accordingly—the ultimate result being that he assesses the tax-payer at an amount which in his instructed opinion he judges to be right. No suit can be brought to set aside or modify the assessment when so made. The amount of the tax-payers' liability is thus definitely fixed, but nothing more is done. The decision of the High Court does not in any way enforce the discharge of that liability. It would appear clear to their Lordships that the word "judgment" is not here used in its strict legal and proper sense.

It is not an executive document directing something to be done or not to be done, but is merely the expression of the opinions of the majority of the judges who heard the case, together with a statement of the grounds upon which those opinions are based. It amounts only to a ruling that a certain deduction claimed by a tax-payer to be allowed from the sum for which he has been already assessed to Income Tax is not permissible.

Should the tax-payer be sued for the Income Tax for which he has been assessed, proof of the assessment would be but the first step in the litigation, not the final one. These circumstances would, according to the judgment of Cotton, L. J., in *The Standard Discount Company* v. *Otard de la Grange* (5), go to show that however the order or decision might definitely and finally fix the amount of the assessment, it was only interlocutory. The Revenue Authorities are undoubtedly bound to act up to the decision of the Court made under sec. 51 of the Income Tax Act.

(5) 3 C. P. D. 67 (877).

THE TATA IRON & STEEL CO., LTD. v. THE CHIEF REVENUE AUTHORITY OF BOMBAY.

Bowen, L. J., in his judgment in *In re Knight and the Tabernacle Permanent Building Society* (6), appears to attach much importance to the fact that in a case where appeal is only made to the Court by special case to exercise its consultative jurisdiction, and make a decision or order of an advisory character, the arbitrator or other person asking for the opinion is not legally bound to act upon it, though he might be morally bound to do so. In a Scotch case of *Peter Johnston v. Glasgow Corporation* (7), where the reference was precisely the same in form as in the other case, the Court held that the Sheriff who had stated the case for the opinion of the Court was bound to act upon its decision, and would not be entitled to disregard it. It does not appear to their Lordships that the fact that the functionary who states a special case for the opinion of the Court is or is not bound to act upon it necessarily determines whether the order and decision of the Court is or is not merely advisory. In order to determine whether an order made by a Court on a case stated is final or merely advisory, it is necessary to examine closely the language of the enactment, whether statute, rule or order, giving the power to state a case.

When a case is stated for the "opinion" of the Court, that word would serve *primâ facie* to indicate that the order made by the Court was only advisory. Where the case is referred for the "decision" or "determination" of a question, there is a *primâ facie* difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive. In the case of *In re Knight and the Tabernacle Permanent Building Society* (6) a case was stated for the opinion of the Court as to whether this Society had power to alter its rules in a certain way. The order made on this question was held to be advisory, but in giving judgment Lord Esher dealt with the case of *Ex parte County Council of Kent* (8). In that case sec. 29 of the Local Government Act, 1888 (51 & 52 Vic. 41) provided "that if any question arises or is about to arise as to whether any business power, duty or liability is or is not transferred to any County Council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may on the application of the Chairman of Quarter Sessions or of the County Council, committee or other local authority concerned, be referred for decision to the High Court of Justice in such summary manner as, subject to any rules of Court, may be directed by the Court, and the Court, after hearing such parties and taking such evidence (if any) as it thinks fit, shall decide the question."

The Court in this case had only to deal with the question, which set of authorities should be charged with such and such portions of administration. Lord Esher criticising this decision in the case said :—

"Where a statute provided that a case might be stated for the decision of the Court it was held that though the language might *primâ facie* import that there has to be the equivalent of a judgment or order, yet when the context was looked at it appeared that the jurisdiction of the Court appealed to was only consultative, and that there was nothing which amounted to a judgment or order."

It would appear to their Lordships that having regard to the authorities cited, and

(6) [1892] 2 Q. B. 613, 619.
(7) [1912] S. C. 300.

(6) [1892] 2 Q. B. 613.
(8) [1891] 1 Q. B. 725.

for the reasons already stated, the decision, judgment or order made by the Court under sec. 51 of the Income Tax Act in this case, was merely advisory, and not in the proper and legal sense of the term final, and thus so far as these considerations are concerned that the appeal is incompetent.

Sir William Finlay, however, in the last resort contended that in any event his client had, by virtue of the Royal Prerogative, a right to appeal to His Majesty in Council. He did not show how it was open to him, as the case stands, to rely upon the Royal Prerogative.

In any view it could not be exercised without leave granted. And without going the length of saying that this case is on a level with the case of *Attorney-General* v. *De Keyser's Hotel* (9), referred to in the argument, where the question was fully considered, their Lordships would be slow to advise His Majesty to grant special leave to appeal when the subject had been adequately dealt with in the Letters Patent.

Their Lordships will therefore advise His Majesty that the appeal is incompetent and must be dismissed, and that the Appellants must pay the Respondent's costs.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors : *Solicitor, India Office* for the Respondent.

G. D. M.

(9) [1920] A. C. 508.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 286 OF 1919.

MOOKERJEE, J.
CHOTZNER, J.
1923,
Heard, 1 and 2, August.
Judgment, 13, August.

RANI AMRITA SUNDARI DEBI and ors, Defendants, Appellants,
v.
MUNSHI SERAJUDDIN AHMED CHOUDHURY and ors., Respondents.

Local investigation, result of, if to be lightly reversed except upon clearly defined and sufficient grounds—Remand order, findings by lower Court inconsistent with, legality of.

Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.

SURUT SOONDARI v. PROSONNO COOMAR TAGORE (2), MONKEE DUMBAR SAHEB v. BHULLUNDUR SAHEB (3) *and* KAMINI KISHORE v. PARBARTYA TIPPERAH RAJ (4) *followed.*

In dealing with a case on remand the lower Court is not entitled to take a view inconsistent with that followed in the order of remand.

This was an appeal preferred on the 22nd of September 1919 against the decree of Babu Matilal Roy, Additional Subordinate Judge of Zillah Faridpur, dated the 30th of July 1919.

In the case out of which the present appeal arose the High Court made an order of remand directing the lower Court to make a decree on the basis of the *thak*

(2) 13 M. I. A. 607; 6 B. L. R. 677 (1870).
(3) 15 W. R. 423 (1871).
(4) 60 Ind. Cas. 434 (1920).

map and not of the survey map, after having the former relaid by a commissioner with as much accuracy as practicable. The commissioner accordingly prepared a map, but the Subordinate Judge disagreed with the commissioner and made a decree on the basis of a tri-junction point as depicted in the survey map, which was found unreliable by the High Court when the order of remand was made. Against this decree the present appeal was preferred to the High Court.

Babus Dwarkanath Chakrabarti, Satis Chandra Bhattacharya, Jatindra Nath Sanyal and *Ramaprasad Mookerjee* for the Defendants-Appellants.

Dr. Sarat Ch. Basak, Babus Asitaranjan Ghose and *Bhupendra Chandra Guha* for the Plaintiffs-Respondents.

THE JUDGMENT OF THE COURT was as follows :—

The subject-matter of this litigation is a large tract of alluvial land formed in the bed of the river Ganges, also called Kirtinasha, in the District of Faridpur. The Plaintiffs claim the land as included within village Bhaga. The Defendants claim the land as comprised within village Sakhipura. The present suit was commenced on the 26th September 1907 and terminated in the trial Court on the 25th April 1910 with a partial decree in favour of the Plaintiffs. The Defendants thereupon appealed to this Court. On the 31st July 1914 the appeal was allowed and the decree of the Subordinate Judge was discharged. It was declared that the Plaintiffs were entitled to possession of such portion of the disputed lands as lay within the *thak* boundaries of the property known as Bhaga *char*, *char* Datali and *char* Lasti. The case was remanded to the Subordinate Judge in order that the *thak* boundaries of the *chars* mentioned might be relaid by a commissioner who would be free to take evidence to determine the tri-junction point from which the *thak* line was to be relaid. The judgment of this Court which has been reported—*Amrita Sundari* v. *Serajuddin* (1)—shows that one of the points argued in the appeal was, whether the decree was to be made on the basis of the *thak* map or the survey map. This Court came to the conclusion that the decree should be based not on the survey map but on the *thak* map, after the latter had been relaid with as much accuracy as practicable. We need not recapitulate all the reasons assigned in support of this view; but one circumstance may be usefully recalled. This Court found that the features of the land had been changed by diluvion which took place in the interval between the *thak* proceedings and the revenue survey; consequently, any disagreement between the *thak* line and the survey line was attributable, *primâ facie*, not to the inaccuracy of the *thak* measurements but to the altered condition of the lands surveyed. The result was that the case was remitted to the trial Court for reconsideration.

The Subordinate Judge after remand appointed a commissioner to hold a local investigation and to prepare a case map so that the direction of this Court might be carried out. The commissioner received the commission on the 8th December 1915 and submitted his final report on the 21st January 1917. The report of the commissioner and the annexures thereto leave no room for controversy that the enquiry was conducted by him with great thoroughness. There was a dispute before the commissioner as to how the *thak* line was to be relaid. The Defendants urged that the starting point to be adopted was a point towards the south-west of the disputed

(1) 19 C. W. N. 566 (1914).

land, where the *Deara* authorities had, in 1878, posted an iron pillar to indicate the tri-junction point of mouzas Bhaga, Nimua and the river. The Plaintiffs urged, on the other hand, that the starting point should be taken towards the south-east of the disputed land as the tri-junction point of mouzas Bhaga, Nimua and Tarabunia. The commissioner rejected the second alternative and gave *primâ facie* sufficient reasons for his opinion that the tri-junction point of Bhaga, Nimua and Tarabunia could not be ascertained with reasonable approach to accuracy, and that the tri-junction points as identified by the Defendants were correct. The commissioner further explicitly recorded his view that the *thak* map of *char* Bhaga could not be correctly relaid except by the process already adopted by the *Deara* authorities. He then prepared a map on this basis and showed the portion of the disputed land which fell within the village claimed by the Plaintiffs.

The Subordinate Judge was not satisfied with the result of this enquiry. He held that the south-eastern point was entitled to preference over the south-western point on account of its proximity to the disputed land. He then proceeded to investigate whether the tri-junction point at the south-east corner could be presumed to be identical with the revenue survey point and he came to the conclusion that a presumption should be made in favour of the identity of the two points. The Subordinate Judge argued that as the south-east tri-junction point was in the middle of the island on the bank of a canal, it was not likely to have been affected by river action during the season which intervened between the *thak* proceedings and the revenue survey. The course adopted by the Subordinate Judge is in our opinion obviously inadmissible. In the first place he assumes that there had been no changes in the situation of the disputed land during the period mentioned. This is directly contrary to the finding contained in the judgment of this Court. As that judgment had become final, neither of the parties litigant was entitled to get round the conclusions then adopted on evidence. In the second place, the Subordinate Judge assumes that the tri-junction point had been correctly depicted on the survey map. This was negatived by the judgment of this Court pronounced on the last occasion. What has happened in substance is that the Subordinate Judge after remand has made a decree on the basis of the survey map which was found unreliable by this Court when the order of remand was made.

The Subordinate Judge stated that there was wide divergence between the boundary lines obtained by the adoption of the two starting points. He had consequently to face the question, which of the two positions should be accepted. He rejected the south-west point on the arbitrary ground of its distance from the disputed land. But if a map has been accurately drawn, it should, in theory at least, be immaterial, from what starting point it was relaid. Accordingly, the root question was, which tri-junction point had been ascertained with precision. The commissioner selected the south-western point. There is this to be urged in support of his view that he thus accepted a point which had been previously adopted by the *Deara* authorities in 1878. The Subordinate Judge, on the other hand, preferred the south-eastern point. But that point itself had not been ascertained with accuracy; its identification was based on the erroneous and inadmissible assumption that the survey map was accurate and reliable. We are consequently of opinion that the Subordinate Judge has not only taken a view in-

RANI AMRITA SUNDARI DEBI *v.* MUNSHI SERAJUDDIN AHMED CHOUDHURY.

consistent with that followed in the order of remand but that his conclusions are based on unwarranted assumptions.

The Subordinate Judge states in one portion of his judgment that the *thak* lines do not agree with the revenue survey lines. This in fact was emphasised in the order of remand and reasons were given why the *thak* map should in the present case have preference over the survey map. The Respondents have incidentally suggested that it is probable that neither the *thak* map nor the survey map is entirely reliable. If this be the fact, the Respondents plainly cannot be benefited thereby. The only result of such a conclusion would be that the foundation of their claim would disappear. The burden lies upon the Plaintiffs to establish that the disputed land is within the village held by them. If the boundaries of their village cannot be located with fair approach to precision, no decree can be made in their favour. We need not develop this point further, because the Defendants have not, in this appeal, attacked the entire decree and have proceeded on the assumption that the *thak* boundary line was correctly relaid by the commissioner.

We may point out finally that the method adopted by the Subordinate Judge was liable to lead to error and was disapproved by the Judicial Committee in the case of *Surat Soondari* v. *Prosonno Coomar Tagore* (2). In that case, a question arose as to title to *char* lands thrown up by the river Brahmaputra. A commissioner was appointed to make a local investigation and the trial Court made a decree in conformity with his report. This Court, on appeal, adversely criticised the report and made a decree "on an examination of the maps filed in the cause and on the explanations and arguments of the pleaders on both sides." The Judicial Committee reversed the decision of this Court and deprecated interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds. The same view was adopted in *Monkee Dumbar Sahee* v. *Bhullundur Sahee* (3) and *Kamini Kishore* v. *Parbartya Tipperah Raj* (4). In circumstances like these, it is not safe for a Court to act as an expert and to overrule the elaborate report of a commissioner whose integrity was unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party. We need not go minutely into the details, but we see no ground for impugning the accuracy of the conclusion of the commissioner upon what must be regarded as the broad and cardinal issue whereon the determination of this case depends. On the other hand, we are unable to see any satisfactory grounds for the assumption which is the foundation of the judgment of the Subordinate Judge and is in conflict with the order of remand.

The result is that this appeal must be allowed, the decree made by the Subordinate Judge on the 30th July modified and a decree made in favour of the Plaintiffs in accordance with the report of the commissioner Babu Joges Chandra Das Gupta, dated 21st January 1917. The report of the commissioner and the map annexed thereto (before it was modified according to the direction of the Subordinate Judge issued on the 21st July 1919) will be treated as part of this decree. The Appellants are entitled to their costs in this Court. The hearing fee is assessed at ten gold mohurs.

J. N. R. *Appeal allowed.*

(2) 13 M. I. A. 607; 6 B. L. R. 677 (1870).

(3) 15 W. R. 423 (1871).

(4) 60 Ind. Cas. 434 (1920).

[CIVIL REVISIONAL JURISDICTION.]

RULE No 67 OF 1923.

NEWBOULD, J.
RANKIN, J.
1923,
6, June.

IBRAHIM MALLICK, Defendant, Petitioner,
v.
LALIT MOHAN ROY and ors., Plaintiffs, Opposite Party.

Contract, oral—Judgment debt, promise to pay, after time, in consideration of abstention from execution, if valid—Indian Contract Act (IX of 1872), sec. 25 (3)—Limitation Act (IX of 1908), sec. 19, if applicable—Cause of action, new.

Oral agreement for payment of a judgment-debt on a date when the application for its enforcement will be barred, in consideration of the Plaintiffs not seeking to enforce the same meanwhile, is valid in law as a new promise for a new consideration, which is a cause of action in itself. Sec. 19 of the Limitation Act which requires only the written admission of an existing debt and not a new consideration, nor an actual proof of promise to pay, does not apply, nor does sec. 25, Indian Contract Act, which applies to the case of a promise to pay a barred debt.

DUKHI SAHU v. MAHOMED BIKHU (1) *and* HEERA LAL v. DHUNPAT SINGH (2) *referred to.*

This was a Rule issued against the decree of R. R. Mukherjee, Esq., Munsif, Burdwan, exercising Small Cause Court Jurisdiction, dated the 16th January 1923.

The Opposite Party obtained a decree against the Petitioner in the fourth Court of the Munsif of Burdwan exercising the powers of a Court of Small Causes, on 28th February 1918 and refrained from executing the same upon the Defendant Petitioner's oral promise to pay the whole amount decreed with interest at the rate of Rs. 12 per cent. per annum in April 1921 when the decree would become barred. The present suit was brought on 31st March 1922 for recovery of the amount which the Defendant orally promised to pay. The question in this rule was whether the present suit is maintainable.

Moulvi A. S. M. Akram for the Petitioner.

Babu Panchanan Chaudhuri for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

This is an application on the part of the Defendant under sec. 25 of the Provincial Small Cause Courts Act. It appears that the Plaintiffs, on the 28th February 1918, obtained a judgment against the Defendant and certain co-sharers of the Defendant for rent. On the 11th February 1920, according to the Plaintiffs' case, the Plaintiffs entered into a contract with the Defendant that in consideration that the Plaintiffs would not seek to enforce their judgment, the Defendant would pay the amount thereof with interest at 12 per cent. per annum in April 1921. By April 1921 the original judgment would become and has become time-barred and execution proceedings could no longer be taken upon it. The present suit was brought against the Defendant on the 31st March 1922. The Plaintiffs have proved the contract alleged and the present application is based upon the contention that such a contract as is alleged and proved is not valid in law. It is pointed out that the contract sued upon is a verbal contract and it is said that as sec. 19 of the Limitation Act requires the acknowledgment to be in writing it stands to reason that such a verbal contract as here alleged cannot be enforceable. That contention seems to be unsound. All that is required by sec. 19 of the Limitation Act is the acknowledgment of an existing

(1) I. L. R. 10 Cal. 284, 290 (F. B.) (1883)
(2) I. L. R. 4 Cal. 500 (1878).

IBRAHIM MALLICK *v.* LALIT MOHAN ROY.

debt. A new consideration is not required and an actual promise to pay is not required. Acknowledgment alone is required. That must be in writing and signed by the Defendant and the original debt can be enforced. But a new promise for a new consideration is a cause of action in itself and is in no way obnoxious to the Limitation Act. [See *per* Mitter, J., in *Dukhi Sahu* v. *Mahomed Bikhu* (1)]. Having regard to the time at which it was to take effect the Defendant's promise as pleaded may very well have been intended as a fresh bargain and not as a mere giving of time by Plaintiffs for payment of the old debt. The learned Judge has found a contract and there is nothing to show that he is wrong.

The present case may be viewed in the light of the 3rd clause of sec. 25 of the Contract Act, a clause which, as has been held in most of the Courts in India, covers the case of a judgment-debt. Sec. 25 is directed to stating by way of exception that in certain cases an agreement although without consideration is not void. One of these cases is a case of promise to pay a barred debt if that promise is made in writing and is signed by the party to be charged. In such a case as that although the judgment-debt is barred the promise to pay it although there is no new consideration would be good if in writing and signed. The present case has these differences that the judgment-debt was not barred at the time; that there was good consideration; but the promise is not in writing or signed. On principle where a person has given consideration for the purpose of obtaining a fresh promise to be acted on as in this case at a time, namely, April 1921, when all remedy under the previous judgment would be barred, such a promise seems valid and enforceable. The case of *Heera Lal* v. *Dhunpat Singh* (2), especially the first branch of the decision, is in the Plaintiffs' favour.

No doubt there is room with the assistance of a certain amount of perjury for driving a gap through the provisions of the law of limitation by setting up a false verbal agreement. At the same time the Courts have always to distinguish between true and false evidence and this is by no means the only kind of case in which they are likely to be called upon to do so. We cannot satisfy ourselves that there is any objection in law to the Plaintiffs' case as pleaded and as found.

The only other observation which seems necessary is this, that this suit in no wise is a suit upon a judgment nor is it a proceeding under a judgment to enforce a judgment. Indeed the whole logic of the matter is that the judgment was superseded by the new agreement. The suit is upon a contract made no doubt with reference to an amount found due by the Plaintiffs' judgment. But it is a suit on a simple contract. No exception can be taken to the frame of the suit. Under these circumstances this rule must be discharged with costs one gold mohur.

H. D. C.

(1) I. L. R. 10 Cal. 284, 290 (F. B.) (1883).

(2) I. L. R. 4 Cal. 500 (1878).

CRIMINAL APPELLATE JURISDICTION.

APP. NO. 400 OF 1923.

GREAVES, J.
PANTON, J.

1923,
Heard, 21 and
22, November.
1924,
Judgment,
3, January.

BHOLA NATH MITTER,
Accused, Appellant,
v.
THE KING-EMPEROR.

Hindu law—Inter-marriage amongst castes—Marriage between kayastha *and* dome, *if valid—* Kayasthas, *if* sudras*—Domes, if Hindus and* sudras.

BHOLA NATH MITTER *v.* THE KING-EMPEROR.

It is the settled law of this Province that kayasthas *are* sudras.

A dome *is a Hindu and a* sudra.

A marriage between a kayastha *and a* dome *performed with due rites is valid in law.*

GREAVES, J.—*A marriage, if otherwise valid, does not become invalid because it is opposed to the usages of the community and is not recognised by them as valid.*

This was an appeal preferred on the 17th July 1923 against the conviction under secs. 497 and 498, I. P. C., and sentences of rigorous imprisonment for 6 months and 10 days under the former section and of 3 months under the latter section (sentences to run concurrently) passed by the Honorary Presidency Magistrate, Calcutta, Northern Division (Babu Rajendra Nath Roy), on the 9th July 1923.

The facts of the case are as follows :—

The prosecution story was that complainant Aprokash Ch. Ghose married Susila Dasi under the proper Hindu rites in the year 1913, that they were living as man and wife but in September 1923 when she was living with the consent and approval of her husband at her brother Kristo Lal Bosu's house in Chandernagore, she eloped with Bhola Nath Mitter, the accused in this case. Searches were made at various places but she could not be traced till 19th December last, when she and Bhola Nath were seen coming away from Elphinstone Bioscope in a taxi. Warrants were then issued and they both were arrested on 29th December last at Tagore Castle Street.

Accused Bhola Nath pleaded not guilty. He said that this case was the result of enmity between him and Sukumar and Kristo who had brought several cases against him. He further said that as he was making *tadbir* for Susila, who was an heiress of a large fortune, in her projected case against Sukumar and his cousin Kristo, they had brought this false case against him.

Accused was tried for offences under secs. 497 and 498, I. P. C.

The trying Magistrate in convicting the accused held as follows :—

"Sec. 497 requires that the accused must have had sexual intercourse with Susila whom he knows or has reason to believe to be the wife of complainant without the latter's consent and connivance.

"In this case no direct evidence of sexual intercourse has been given and I think such evidence is hardly possible in the present case. But best proof available has been produced. It has been shown that accused and Susila were seen one morning about 9 or 10 months ago at Chandernagore Railway Station and since then Susila was not found at Chandernagore and her whereabouts could not be known till her arrest at Tagore Castle Street along with accused. . . . .

"The accused and Susila are a young man and a woman; their familiarities and the opportunities obtained coupled with the fact that they were known to live as man and wife point strongly to an inference of the accused's guilt and I think sufficient to establish the fact of sexual intercourse.

There is no doubt about the marriage between Aprokash and Susila. Independent and reliable witnesses who were present at the marriage were examined and they have proved it to my satisfaction. Besides in French Chandernagore all marriages have to be registered and there is clear evidence to show that this marriage was also registered. There is also evidence that the accused was present at the marriage being a relative of Purna and had free access into their family.

BHOLA NATH MITTER *v.* THE KING-EMPEROR.

"It has been seriously contended that this marriage is not valid in law. It is said that Aprokash being a *kayastha-sudra* cannot marry Susila, a *dome-antaja* under the Hindu law. The defence has examined two *Pundits* to show that a marriage between a *kayastha* and a *dome* is not permissible under Hindu law.

"A vakil of High Court who is also secretary to the *Bangiya Kayastha Somaj* has been examined to show that there is no custom for a marriage like this. But in view of the ruling in *Muthusami Mundaliar* v. *Masilamani* (2) and *Rajani Nath* v. *Nitai Chandra* (5). I cannot but hold that the present marriage is legally valid. As regards the custom of the *kayastha* marrying in the family of Purna and Kristo there is satisfactory evidence to show that Purna who is a brother of Kristo has married the accused's sister and Kristo has married his sister-in-law. His family name no doubt shows that the accused himself is a *kayastha* by caste.

"There is nothing to show that the accused had complainant's connivance or consent in his illegal intercourse with Susila.

"For all the above reasons I am clearly of opinion that the provisions of sec. 497, I. P. C., have been complied with and the accused is guilty under that section.

"Sec. 498.—From the evidence it is clear that accused brought Susila knowing her to be the wife of Aprokash and detained her at 8, Tagore Castle Street with intent to have illegal intercourse and has committed illegal intercourse with her and so has committed an offence under this section."

Babus Manmatha Nath Mukherji and *Satindra Nath Mukherji* for the Appellant.

(2) I. L. R. 33 Mad. 342 (1909).
(5) 25 C. W. N. 433, 465 (1920).

Mr. B. L. Mitter and *Mr. A. K. Bose* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

PANTON, J.—The Appellant Bhola Nath Mitter has been convicted by Mr. Rajendra Nath Roy, an Honorary Presidency Magistrate, of offences punishable under secs. 497 and 498, I. P. C. It is found that he enticed or took away one Sikhar Basini Dasi *alias* Susila Bala Dasi *alias* Renu whom he knew or had reason to believe to be the wife of Aprokash Chandra Ghose with intent to have illicit intercourse with her; and that between September 1922 and the 24th October 1922 and again between the 15th November 1922 and the 29th December 1922 he committed adultery with her. There is evidence that Aprokash is by caste a *kayastha* and Susila a *dome;* the learned Magistrate has dealt with the case on this footing and these facts are not now disputed. Susila, however, in spite of this humble origin appears to belong to a family of some wealth; and the defence set up by the Appellant in the Court below was that a false charge had been brought against him in order to defeat his efforts to secure for Susila a legacy of Rs. 50,000 due to her under her mother's Will.

For the Appellant it has been urged that Aprokash and Susila were not validly married; that the fact that she was taken from the custody of her husband or from a person having care of her on his behalf and of the subsequent adultery have not been proved; and that the charge, so far as it related to the offence of adultery, was defective in form inasmuch as the precise dates of the alleged adultery were not specified and instead it was only charged to have been committed between the dates just now stated.

BHOLA NATH MITTER *v.* THE KING-EMPEROR.

It will be convenient to deal in the first place with the latter contentions.

There is ample evidence that in September 1922 Susila was, with the assent of Aprokash, living in the house of her brother Kristo Lal, that she left this house and was seen by a motor car driver at Chandernagore Railway Station in the company of Bhola Nath. Aprokash and Kristo Lal say that they searched for the pair but did not discover their whereabouts until December. They were traced to a house in Tagore Castle Lane, where, according to the evidence Susila had been living since September and had been visited by Bhola Nath. The evidence as to their conduct there fully justifies the inference that sexual intercourses occurred during the periods specified in the charge. It was clearly impossible in circumstances such as these that particular dates could be assigned in the charge for the intercourse alleged and we are satisfied that the manner in which the charges were framed were, in the circumstances of the present case, in full compliance with what the law requires.

There can be no doubt upon the evidence that a regular form of marriage was gone through by the parties in the presence of the Appellant in French Chandernagore and that this marriage was registered officially with the local authorities. But the question raised in appeal, and this is the main question, is whether the marriage is one which is valid under Hindu law. The learned Magistrate has dealt with this point on the footing that both parties being *sudras* their union is in this respect valid. It is not disputed before us that marriages between members of different *sudra* castes are valid under the Hindu law. But it is urged that this marriage was contrary to law both because Aprokash as a *kayastha* is above and because Susila as a *dome* is outside the *sudra* class. Both branches of this argument appear to have been put forward before the learned Magistrate; and in rejecting them he has relied on the decision of this Court in *Biswanath Das Ghose* v. *Sarosibala Dasi* (1) and on the case of *Muthusami Mundaliar* v. *Masilamani* (2) respectively. In the former case it was held, following the decision of *Asita Mohon Ghose Moulick* v. *Nirode Mohon Ghose Moulik* (3), that "it must therefore be taken, as the learned Judges said in the above mentioned case, that the *Bengali kayasthas* are treated as *sudras* in this Court." Some attempt was made to show us that this is an incorrect decision but I am satisfied that the law on the subject is now well settled so far as this Province is concerned.

In support of the second part of his contention Mr. Mukherji urged that a *dome* is not a member of a sub-division of a *sudra* caste but an outcaste, untouchable, and not a member of the Hindu community. He supports this contention by reference to the articles on the *dome* caste in Risley's Tribes and Castes of Bengal and Crooke's Tribes and Castes of the North-Western Provinces and Oudh, laying particular stress upon the opinions of the learned authors as to the aboriginal origin of the *domes*. The low social status of the *dome* community is a fact for which no authority is needed; but I cannot assent to the proposition that people of aboriginal origin can have no place in the Hindu system. He refers us to the Text of Manu, Chap. X, verses 16, 30, 51, 56, laying particular stress on verse 53. "Let no man, who regards his duty, religious and civil, hold any . . . intercourse

(1) I. L. R. 48 Cal. 926; s. c. 25 C. W. N. 639 (1921).
(2) I. L. R. 33 Mad. 342 (1909).
(3) 20 C. W. N. 901 (1916).

BHOLA NATH MITTER *v.* THE KING-EMPEROR.

with them; let their transactions be confined to themselves, and their marriages only between equals" (Manu's Institutes of Hindu Law). The degraded condition of the community is here emphasised and intercourse with its members is deprecated. But this carries the matter little further; and I am not prepared to say that the institution against inter-marriage is such as would render such a union, otherwise regularly celebrated, invalid at the present day. On the other hand, there is distinct authority of the Courts to support the view taken by the learned Magistrate, though, it is true, no decision which I can find relates directly to the *dome* community. The learned vakil has invited us to hold that the case of *Muthusami* v. *Masilamani* (2), on which the Court below has relied, was wrongly decided inasmuch as it proceeded on two incorrect assumptions: (1) that every one not a member of the twice-born caste is a *sudra* and (2) that the validity of a marriage is for the caste to decide. As to the second point it is only necessary to refer to the concluding portion of the judgment of Sankaran Nair, J., at page 356, where he finds the marriage in question valid not only on the ground of custom and because it was recognised by the caste but also "because it is in conformity with Hindu law which does not prohibit marriages between any persons who are not *dwijas* or twice-born persons."

As to the first point, the opinion of the learned Judge, expressed at pp. 346 and 347 of the report, is founded on ample authority, including a decision of this Court—*Upoma Kuchani* v. *Balaram Dhubi* (4). The latter case is here of particular importance since it upheld the validity of a marriage between persons, one of whom was an outcaste.

(2) I. L. R. 33 Mad 342 (1909).
(4) I. L. R. 15 Cal. 708 (1888).

I am of opinion then that however great the repugnance with which a marriage such as this one may be regarded by members of the communities concerned, it is valid in law if performed with due rites.

The appeal must therefore be dismissed.

GREAVES, J.—I agree with the judgment which has just been delivered. Susila was married to Aprokash Chandra Ghose according to Hindu rites and presumably before her marriage had lived as a Hindu. I think therefore that, although she was a *dome* by birth, she must be taken to be a *sudra* and upon the authorities referred to by my learned brother it would appear that marriages between different sub-divisions of the *sudra* caste are valid. Upon the authorities it does not appear that if a marriage is otherwise valid it becomes invalid because it is opposed to the usages of the community and is not recognised by them as valid.

N. G.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

VISCOUNT FINLAY.	SATISH CHANDRA
LORD DUNEDIN.	CHATTERJI, since deceased (now represented by Bon Behari
LORD ATKINSON.	Chatterji and ors.),
SIR JOHN EDGE.	Appellant,
MR. AMEER ALI.	*v.*
1923,	KUMAR SATISH
Heard, 15, 16, 19, 20, 22, 23 and 26, February.	KANTHA ROY and ors.,
Judgment, 27, April.	Respondents.

Commission, evidence taken, when should be used—Fraud and collusion, charges of—Onus—How discharged.

Evidence taken on commission should only be permitted to be used where the witness is proved to be too ill to give his

evidence in Court or is absent for other sufficient reason.

Charges of fraud and collusion must be proved by those who make them—proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape.

This was an appeal from a decree of the High Court in Bengal, dated the 8th July 1919, which reversed a decree of the Subordinate Judge of the 24-Parganas, dated the 2nd April 1917.

The suit was instituted by the Plaintiffs against the Appellant and others to set aside an auction sale for arrears of revenue on the ground that the sale had been effected by collusion and fraud. Towzi No. 2402 on the roll of the Collector of the 24-Parganas was the property sold.

It was an estate paying an annual revenue of Rs. 398-9-0 and owned as to 2/3rd by the Plaintiffs, the remaining one-third belonging to Hemada Kantha Roy (deceased), the father of the Defendant No. 4, who had mortgaged his share to the Plaintiffs. In September 1914 default was made in payment of the revenue due (Rs. 26-4-8) in respect to Hemada's share.

The entire estate was thereupon put up for sale and was purchased by the Appellant on the 8th January 1915. Hemada was ill at the time and died a day or two later.

An application was made by the Plaintiffs to have the sale set aside but the application was refused by the Commissioner and the Plaintiffs accordingly instituted their suit for a declaration that the sale was illegal and had been brought about by fraud and conspiracy on the part of the 1st three Defendants and prayed for a cancellation of the sale.

The first Defendant (who alone defended the suit) was the auction-purchaser, the 2nd Defendant was alleged to be an old enemy of the Plaintiffs and the 3rd Defendant was the manager of Hemada Kantha Roy who was responsible for the payment of revenue on behalf of his master. The defence stated that the Appellant (1st Defendant) had purchased the property entirely on his own account.

The Subordinate Judge who tried the suit found that the sale was brought about by a "nefarious plan hatched by Defendants Nos. 2 and 3," but in his opinion the evidence did not go far enough to prove collusion between them and Defendant No. 1, and he dismissed the Plaintiffs' suit.

The Plaintiffs appealed to the High Court (Mookerjee and Panton, JJ.), who after hearing additional evidence reversed the decree of the Subordinate Judge.

In their judgment they observed :—

"It is indisputable that default was deliberately made by the third Defendant in the payment of Government revenue due on the share of his master Hemada Kantha Roy, the predecessor-in-interest of the fourth Defendant. As the Subordinate Judge finds, the object was to injure the Plaintiffs, and the step was taken in collusion with the second Defendant who, it was arranged, would purchase the entire estate, free from encumbrances at the revenue sale. There is some discrepancy in the evidence, as to the exact proportion in which the spoil was to be divided; the details of the proposed distri-

SATISH CHANDRA CHATTERJI *v.* KUMAR SATISH KANTHA ROY.

bution are, however, not very material for our present purpose, and we need only observe that the story seems plausible that the third Defendant looked forward to a share for himself and another share for his master. The complicity of the second Defendant in what the Subordinate Judge calls a 'nefarious plan' is proved beyond challenge."

They were of opinion that the Appellant was taken into confidence and apprised of the scheme, and an arrangement was made that his name should be used at the sale and the purchase made for the benefit of the 1st three Defendants. In the circumstances they decided that the Appellant was unable to defend his title which had been obtained through fraud and they decreed the suit in respect of a two-third share of the estate sold, and directed the Appellant to execute a conveyance of such share upon payment of a proportionate share of the purchase money.

From this decree the purchaser appealed to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and *J. M. Parikh* for the Appellant.

Messrs. A. M. Dunne, K. C. and *W. Wallach* for the Respondents.

The arguments were directed to the evidence.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an appeal from a decree, dated the 8th July 1919, of the High Court of Judicature at Fort William in Bengal, which reversed a decree, dated the 2nd April 1917, of the Subordinate Judge, Fourth Court of the 24-Parganas.

The main question for decision in the appeal is whether or not a sale of a revenue-paying estate purporting to have been carried out under the Bengal Revenue Sales Act, No. XI, 1859, in respect of unpaid arrears of revenue, and purchased by the Appellant Satish Chandra Chatterji (now dead), was good and valid. The Subordinate Judge before whom the case was tried decided this question in the affirmative; the High Court decided it in the negative and made the decree hereafter mentioned.

For convenience' sake the several parties to the suit may be thus denoted: the Appellant by his first name, Satish; the first four Respondents by their family name of Roy; the fifth Respondent by the name of Akshoy; the sixth by that of Sitanath; and the formal Respondent by the name of Kali Dasi.

The facts out of which the appeal has arisen are somewhat complicated. They may be stated as briefly as is needful as follows. The estate purported to be sold was the Towzi No. 2402. It was entered on the Roll of the Collector of the 24-Parganas as subject to the payment to the Government of an annual revenue of Rs. 398-9 annas. It comprised two villages, Atpur and Panditnagar. It was held jointly by one Hemada Kantha Roy, the father of the formal Respondent, and the Roys. The estate had never been formally or legally partitioned nor the entire revenue apportioned, but the co-owners arranged among themselves to pay to the Government separately their respective appropriate shares of the revenue. Hemada paid separately one-third, and the Roys together two-thirds. Hemada had, some years before the sale complained of, mortgaged his one undivided third of this zemindari to a certain Shebait, living in the vicinity, who subsequently assigned this mortgage to the Roys, the members of that family thus becoming owners of two undivided thirds of the

Towzi and mortgagees of the remaining undivided one-third. At the date of the alleged sale a sum of Rs. 3,655 odd was due upon this mortgage. In the month of January 1915, if not for some time earlier, Hemada was very ill. In the early days of that month he was confined to bed, and died on the 10th day of it. Hemada for some considerable time had had in his employment as manager of his estate Sitanath, the sixth Respondent. This manager—not from want of funds, that is not suggested—left unpaid the instalment, due in the month of September 1915, of the revenue payable in respect of his employer's share. This instalment only amounted to the paltry sum of Rs. 26-4-8. It is charged that Sitanath withheld the payment of this instalment deliberately with the design of bringing about a sale by the Government of the whole Towzi, the revenue never having been apportioned, with the result that the mortgage held by the Roys would, if the sale took place, be annulled, to their great pecuniary loss. The revenue being thus in arrear, the Collector, acting under the powers conferred upon him by the provisions of the Bengal Revenue Sales Act, No. XI, 1859, on the 8th January 1915, put up for sale the interests of all the joint co-owners in the entire Towzi, and sold it to Satish, who was apparently the highest bidder at the auction, for a sum of Rs. 9,200. The Roys immediately appealed from the order of the Collector, declaring Satish the purchaser, to the Commissioner. It is said that they based their application to have the sale set aside on the ground of fraud as well as of irregularity in the mode in which the sale was constituted and conducted. No evidence has, however, been given to establish this, nor have the Board been referred to any authority to show that the Commissioner would have had jurisdiction to inquire into such a charge, and the terms of the order made by the Commissioner on the 1st June 1915, strongly indicate that no question of fraud was raised before him. The crucial part of the order runs as follows :—

"It does not appear that there was any irregularity in this case which would justify me in annulling the sale, under sec. 25 of Act XI of 1859. It also appears from the Collector's Report, No. C 257-6-15, dated the 21st May 1915, that there is no ground of hardship or injustice on which I could recommend annulment of the sale, under sec. 26. This appeal is, therefore, dismissed.

"F. J. MONAHAN,
"*Commissioner.*

"The 1st June 1915."

It appears to their Lordships to be very strange indeed that no reference is made to the charge of fraud if it had, in fact, been put forward.

On the 18th August 1915, the Roys accordingly instituted the suit out of which this appeal has arisen. They made the following persons Defendants: Satish, No. 1; Akshoy, No. 2; Sitanath, No. 3; and Kali Dasi, No. 4, as a formal Defendant.

The causes of action set forth in the plaint are substantially the following, that the Mouzah Atpur, being situated on the bank of the River Hooghly, afforded good sites for jute mills, that it was, in its then state, worth Rs. 15,000, that it was worth much more than Rs. 9,200, that Sitanath, with the object of inflicting pecuniary loss upon the Plaintiffs and serving his own pecuniary interests, in violation of his duty to his employer, entered into a conspiracy with Akshoy (an enemy of the Plaintiffs with whom they had been engaged in litigation) and Satish to purchase the aforesaid Towzi at the auction sale for the benefit of Sitanath, Satish and Akshoy; that with this end

SATISH CHANDRA CHATTERJI *v.* KUMAR SATISH KANTHA ROY.

in view and to effect this purpose Sitanath abstained from depositing with the proper officer the sum of Rs. 26-4-8; that in further pursuance of this conspiracy these three co-conspirators caused the notices and proclamations of the sale proper to be given and made in such sales to be suppressed and false returns to be filed, thereby preventing the Gomasta of the Plaintiffs and also the general public from knowing anything about the wilful withholding of the aforesaid instalment of the Government revenue or of the impending sale by auction, by reason whereof no local purchasers attended the sale, and the zemindari was sold at an undervalue—Rs. 9,200. The relief claimed was: (1) that the sale should be set aside as invalid; (2) that if in the opinion of the Court the sale was not liable to be set aside that a decree might be passed ordering the Defendant Satish to convey to the Plaintiffs and to the daughter and heiress of Hemada the taluk sold at the auction sale; (3) that an *ad interim* injunction might be granted restraining the taking possession of the taluk by the purchaser and for general relief.

These are serious and damaging charges. It appears to their Lordships difficult to understand how any man, even with the feeblest feeling of honour or sense of shame, could, if he were innocent, abstain from filing a defence to such accusations and at the earliest moment availing himself of the opportunity of going into Court to meet his accusers face to face. Well, to this plaint Sitanath did not file any written statement or give any evidence. Akshoy, a man of weath, as he has admitted to be, did not file any written statement, and he and his two sons only gave evidence when, by the wise and peremptory action of the High Court, they were forced to do so.

Satish, on the 10th January 1916, did, four months all but eight days from the filing of the plaint, file a written statement. The evidence which he contrived to have substituted for testimony in open Court, in the presence of his accusers, will be presently referred to. In this statement he traverses all the allegations of fraud contained in the plaint, denies that he is related in any way to Akshoy as therein alleged, and alleges that the property purchased by him was not worth more than Rs. 9,200, that he purchased it for his own use and benefit without any connection with Akshoy or Sitanath. On the 15th January 1916, issues, eight in number, were settled on these pleadings. Of these only four seem of importance at this stage. They are: (1) Have the Plaintiffs any cause of action, and does the plaint disclose any cause of action against the Defendant No. 1 (*i.e.*, Satish)? (2) Is the suit, in its present form, maintainable? (3) Was the revenue sale brought about by collusion and fraud on the part of Defendants? (4) Is the sale liable to be set aside as illegal and *ultra vires*? The trial did not come on till the 28th February 1917, over thirteen months after the issues had been settled. Satish was in no hurry to vindicate his character. On his behalf three adjournments were obtained for the filing of his own written statement. On the 21st June 1916, an order, signed I. G. Goswani S. J., was made which runs thus:—

"I think the Defendant should not be compelled to attend Court for deposing as he has got a big hydrocele from which watery substance comes, and he is not in a position to move to a distance from his house. It will be for the Presiding Officer of this Court to consider whether it would be possible for him to examine the witness at his house or to issue a commission for his examination. The learned pleader for the Plaintiffs urges strenuously for the exami-

SATISH CHANDRA CHATTERJI v. KUMAR SATISH KANTHA ROY.

nation of the witness before the Court in the interests of justice. That is the reason why the order is passed in the form given above."

On the 12th December 1916, a definite order is made directing a commission. It runs thus:—

"I have again heard the pleaders on both sides. The Defendant has been suffering from an ugly disease. He has got an unmanageable secreting tumour, and the medical certificate shows that he is unable to come to Court to give evidence here. There is nothing to controvert the fact. I should therefore confirm the order of my predecessor. On the 5th December 1916, a Commissioner is appointed and directed to submit his report before the 19th December 1916."

The date of the medical certificate mentioned in this order of the 2nd December is not given. No such document is to be found in the printed book, but in the list of omitted exhibits at p. xx is to be found this description: "Medical certificate given Satish Chandra Chatterji, dated 19th July 1916." The trial commenced on the 28th February 1917, and the Commissioner only sent in his report on the 15th February, the evidence having been taken on the 21st and 27th January, and 4th and 5th February 1917, previous.

The Plaintiffs filed a petition objecting to the reading of this deposition. The objection came on for consideration on the 23rd March 1917, when it was read in evidence. Nothing could be more unsatisfactory than this mode of procedure. The principal Defendant gives his evidence before the Plaintiffs' case has been opened or the evidence of their witnesses given. The Court which has to decide has no opportunity of judging of the veracity of the witness from his conduct and demeanour. All the advantage of confronting a witness, accused of a fraud, such as Satish is accused of, with his accusers is lost. Evidence taken on commission should only be permitted to be used where the witness is proved to be too ill to give his evidence in Court or is absent for other sufficient reason. If Satish went to the Court he could, and presumably would, have been accommodated with a seat. Moreover, unless several of the witnesses who have been examined are utterly mistaken, Satish at this time was quite able to drive about and walk from his carriage into houses. The whole procedure in this matter strongly suggests that it was his aversion to undergo the ordeal of an examination in open Court, in the presence of those who knew him, rather than ill-health, which kept him from the witness-box.

Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them—proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape. Turning to the evidence given before the Subordinate Judge, the first witness of the Plaintiffs, Satindra Chandra Bose, does not give any evidence of importance. The same may be said of the second witness, Kalibar Mitter, save that he gives a description of Sitanath and Akshoy, mentions their respective residences and says that the market value of the property sold was Rs. 50,000 to Rs. 60,000. The fifth witness, Hriday Nath Ghose, only gives evi-

SATISH CHANDRA CHATTERJI v. KUMAR SATISH KANTHA ROY.

dence as to the service of the notices and proclamations of the sale. The sixth witness, Upendra Nath Sarkar, merely tells what Panchanan Mitter told him. (Why he was allowed to give this evidence is strange.) He says that after the auction Panchanan Mitter told him that Sitanath fraudulently caused the sale to be held by not paying the arrears of revenue; that Akshoy, Sitanath and Satish jointly purchased the taluk. He said Panchanan did not tell him the shares which they bought, but gave the dates of the purchase and the price. The witness said he did not inquire who supplied the purchase money, and that Panchanan did not give him any information on the subject. The eighth and ninth witnesses examined for the Plaintiffs only dealt with the service of the notices of sale. The tenth gives no evidence touching the formation of the alleged conspiracy, nor the alleged joining in it by Satish or the occurrences at the sale.

The eleventh witness Rajendra, the twelfth Ashutosh, and the Maharaja Sir Pradyot Kumar Tagore only deal with the admission of Satish made after the sale; and Sarat Chandra Roy, the thirteenth witness, only with the absence of notices and proclamations of the sale. It is obvious, therefore, from this analysis of the evidence of the witnesses, other than Panchanan Mitter and Prya Nath Ghose, that it affords no proof whatever of the formation of any conspiracy between Sitanath and Akshoy touching any subject. But both the Subordinate Judge and the High Court have found that there was a collusive arrangement between Akshoy and Sitanath to injure the Plaintiffs, and that in order to effect this end they agreed that Akshoy should bid at the sale by auction of the aforesaid Towzi in his own name, and that if declared the, purchaser, he (Akshoy) would convey a half-share of the property purchased in favour of Hemada, that Akshoy did bid at the sale, that he was outbidden by Satish, and that the nefarious plan hatched by these two Defendants thus failed. The High Court in reference to the same matter said "that it was indisputable that the default in the payment of the instalment of Hemada's share of the Government revenue with the object of injuring the Plaintiffs was, as the Subordinate Judge has found, deliberately made by Sitanath, and that this step was taken in collusion with Akshoy, who it was agreed should purchase the zemindari at the auction free from encumbrances." The High Court proceeded: "There is some discrepancy as to the exact proportions in which the spoil was to be divided amongst the conspirators, but the details of the proposed distribution are not very material for present purposes"; they (the Court) need only observe that the story seems very plausible; that the third Defendant Sitanath looked forward to a share for himself and another for his master; that the complicity of the second Defendant, Akshoy, in what the Subordinate Judge described as a nefarious plan, was proved beyond challenge. Thus there are, in effect, two concurrent findings of these two Courts upon an issue of fact, namely, the formation of the corrupt and fraudulent conspiracy between Sitanath and Akshoy of the character and with the aims described. But the only evidence given on behalf of the Plaintiffs to sustain these concurrent findings is that of the two witnesses passed over in the above analysis, namely, Panchanan Mitter and Prya Nath Ghose. Neither the Subordinate Judge nor the High Court had any other evidence upon which either could have found as they have found, and it is quite obvious that they could not have based the conclusion at which they have arrived on the evidence

43

of these witnesses unless they believed that *quoad* the matters on which they so found, these witnesses were truthful and reliable. Panchanan, however, in his evidence goes beyond these matters. He brings Satish into touch with the alleged conspiracy, proves that he entered into it, and deliberately assisted the other conspirators in the carrying out of the objects of their conspiracy. His evidence may be divided into two parts. The first deals with what occurred up to the time they left Akshoy's house on the evening of the 7th January, and the second with what occurred from that time till after the sale. The High Court accepted both parts of Panchanan's evidence. The Subordinate Judge accepted the first part of it, but, for reasons which will be shown to be quite inadequate, rejected the second part of it. As it is this second part which implicates the Appellant Satish, it is necessary to deal with all Panchanan's evidence at length.

Panchanan Mitter was examined on the 2nd and 3rd March 1917; he deposed that he was 38 years of age, was, and for two years had been, clerk to a Jessore pleader named Babu Nibaran Chandra Bose (who happens to be the pleader of the Plaintiffs) and was for 14 or 15 years previously the *sudder* of Hemada, deceased; that he remained in the latter's service up to his death; that Sitanath was Hemada's manager up to that time; that he, the witness, used to write out and send the revenue payable by Hemada by money order to the Collector; that Sitanath calculated the dues on the land; that Hemada had one-third of the Atpur Panditnagar estate; that the Plaintiffs had the remaining two-thirds; that there was ill-feeling between Hemada and the Plaintiffs as they had many lawsuits between them; that before Hemada's death his taluk was sold by auction for arrears of revenue; that Sitanath, the manager, caused it to be sold by refraining from paying the instalment of the revenue which fell due in respect of the September Revenue for 1914, and deliberately withheld it; that Hemada had mortgaged his interest in his share to the Shebait of Dashmahabidya for Rs. 2,000; that this mortgage was purchased by and assigned to the Plaintiffs; that on inquiry from Sitanath the latter told him that he would take steps to suppress the publication of the necessary processes (*i.e.*, presumably notices and proclamations) in the mofussil preparatory to the sale; that Sitanath and he were present at the Atpur Collector's at the time of the sale; that Prya Nath was the Karjyakarak of Akshoy; that Sitanath told the witness he had relations with Prya Nath (*i.e.*, presumably was related to Prya Nath); that Sitanath came from Jessore to Calcutta four or five days before the auction sale; that some two days before the sale he, the witness, came to Calcutta, met Sitanath there and stayed with him at the Sealdah Hotel: that Hemada was then in Calcutta on his deathbed; that Sitanath told the witness that his, Sitanath's, son-in-law would not give security for bidding at the sale, so that the two must go to Akshoy for the purchase money; that the day before the sale the two went, between 9 and 10 a.m., to Akshoy's house, 112, Amherst Street, Calcutta, but found he was away from home at Puri; that they met Prya Nath and Akshoy's two sons, Taradas Babu and Shyamadas Babu; that it was not then settled who was to bid at the auction sale, but that it was arranged to telegraph to Akshoy in Puri to ascertain his views; that a telegram was accordingly sent and a reply received that was as follows :—

"To

"AKSHOY KUMAR CHATTERJI,

Sagarika, Puri.

"Kumar Satish Khiroda Hemada are joint

proprietors of towzi 2402 mahal Atpur 24-Parganahs on Ganges near Kidderpore. Hemada did not pay revenue and will cause the sixteen annas mahal to be sold tomorrow. Hemada represents total income as Rs. 1,200 and requests us to buy the same in auction within ten thousand rupees and sell half to him; going out to ascertain facts Wire permission.

"TARADAS CHATTERJI."

"112, Amherst Street, Calcutta.

"May bid less or more amount if income is as you represent.

"AKSHOY."

The telegram was received at 13'30 and the reply received at 16'40.

The witness then stated that Sitanath and he returned to Akshoy's house in the afternoon; that Sitanath suggested that the property should be purchased *benami;* that one-half of it should remain with Akshoy and the other half be transferred to Hemada (the dying man) in *benami* of Sitanath by a kobala without any conditions; that the whole purchase money should be paid on behalf of Akshoy; that Akshoy had several holdings under the Plaintiffs and that there were several litigations between them and him, and that therefore the property should be purchased *benami* of Sitanath. The witness further stated that Sitanath, Prya Nath, Shyamadas and he himself then went to Satish's house. He corrects this in his cross-examination. In this statement the witness is in error, and says that Prya Nath only went half-way and then descended from the carriage and went to do some other business. The witness states that when they went to Satish's house the latter was informed that under the circumstances mentioned, which were stated to him, the property should be purchased in his *benami;* that Satish replied that a share should be given to him; that Sitanath agreed to this, and that it was settled that Sitanath, Satish and Akshoy should each get a third share; that the property should be bid at the sale up to Rs. 12,000, and that Sitanath said that the price offered should at least be Rs. 9,000; that in that state of things Sitanath, Panchanan and Shyamadas started for Satish's house to interview him; that Prya Nath accompanied them—not, however, with any intention of going to see Satish—half-way, then descended from the vehicle they were in and went off on some business of his own. Though Prya Nath corroborates Panchanan substantially in the latter's description of what occurred up to his separation from the three persons named *en route* to Satish's house, there are some trifling but immaterial discrepancies between these stories, but they are discrepancies of the character that strengthen rather than weaken the evidence of witnesses, since the diversity repels the idea of concocted uniformity.

But Panchanan is corroborated and his evidence strengthened in other ways in addition. He is corroborated by the telegram already referred to with the reply to it. He is corroborated by the silence of Sitanath, by the silence of Akshoy's two sons, Taradas and Shyamadas, until they were by the insistence of the High Court, forced into the witness chair. All the three were accused of being involved in the deliberate commission of a base and contemptible fraud. The elder of the two is a legal practitioner, the younger an engineer and contractor, educated at the Government Industrial College, presumably each an intelligent man. Their silence might have been wise if they were guilty and ashamed of what they had done, apprehensive of disgrace and punishment. It was idiotic and cowardly if they were innocent. When Shyamadas does appear he commences by swearing what is absolutely incredible, namely, that he did not

know in connection with what suit he was summoned as a witness. He made no allusion to the alleged meeting at his father's house; never denied it had taken place there, or the making of the arrangement there deposed to by Panchanan and Prya Nath.

He denied, no doubt, that he visited Satish's house the night before the sale. He is asked if he knows Satish, and his reply is rather peculiar. He answers, "No, I never had any connection with him *before*," but that statement is followed by two others which are also incredible. He says he did not know he had a rival bidder at the sale and did not ask who the other bidder was, but he *pretends* to tell all this rival bidder did, though he never asked his name.

Well, Taradas, when produced, begins by refusing to admit that he sent a telegram, the copy of which is produced to him. He says he has no cause of doubt or any cause of belief he did. He does not deny that Sitanath was at his father's house before he sent the telegram, or that both were present there later in the evening. He says that Prya Nath Ghose was not there, that the Chandra Raja estate officer, *i.e.*, Sitanath, was there, that he asked them to sell half of the property, but nothing was settled about the price; that he, Sitanath, asked the witness Taradas to send a telegram like that produced; that no arrangement was made as to the purchase money to be paid to his father for the sale of the half-share; that this officer stated to him what the income was and he stated that in the telegram. He says he does not know Satish. He was then asked if, to his knowledge, his father was served, as Defendant in this suit, with a copy of the writ. His reply is that this Gomasta told him that a summons had been left with him with a copy of the plaint. He is then asked if he meant to suggest that this Gomasta did not show it to him within a reasonable time. His reply was, he does not understand reasonable time, not that very day nor the next day; he might have shown it months or days after. He is asked if the signature on the summons is in his father's handwriting, and he replied it looks like it but is in pencil, and is not exactly like his; some portion of it is written in the hand of a lady which he never writes.

He is then asked if it is inaccurate to say he got a copy of the summons. And his reply is:—

"It may have been served on him (*i.e.*, his father) but I got this (*i.e.*, the summons) some time later, and I thought I ought not to take any steps. I did not consult my father regarding it. I might have said to him 'you have been made a party.' I do not remember whether I said anything or not. I might or I might not have said anything. I refer only important matters to him. I did not consider this matter to be important, because we had no connection with this property. I thought we should do nothing."

He is then asked, did he think it was important that his father should be charged with fraud and that he should be defended? And his reply was, "I did not think so at that time." He is then asked, "You thought that connection with the property was all-important?" And his reply is, "Yes, I do not remember any charge of fraud."

Taradas added that he did not know Satish. He is asked what instructions he gave his brother Shyamadas about the auction purchase. His answer is, "Probably I gave him the same instructions I received from my father." Then he was asked, "Was your instruction merely reading out the telegram you received from your father?" His answer is, "No, I

gave him more instructions." Then he is asked what was it. And he replied, "I do not remember, he might not understand the telegram fully. I might have told him to go and bid up to Rs. 12,000." Then he is asked, "How much money did you send with your brother Shyamadas?" His reply was, "I do not remember; it might be one-fourth of the amount.' Then the question is put to him, "That is one-fourth of Rs. 12,000, equals Rs. 3,000." He is then asked when his brother came back from the sale, "Did you put it to him that if somebody bid higher than your brother why he did not ask permission to bid still higher?" And his answer was, "I do not remember whether I asked him."

It appears to their Lordships strange that any legal practitioner could suppose that clumsy, stupid and transparent prevarication such as this witness indulged in could impose upon any legal tribunal worthy of the name, much less upon one of the ability and distinction of the High Court of Calcutta. In their Lordships' view this man's testimony is utterly unreliable, and the evidence of Panchanan is quite unshaken by it. The Subordinate Judge, however, held that this latter witness's evidence is rendered unreliable by another particular matter. It is this. On his direct evidence this witness Panchanan undoubtedly swore that Prya Nath accompanied the rest of the party to Satish's house on the evening before the sale. On cross-examination he corrected that, and stated that Prya Nath only came with the others half the distance, then descended from the vehicle in which they were and went away on other business. On the face of it this correction looks quite innocent, the mistake being one which a man might well make at night under the circumstances deposed to, but the learned Subordinate Judge, though Panchanan was not asked a single question touching the alteration in his evidence, considered that it showed a dishonest attempt on the witness's part to alter his evidence so as to reconcile it with Prya Nath's, and therefore deprived him of all credit. In their Lordships' view that is not a reasonable construction of the incident, and they concur with the High Court in thinking that Panchanan's evidence is not shaken by it and that he is notwithstanding it worthy of credit on this as on the antecedent parts of his testimony.

In the second part of his evidence Panchanan says that he himself, Prya Nath, Satish, Shyamadas and a Durwan of Akshoy attended the sale; that a bid was made in the name of Satish, that Rs. 2,300 were deposited in Court that day; that the money was with Prya Nath, who paid it to Shyamadas, and Satish deposited it with the Collector. He said that Hemada owed some money to Sitanath, and that if the property was transferred to Sitanath by Akshoy, the money due to him would be realised; that this was the second object of causing the property to be sold. Shyamadas, he said, paid the purchase money to Satish in notes and gold. He does not remember to whom Satish paid it. Shyamadas bid on behalf of Akshoy; that Satish and Shyamadas stood there side by side. He was not present when the chalan for the money was written. He does not remember whether Satish said to the Collector, "I have not now with me more than Rs. 1,000, and may I be given time for the balance?" That he came downstairs as soon as the sale was over, and waited there for half an hour: that one-fourth of the purchase money was deposited with the Collector; that it was settled that Satish should pay half the purchase money in order that he might

get a one-third share of the property, that according to the arrangement made Akshoy was to advance the whole of the purchase money in the first instance, and Satish was to pay him back half of it when it was settled. It is obvious that the ultimate pecuniary benefit to Satish under this arrangement would be the same as if he advanced the entire of the purchase money in the first instance and Akshoy paid back half. This latter mode of procedure would, doubtless, look to the officials more as if Satish was the real purchaser than the other, and in either case Satish could say with equal truth, as is sworn he did say to the Maharaja, that he had co-sharers in the property, and that Akshoy was one of them. The mere fact that Satish found in the first instance the money to pay the purchase money is not at all, therefore, such a crucial fact as Mr. DeGruyther contended it was. Akshoy could, doubtless, repay him half the money at any time. The witness then explained and excused with fair success, their Lordships think, the part he had taken in the business.

Some unfavourable comment was made upon this witness's evidence owing to the fact that he did not enumerate the particular sums which, together, made up the sum (Rs. 2,300) deposited, but treated it as having been deposited in one sum. That, no doubt, is so, but if that be a discrediting incident, he shares the discredit with Satish himself, who in his cross-examination said :—

"On the day of the sale, having put in notes to the amount of Rs. 2,500 into the Collectorate, I took a refund of Rs. 200 and thus deposited Rs. 2,300 only: this sum of Rs. 2,500 was in notes of the value of Rs. 1,000 and Rs. 500 only. I borrowed those notes from the house of Tarak, my cousin" [No mention whatever is made of the Rs. 1,000 it is now alleged he brought with him to the sale, and he represented that the borrowing of the Rs. 2,500 was one transaction. Tarak Nath Banerji, the money-lender, says precisely the same. He said some two or two and a half years ago, in January, he borrowed from me Rs. 2,500 in two hand notes, one hand note for Rs. 1,000, the other for Rs. 1,500. "The amount of the first remains due, the other was paid. Satish owes money to me, my mother and my sisters also. I have no accounts of my loan transactions. I did not enter the payment of Rs. 2,500 to Satish Babu as debts."]

Prya Nath's evidence as to what occurred at the sale is not so full as Panchanan's, but it is quite consistent with the latter's. He mentions two important matters. He says that it was thought that the relationship with Satish would not be easily ascertained, and so he was chosen to be a fit person to bid at the sale and purchase the property. (It is not very clear what this means.) He also said that he went to Khulna three days after the sale and saw the entry of the purchase money in the rokar after coming back.

Now who and what was Satish? He was a feeble invalid, afflicted with a painful and unpleasant disease. Up to seven or eight months before he was given to drink, and since then, by way of reformation had become an opium-eater. That is the description he gave of himself. He was asked at the end of his cross-examination if he was addicted to intoxicants. His reply was :—

"Yes, formerly, I gave up the habit seven or eight months ago." (He was speaking on the 11th February, 1917.) "I have drunk wine up to the value of Rs. 13-8 per bottle. I never drank anything costlier than that; the price of the same bottle to-day is Rs. 30 to Rs. 32. I have poured out to the goddess of drink Rs. 50,000 or Rs. 60,000. I eat opium twice a day now. As I have got the rheumatism, one tolah of opium lasts me 14 or 15, eating twice a day."

SATISH CHANDRA CHATTERJI *v.* KUMAR SATISH KANTHA ROY.

For the last twenty-three years, he said, he had been purchasing taluks at revenue sales, certificate sales and Civil Court sales. He said he did not know Sitanath or Akshoy and never had any conversation with either of them. His debts, he said at the time he was examined, amounted to Rs. 18,000 or Rs. 19,000. Before buying this property, he said, he did not ascertain even where the property was situated or make any inquiries about it. After the institution of the suit he made no inquiry as to the extent of Hemada's share in the property or as to whether he had an officer called Sitanath, or as to the truth of the charges made against him or whether any officer of Hemada's, fraudulently or otherwise, caused the zemindari to be sold by auction by withholding the revenue. Nor did he make any inquiry as to who Akshoy was. On seeing the bid sheet two or three hours after the sale, for the first time, he knew Akshoy's name. He said he never made up his mind to purchase the property till after he had seen the bid sheet. He did not know Taradas nor Kaledas, sons of Akshoy; that he never went to Akshoy's house up to the day he spoke, 4th February 1917, and never inquired what are the quantities of lakeraj lands or mal lands in the taluk. The excuse he made for this amazing indifference and ignorance was that he did not send his officers there to make inquiries touching these matters because there was a criminal case once and if he sent them to inquire there might be another criminal case, which would cost money. He then added :—

"Therefore I am waiting till the case is over. I am not in very affluent circumstances, you, yourself, see. I have purchased property by borrowing money. How can I then say I am in affluent circumstances?"

The plaint was filed on the 18th August 1915; Satish was examined on the 21st, 27th and 28th January 1917. It seems to their Lordships quite incredible that for one year and four months he would have abstained from making any inquiries touching a property which he, an embarrassed man, alleged he bought, or have ignored so completely the charges made against him. His conduct as to the property might not be unnatural if he was merely a sham bidder put forward by Akshoy, but it certainly is inexplicable if he was the real purchaser.

Akshoy was examined on the 7th May 1919, he states that his income is about Rs. 30,000 to Rs. 40,000 per annum; that he had houses in Calcutta and elsewhere, and about a lakh of rupees in G. P. notes, most of it made by his own enterprise and speculation; that he had known the Chandra Rajas (*i.e.*, the Plaintiffs) since he was at school; that they were the landlords of his family at Khulna; that there were lots of law-suits between his family and the Rajas, about a portion of their property, which ended about a year previous, *i.e.*, in 1917. He said he heard before he got the summons to give evidence that a suit was going on with the Chandra Raja about properties sold for arrears of Government revenue: that somebody had purchased it; that the suit was going on in the Alipur Court: that this was all he knew. He did not know who the purchaser was; that he was not aware he was a Defendant in the suit to set aside the purchase till the day before yesterday (*i.e.*, till the 7th May, 1917), when he heard; that he first heard of the institution of the suit to set aside the sale from Satish's Gomasta. He had no information about the property he bid for except his son's telegram. After the sale he had some information. He was asked

SATISH CHANDRA CHATTERJI *v.* KUMAR SATISH KANTHA ROY.

whether on receipt of the telegram from his son he thought it a *bonâ fide* honest proposition, and he answered :—

"I never thought whether it was reasonable or not, or whether it was proper or not for me to bid at the sale, as the property was going to be sold by auction. I thought as a business matter I *could enter* it. Whether it was right or wrong I did not think at the time, because the revenue was not paid and the property was going to be sold. The only thing was that I had to sell half to him."

He was then asked did he buy any other property in auction sale, and he answered, "Of course, I bought the tenants' holdings. When they failed to pay the rent they (presumably the holdings) were sold by auction."

He admitted he had a talk with the Gomasta of Satish soon after the litigation was instituted; that the Gomasta told him they were going to apply to set aside the sale. This man did not tell the witness at that time that he was a Defendant in the suit: "that between Satish and ourselves (*i.e.*, Akshoy and his people) a suit was pending, and he used to come from time to time in reference to this matter, but he never told me I was a Defendant in this suit, though I had occasional talks with him." He said his sons told him that they had not purchased at the auction; that they wrote about it; that they did not tell him who it was who purchased it; that since then he had come to know that Satish purchased it. At that time he did not care to know the name. His sons might have mentioned the name of Satish the first time or afterwards. He denies that he ...s helping Satish to buy the property. ... witness appears to their Lordships ...ite unreliable. He was a Defendant ... the suit out of which this appeal ... He was charged with fraud. Service of the plaint must have been effected upon him, and yet, he says, he was never told the nature of the suit. That appears to their Lordships to be quite incredible. They think, judging from all the probabilities, he must have been told of these things; but being resolved not to play the part of an innocent man and come boldly into Court and defend himself, he thought it wiser to lie low and remain silent, and is now professing this ignorance to excuse his conduct.

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Mr. Dunne, in his argument on behalf of the Respondents, criticised in detail the evidence of the Appellants as to the persons from whom and the mode by which he found the purchase money of the property he purchased. Damaging as that criticism was, their Lordships prefer to rest their conclusions in the main on the somewhat broader aspects of the case, including the relative positions of the two most interested men, Satish and Akshoy. The latter, a very wealthy man, so anxious to acquire, though he should have to part with half of it, yet trusting to the information contained in the telegram which Sitanath must have supplied. Himself a tenant of the Roys, yet ready to join in their undoing by forwarding this auction sale provided only this could be effected without his co-operation being disclosed. And on the other side one has a diseased, intemperate and crippled man, accustomed to attend revenue and other sales by auction, but apparently at this time without an anna of his own available to pay for anything he might buy, obliged in this case to borrow every rupee of the purchase money (Rs. 9,200), in some instances at high rates of interest; and further obliged, according to his own story, to pledge to a relative the anticipated compensation which he might receive for the compulsory

purchase of some of his property in order to raise Rs. 8,500. If Akshoy had desired to procure the service of a tool to buy for him this property at this auction, giving him, however, an interest in the property bought as a reward, and with the help of Shyamadas giving to a sham competition at the auction the appearance of reality, he could scarcely have found a person more qualified to fill the rôle than Satish. The question is, did he fill that rôle or a rôle something like it, or did he buy this property entirely for himself, for his own use and benefit? There is available evidence which, in their Lordships' view, is much more consistent with his having filled the first of these rôles than the second. It is the following: Rajindra Nath Banerji, the Naib on the estate of the Maharaja Pradyot Tagore named Mulajore, who says that this estate lies to the south of the Roys' estate of Atpur; that he knows the District well, including the taluk in dispute: that in 1915 Satish had purchased it at an auction sale; that his employer, the Maharaja, was anxious to purchase it; that he, the witness, went to Satish's house to propose to buy it on behalf of his master; that he met Satish and had a talk with him on the subject; that Satish said that he was not in a position to say whether he could sell the taluk: that he, the witness, then brought Satish to the Maharaja's house in Calcutta; that Satish there gave no final answer but said that he would have to consult one or two persons who had interest in the property purchased. He did not mention the names: that he, the witness, pressed him very much in the matter; that Satish then took him to the house of another person named Chatterji; that Satish entered the house, remained there for some time while the witness remained outside in the carriage; that after an interval Satish returned and said he could not sell the property; that Chatterji was unwilling to part with it. (The full name of Akshoy is Akshoy Kumar Chatterji.)

The Maharaja Sir Pradyot Kumar Tagore was examined on commission. He says he knows the villages of Atpur and Mulajore; that he is a zemindar; that after the auction he heard of the sale; that had he known before it took place that it was about to take place he would have attempted to purchase it. He heard from his amlas that the value of the property was from Rs. 25,000 to Rs. 30,000. He heard the name of the person who purchased the property at the auction. He tried to purchase it from him and sent word of that to Satish by Rajindra, the officer of his *debuttar* estate. After that interview, Satish had a talk with witness at his, the witness's, own house. The witness was asked "what did he say to your proposal?" And he replied: Satish said he had a partner named Akshoy, and other partners too, and that he was unable to say anything without consulting them; that conversation took place in August or the beginning of September 1915, as well as he could recollect. The negotiations progressed no further; his officer told him it would not come off. The witness said he had not seen Satish before; he had no personal knowledge of him. The witness was asked to describe the man he spoke to: he said he was about 45 years of age, rather stout, of dark complexion, stood rather uncomfortably, and spoke to him, the witness, in Bengali.

A number of quite irrelevant questions were put to the Maharaja which may be passed by.

The next witness is Ashutosh Bhattacharji. He was examined on the 7th March 1917. He states that he is only Superintendent of the Raja Kishori Lal

SATISH CHANDRA CHATTERJI v. KUMAR SATISH KANTHA ROY.

Gossain of Serampur; that his head office is at Serampur; that his master was a member of the Executive Council of the Governor of Bengal; that he himself is an undergraduate, an Honorary Magistrate of the Bhatpara Bench, and a Municipal Commissioner of Bhatpara Municipality; that he has served as Superintendent for twelve years. He knows Atpur. He knows the taluk 2402; that he knew of the sale of it in Baisakh from middle of April to middle of May 1915. Had he known of it before it took place he would have tried to acquire it for his master; that on his master's behalf he tried to purchase it several times from Satish. First he sent Mokhtar Tarpadi Dutta, to the knowledge of his master, on two or three occasions to Satish. After that he, witness, went in the middle of May. He said the case for setting aside the auction sale was then pending before the Commissioner, and that he must consult Akshoy. The witness then went to the house of Akshoy Chatterji on three or four occasions in July or August. He went to Satish for the last time in October 1915. After the disposal of the case he, Satish, said he could sell the property for Rs. 50,000. The witness says he then offered him Rs. 25,000. On cross-examination, the witness said that he, Satish, had a mind to sell as far as he understood him. He said he stayed at Satish's house about ten or fifteen minutes; that he did not know Akshoy before he went to his house in connection with this matter; that Satish gave him Akshoy's address; that he did not do or say anything to induce Satish to sell the property. On the first day he, the witness, saw Akshoy he expressed his willingness to sell the property. He saw him when the appeal before the Commissioner was over and he then demanded Rs. 50,000.

The learned Subordinate Judge has criticised unfavourably the Maharaja's evidence, but he bases his criticism on the most surprising error: "He says the conversation with the Maharaja took place, according to Rajendra, in Jaishta, *i.e.*, which means from the middle of May to the middle of June; that there was an appeal to the Commissioner pending, which was disposed of on the 1st July; that the present suit was instituted on the 18th August 1915; that Satish is an astute man of business; that it is highly improbable that he would make such admissions of fraud on his part when in the appeal to the Commissioner his complicity with Defendants Nos. 2 and 3 was distinctly alleged and the matter was being fought out between them. It has not been shown to this Board that the charge of fraud was made before or could be entertained by the Commissioner. He gave no decision whatever upon such a charge, if made. His decision is entirely confined to the irregularity of the sale, but it is strange that the learned Subordinate Judge did not take the trouble to verify his dates before he made such a charge as this against such a person as this Maharaja, based entirely on the assumed fact that the Commissioner's judgment was delivered on the 1st of July. Had he done so, he would have found that the Commissioner delivered his judgment not on the 1st July 1915, as he assumes, but one month earlier, namely, the 1st June 1915. The criticism based upon this blunder therefore falls to the ground.

Now, if Satish and Akshoy had admitted that they had had these interviews with the persons named, but that these latter had mistaken what they said, or that they were so pressed to sell that they said what they were alleged to have said as an excuse to get rid of the pressure, there might be something to say on their behalf. But

they do nothing of the kind; they say these interviews never took place; that the whole thing is a myth, a work, it is to be supposed, of the perverted and diseased imagination of these three witnesses. Their Lordships are as unable as the High Court are to take that view. They think, on the contrary, that these three witnesses are reliable and their evidence most convincing. They believe that if this large sum of Rs. 25,000 or Rs. 30,000 was within the reach of this needy man Satish, then in debt to the extent of Rs. 15,000 to Rs. 18,000, he would have eagerly grasped at and gladly sold the property he purchased in order to procure it. The fact that he did not do this can only be accounted for on the assumption that he was not the absolute owner of this property, free to dispose of it as he might, but that his action was dominated and controlled by the wealthy co-owner he named to whom gains of Rs. 10,000 or Rs. 20,000, had not such a strong attraction. Their Lordships are therefore of opinion that the Respondents-Plaintiffs have established the cause of action on which they sued, and that the appeal fails. The appeal having been dismissed, it is not necessary to discuss the matter further, as there is no cross-appeal. The Respondents are apparently content with the decree which has been pronounced by the High Court, and as their Lordships think it does substantial justice between the parties in the circumstances of the case, they will merely humbly advise His Majesty that the appeal be dismissed with costs.

Solicitor: *Mr. Edward Dalgado* for the Appellant.

Solicitors: *Messrs. Watkins & Hunter* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

VISCOUNT HALDANE.
LORD SHAW.
LORD PARMOOR.
LORD CARSON.
1922,
Heard, 24, 27 and 28, November.
1923,
Judgment,
1, March.

GOPI LAL,
Appellant;
v.
LAKHPAT RAI and ors., Respondents.

Patent, revocation of—**Banslochan**, *preparation of—Patent taken out on the ground of discovery of two kinds of improvement—One found invalid in law, sufficient to invalidate patent—Common earthenware vessels substituted for the usual iron ones for heating, if a valid subject-matter of grant of patent.*

The Respondents had obtained letters patent in respect of improvements alleged to have been discovered by them in the preparation of "banslochan" *consisting (1) in the addition of sulphuric acid to the substance when red hot, and (2) in the use in the process of heating of a stove constructed as described and illustrated in the said letters patent. The Judicial Committee agreeing with the trial Judge's finding that the addition of sulphuric acid at the stage alleged was commonly resorted to by other manufacturers affirmed the trial Judge's decree revoking the letters patent, the Indian law being that if either of the two claims upon which the letters patent were obtained was bad in law, the letters patent would be invalid; and it was thus unnecessary for their Lordships to examine the validity of the second claim. But their Lordships thought it desirable to make it clear that they must not be understood as assenting to the proposition that the substitution of well-known earthenware vessels in lieu of iron ones for the purpose of carrying out the process of*

manufacture would necessarily be a good subject-matter for a patent.

These were consolidated appeals (Nos. 37 and 40 of 1921) from two decrees of the High Court at Allahabad, dated 22nd May 1918, one of which reversed a decree of the District Court of Farrukhabad, dated 14th February 1917 and the other dismissed a petition for the revocation of Indian Patent No. 2191.

The patent was granted to the Respondents in respect of improvements in the manufacture of a medical preparation known as "*banslochan.*"

The facts are fully set out in the judgment of the Board. On the 1st March 1916, the Respondents sued the Appellants in the 2nd appeal for infringement of their said letters patent and prayed for an injunction and damages.

The Defendants denied the infringement and alleged that the process and apparatus of the Respondents which were the subject-matter of the patent were of no utility and did not constitute a new invention.

The Additional District Judge gave judgment on the 14th February 1917 dismissing the suit.

On the 16th January 1917, the Appellant in the first appeal filed a petition for the revocation of the letters patent.

An order was made on the 12th June 1917 that the evidence in the infringement suit should be evidence on the hearing of the petition and the revocation proceedings were transferred to the High Court.

On the 22nd May 1918, the High Court (Piggott and Walsh, JJ.) gave judgment setting aside the decree of the District Judge and dismissing the petition for revocation. From the resultant decrees the present appeals were brought to His Majesty in Council.

Messrs. DeGruyther, K. C. and *W. Trevor Watson* for the Appellants.

Sir A. Colfax, K. C. and *J. Whitehead* for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD CARSON.—The material question to be determined in these consolidated appeals is: Whether the Respondents' Indian Patent No. 2191, and dated the 23rd June 1915, is a valid patent?

The Appellants resided and carried on business as merchants at Muhalla Sadhwara Farrukhabad, and the Respondents, who are the registered owners of the patent in question, resided and carried on business as merchants at Calcutta under the name and style of Lakhpat Rai Sampat Rai.

In the second appeal the Respondents, on the 1st March 1916, sued the Appellants for infringement of the said letters patent and in the first appeal the Appellants, on the 16th January 1917, presented a petition for the revocation of the said letters patent.

The said letters patent were granted to the Respondents in respect of "improvements in the manufacture of a medicinal preparation," and as stated in the specification, "the present invention relates to improvements in the treatment of a substance found in the interior of some bamboos and known as 'tabakshir' or 'bamboo manna,' for the purpose of refining the same when in the raw state to convert it into a nutritious and saleable article.

This medicinal preparation was commonly known and marketed as "*banslochan,*" and admittedly had for many years prior to the date of the said patent been refined and sold throughout India.

It was not disputed, that prior to the

GOPI LAL v. LAKHPAT RAI.

date of the said patent "*banslochan*" had been prepared for the market by a process which included (*a*) washing the crude material in water; (*b*) treating it at some period of the process with sulphuric acid; and (*c*) calcining the mass which had been so treated in an iron stove or pan at a high temperature.

The improvements alleged to have been discovered by the Respondents, and in respect of which the said letters patent were granted, consist broadly (1) in the addition of sulphuric acid to the substance at a defined stage of the process, *viz.*, when red hot, and (2) in the use of the process of heating of a stove constructed as described and illustrated in the said letters patent.

These improvements were the subject of distinct and separate claims in the said letters patent, and it was not disputed in the argument before this Board that under the law applicable in India, if either of the said claims was bad in law the letters patent would be invalid.

The action for infringement came to trial before the Additional District Judge of Farrukhabad, who, on the 14th February 1917, gave judgment in favour of the Defendants (the present Appellants), deciding as matters of fact "that long before the Plaintiffs' (Respondents') application for the patent, the stove with earthen vessels and of the same construction as the patent stove, was commonly used by other manufacturers at Calcutta, and that sulphuric acid was also applied to the material while it was red hot, and not while it was still cold."

From this judgment the Respondents appealed to the High Court of Judicature for the North West Provinces, and on the 22nd May 1918, the judgment of the Court was delivered reversing the judgment of the Court below and holding that the Respondents' patent was valid. As their Lordships have come to the conclusion that the first claim in the specification, *viz.*, "in the preparation of the said substance the treatment of the same when red hot with an acid," is invalid on the grounds of want of novelty and prior user, it is necessary to examine the judgment of the Appellate Court to see how that question was dealt with, having regard to the definite finding of fact by the Additional District Judge before whom the matter first came. In the first place, it is to be noted that the the order of the Appellate Court of the 22nd May 1918, leaves entirely untouched the question of the Appellants' right to apply sulphuric or other acid in the treatment of the substance when red hot and only grants an injunction restraining the Defendants (Respondents) from constructing or using the special kind of stove which forms the subject-matter of the second claim in the Respondents' application for a patent. Upon turning to the judgment of the learned Judges, the matter is dealt with in the following passage :—

"A difficulty has been raised with regard to the first part of the claim where the patentees state that they claim in the preparation of the said substance the treatment of the same when red hot with an acid. We have purposely refrained from referring in detail to the evidence with regard to the use of acid. We think it clearly establishes what the Plaintiffs (Respondents) have not seriously denied, that in some form or another, and at some stage or another in the process of manufacture, acid has always been used for purifying the material, and there seemed at one time a difficulty with regard to this claim, namely, as to whether it was not either too wide or too vague, or, in itself, old."

Later on the judgment continues :—

"Therefore we must hold that it is established that the treatment of sulphuric acid at "red heat," which is a defined stage

GOPI LAL v. LAKHPAT RAI.

in the process of heating, is well known to the trade and perfectly intelligible, and also new, as nobody in the case suggests that there was any defined or ascertained stage at which it was always done."

Their Lordships find it very difficult to reconcile this statement with what follows :—

". . . and the patent does not confer upon the Plaintiffs either the sole right to manufacture and sell the substance itself or even the sole right to apply sulphuric acid at red heat so that nobody may use it. What people cannot do is to manufacture an oven or stove substantially as described and illustrated in the specification for drying, heating, roasting and calcining the said substance, and to use such construction for the purpose of applying sulphuric acid in the process of preparing and heating the substance to a red heat in the stove."

Their Lordships cannot help thinking that the Appellate Court did not keep sufficiently clearly before their minds the necessity of adjudicating on each claim independently and was construing the specification as if it was one for a combination and not for subject-matters which were distinctively claimed. Indeed, in another part of the judgment it is stated :—

"We find that the essential features of the process patented by the Plaintiffs is the treatment of the substance at a red heat with sulphuric acid inside a closed crucible or retort made entirely of earthenware."

Their Lordships can find no reason for disagreeing with the finding of the Additional District Judge on this point.

It is unnecessary to decide whether, when, as found by the Appellate Court, "that in some form or another, and at some stage or another in the process of manufacture, acid has always been used for purifying the material;" a valid claim for a patent can be made for the use of such acid for the same purpose at a definite stage, e.g., when the material is red hot. The evidence which has been given at the trial, and which has been carefully and ably analysed by the trial Judge, seems to their Lordships amply to support the finding of the Judge that long prior to the date of the letters patent, "the sulphuric acid was also applied to the material while it was red hot."

This was proved distinctly by Manna Lal, Ramishwar Bajpei, Shrovaj Narain, Maharaj Narain, Gobind Singh and Chhedu. No doubt there is evidence on the other side of the use of the acid at different stages, but as regards its use when the material is "red hot" the evidence is purely negative.

It is also worthy of note that from beginning to end of the plaint filed in the Respondents' action there is no mention of the claim in respect of the application of the acid to the material when "red hot," and the same observation applies to the notice served by the attorney of the Plaintiffs on the 3rd February 1916, before the action was commenced, when the complaint was founded on an alleged infringement of the second branch of the Plaintiffs' claim, *viz.*, the construction of a special kind of earthenware stove.

Having come to the conclusion that the first claim put forward by the Respondents in the application for a patent cannot be sustained, and that therefore the letters patent are invalid, it is unnecessary for their Lordships to examine the second claim. Their Lordships, however, would like to make it clear that they must not be taken as assenting to the proposition that the substitution of well-known earthenware vessels in lieu of iron ones for the purpose of carrying out the process of manufacture would necessarily be a good subject-matter for a patent.

Under the circumstances, their Lordships will humbly advise His Majesty that the present appeals should be allowed

GOPI LAL v. LAKHPAT RAI.

with costs. This will involve that the decree of the Appellate Court of the 22nd May 1918, in the second appeal, should be set aside and the decree of the District Court of the 14th February 1917, should be restored with costs, and, further, that the decree made on the Appellants' petition in the first appeal on the 22nd May 1918, dismissing the claim for revocation of the letters patent should be set aside and an order for such revocation decreed with costs.

Solicitor: *Mr. Douglas Grant* for the Appellants.

Solicitors: *Messrs. Downer & Johnson* for the Respondents.

G. D. M.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 245 OF 1923.

SANDERSON, C. J.
CUMING, J.
1923,
Heard, 3 and 6, August
Judgment, 6, August

KIAMUDDI KARIKAR, Appellant,
v.
THE KING-EMPEROR.

Indian Penal Code (Act XLV of 1860), sec. 71, separate sentences under sec. 147 and under sec. 325 read with sec. 149, legality of—Separate sentences, if legalised when they are made to run concurrently —Order of the sentences, if material in deciding the legality of the respective sentences.

An accused was sentenced to two years' rigorous imprisonment under sec. 147, I. P. C. and a further 3 years' under sec. 325 read with sec. 149, both sentences being directed to run concurrently:

Held *per* SANDERSON, C. J.—*That the infliction of separate punishments for the two offences was illegal under para. 1 of sec. 71, I. P. C. and it did not make any difference that the sentences were directed to run concurrently. The learned Judge had no jurisdiction to sentence the accused for both the offences. The second sentence under sec. 325 read with sec. 149 must therefore be set aside.*

NILMONEY PODDAR *v.* QUEEN-EMPRESS (1) *followed.*

Per CUMING, J.—*Where two separate sentences have been passed, the illegality does not necessarily attach to the sentence which is passed second in point of time. Obviously this would possibly reduce the question as to what sentence the accused would get to a lottery depending on the order in which the Judge or Magistrate passed the sentences and result in a serious miscarriage of justice. The prohibition in sec. 71, I. P. C. against punishing an accused with the punishment of more than one of the offences is obviously met by making all the sentences which have been imposed run concurrently.*

This was an appeal preferred on the 23rd May 1923 against the conviction under secs. 147, 325/149, I. P. C., in agreement with the verdict of the jury and the sentence of rigorous imprisonment for 2 years under sec. 147, I. P. C. and for 3 years under secs. 325/149, I. P. C., passed on the 5th March 1923, by the Additional Sessions Judge of Dacca (Mr. P. C. De).

The facts are briefly as follows:—One member of an assembly, which was lawful in the beginning but became unlawful later on, caused grievous hurt to a person in pursuance of their common intention and was found guilty by the jury of an offence under sec. 147 and of an offence under sec. 325 read with sec. 149. The Judge accordingly sentenced the accused to 2 years' rigorous imprisonment under sec. 147, I. P. C. and to a further sentence of 3 years' rigorous imprisonment under

(1) I. L. R. 16 Cal. 442 (F. B.) (1889).

KIAMUDDI KARIKAR *v.* THE KING-EMPEROR.

sec. 325 read with sec. 149 and directed the sentences to run concurrently. Against this decision the present appeal was preferred.

Babus Jyotish Chandra Guha and *Monmotho Nath Mukerjee* for the Appellant.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by Kiamuddi Karikar, who was tried by the learned Additional Sessions Judge of Dacca and a jury. By the unanimous verdict of the jury he was found guilty of an offence under sec. 147, I. P. C. and of an offence under sec. 325 read with sec. 149. The jury found him not guilty under sec. 325, sec. 304 and sec. 304 read with sec. 149.

Shortly stated the facts were these :—

The police were summoned for the purpose of preventing a considerable number of people from fishing in a certain tank. In the first instance the police were attacked, but the next thing that happened was that the people, who had assembled for the purpose of fishing, apparently gave way and retreated. The allegation was that then some of the people, who were with the police, and the police themselves pursued the retreating crowd. The deceased man, who was aged about sixty, fell at the rear of the crowd, and he was so severely beaten that he died on the spot.

The accused, according to the evidence, was alleged to have been one of those who beat the deceased man. But, as I have already said, the jury acquitted him of the charge under sec. 325 and also of the charge under sec. 304. The learned vakil, who argued the case very well, relied mainly upon an alleged misdirection as to the accused being a member of an unlawful assembly. It is clear that the assembly, of which the accused was a member, was in the first instance a lawful assembly, and that was pointed out by the learned Judge. But the case of the prosecution was that after the people, who had come to fish in the tank, retreated and after there was no further necessity for any violence, some of those who formed the police party turned themselves into an unlawful assembly with the common object of unnecessarily beating some of those who had come to fish : and the learned vakil argued that the learned Judge had not sufficiently directed the jury upon this point.

The main part of the summing up in this respect, was as follows :—The learned Judge dealt fully with the facts. Then he said : " Now I come to the law. The first charge is under sec. 147. To understand it you should know sec. 141 read and explained." Therefore, it is clear that the learned Judge explained to the jury what was necessary to constitute an unlawful assembly under sec. 141—" common object is essential." Therefore, the learned Judge directed the attention of the jury to the fact that a common object was essential : and, I find that in a later part of his summing up he indicated that the alleged common intention was to beat the fishing party. Then he proceeded to say in his charge to the jury, " An assembly not unlawful at the inception may become so later. Then again, illegal act by one or two not acquiesced in by others does not change its character." There, I think, the learned Judge must have been explaining to the jury that if the police party in the first instance constituted a lawful assembly, the fact that one or two of them committed the alleged illegal act would not change the character and nature

of the assembly, but that it would require five persons or more than five persons, who were actuated by a common intention, namely, that of beating the fishing party, to change the character of the assembly from a lawful one to an unlawful one.

In considering the learned vakil's point it must be remembered that these were "heads of charge" only, and it was impossible for the learned Judge to write down everything he said to the jury. I am satisfied, on the summing up, taking it as a whole, that the learned Judge appreciated the point and that he drew the attention of the jury to it.

Consequently in my judgment, there was no misdirection in that respect.

Another point, to which the learned vakil drew our attention, was that there were certain witnesses, who were not called on behalf of the prosecution; and, he argued that the learned Judge ought to have directed the jury that they were entitled to assume from that fact that if those witnesses had been called they would not have supported the case for the prosecution. The learned Judge did not say this in so many words, but in effect what he did say on that point, in my judgment, was sufficient.

The last point, with which it is necessary for me to deal, is the question of sentence. The learned Judge sentenced the accused to two years' rigorous imprisonment under sec. 147, I. P. C. He then proceeded to pass a further sentence under sec. 325 read with sec. 149, namely, for three years' rigorous imprisonment, and directed that the sentences should run concurrently.

The learned vakil drew our attention to the case of *Nilmoney Poddar* v. *Queen-Empress* (1). In that case the accused had been convicted of an offence under sec. 148, and there was a further conviction under sec. 324 coupled with sec. 149. A sentence of two years' rigorous imprisonment was passed upon the Appellant under sec. 148 and a further sentence of one year's rigorous imprisonment was passed for the offence under sec. 324 read with sec. 149. The learned Counsel for the Crown admitted that the case, which we are now considering, cannot be distinguished in principle from the case in *Nilmoney Poddar* v. *Queen-Empress* (1). The learned Chief Justice in that case said :"In this case the offence of voluntarily causing hurt under sec. 324 coupled with sec. 149 of the Indian Penal Code, of which these Appellants have been found guilty, is primarily made up of two parts, *viz.*: (1) of their being members of an unlawful assembly, by which force and violence was used in prosecution of its common object, and the members of which were armed with deadly weapons; and (2) of the offence of voluntarily causing hurt being committed by two other members of the unlawful assembly in prosecution of its common object. The first of these two parts is itself an offence, *viz.*, rioting, armed with deadly weapons, under sec. 148 of the Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part respectively. Therefore we find that all the conditions laid down in paragraph 1 of sec. 71 of the Indian Penal Code are present here. Consequently the infliction of separate punishments for the two offences is illegal under it." In the result, the Court set aside the sentence of one year's rigorous imprisonment passed upon the Appellants under sec. 324 read with sec. 149. In the

(1) I. L. R. 16 Cal. 442 (F. B.) (1889).

(1) I. L. R. 16 Cal. 442 (F. B.) (1889).

KIAMUDDI KARIKAR v. THE KING-EMPEROR.

present case the first conviction was under sec. 147, I. P. C. instead of sec. 148 as in the Full Bench case; and the second conviction was under secs. 325/149 instead of secs. 324/149 as in the Full Bench case. It being admitted that the Full Bench decision is applicable to the present case, the infliction of separate punishments for the two offences is illegal under para. 1 of sec. 71 of the Indian Penal Code. It was suggested by the learned Counsel for the Crown at one time during the course of the argument that there was a difference between the case, which we are now considering, and the Full Bench case, inasmuch as the learned Judge who tried this case directed that the two sentences should run concurrently. I do not understand how that can make any difference. The provisions of para. 1 of sec. 71 forbid the infliction of separate punishments for the two offences in a case to which those provisions apply. In this case the learned Judge inflicted a sentence of two years under sec. 147 and a sentence of three years under sec. 325 read with sec. 149, I. P. Code. As the learned Chief Justice said in the Full Bench case, consequently the infliction of "separate punishments for the two offences is illegal under it." In my judgment, the learned Judge had no jurisdiction to sentence the accused in this case for both offences. If he had thought that it was necessary that the accused should be punished with a sentence of three years' rigorous imprisonment, he could have inflicted a sentence for that period under sec. 325 read with sec. 149, and he need not have passed any sentence under sec. 147. As a matter of fact he punished the accused first under sec. 147 and then proceeded to pass a further sentence under sec. 325 read with sec. 149. In my judgment, the sentence under sec. 325 read with sec. 149 should be set aside.

The result is that, in my judgment, the conviction of the accused under sec. 147 and the sentence of two years' rigorous imprisonment passed upon him must stand. The conviction under sec. 325 read with sec. 149 must also stand but the sentence passed thereunder must be set aside.

CUMING, J.—I agree generally with the judgment which has just been delivered by the learned Chief Justice. At the same time I desire to make it clear that I am not prepared to hold that where, as in the present case, two separate sentences have been passed—one for rioting under sec. 147 and the other for constructive grievous hurt under sec. 325 read with sec. 149—the Court is obliged necessarily to maintain the one which was passed first in point of time and to set aside the sentence which come second in point of time. Obviously this might possibly reduce the question as to what sentence the accused would get to a lottery depending on the order in which the Judge or Magistrate passed the sentences and result in a serious miscarriage of justice. Sec. 71 provides that an accused person shall not be punished with the punishment of more than one of his offences which provision is obviously met by making all the sentences which have been imposed run concurrently. In the present case I am, however, of opinion that the ends of justice will be met by the sentence of two years' rigorous imprisonment.

J. N. R. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD BUCKMASTER.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
LORD SALVESEN.
1923,
Heard, 1, 3, 4, 7 and 8, May.
Judgment, 26, October.

SATYA NARAIN SINGH, Appellant,
v.
SATYA NIRANJAN CHAKRAVARTI and ors., Respondents.

Ghatwali tenure, nature and incidents of—Where written grant produced, terms and conditions matter of construction—Inferences from subsequent dealings, if admissible—Law, if may be considered for purpose of construction—Grants by Government officers—Presumption that they were within their authority—Ghatwali tenure, if may be hereditary—Conditions of service, imply forfeiture on non-compliance—Continued demand and performance of service, if necessary—Readiness and willingness to serve and capacity for performance, sufficient—Ghatwali tenure, why inalienable—Local custom to contrary, what is necessary to prove—Proof of similar acts by doer, if admissible to establish validity of questioned act.

In a suit to enforce by sale certain mortgages executed by a former owner of the Hundwa estate against his heir, the latter pleaded that the estate being a ghatwali service grant direct from the Government was inalienable, and relied on two instruments executed by officers of the East India Company of 1776 and 1794, purporting to define the terms and conditions under which the lands were to be held, whilst the mortgagee's case was either that the grant was a non-ghatwali Istamrari Mokarari grant or at any rate a shikmi *ghatwali of the Kharakpur Raj which have been judicially recognised as alienable with the consent of the Zemindar of Kharakpur; and to prove which they chiefly relied on a long series of administrative acts, records and reports of periods subsequent to the above-mentioned instruments which either affirmatively declared Hundwa to have been a* shikmi *ghatwali of Kharakpur or negatively treated it as, at any rate, wholly free from any ghatwali services to the Government:*

Held—*That the original instruments of grant having been produced and put in evidence, the nature of the grant rested upon their true construction and not upon notions entertained about them in later generations.*

The Judicial Committee thought it advisable to consider generally the law relating to ghatwali tenures partly for the purpose of determining whether the construction adopted would in any way be inconsistent with that law and partly for the purpose of deciding the incidents which the law attaches to the form of tenure resulting from that construction.

Held—*That upon the true construction of these instruments, the tenure was a Government tenure and this notwithstanding the fact that the grantees appeared to have been already holders of these lands under earlier grants or on customary service terms; that they granted a perpetual hereditary tenure, that the tenure was a service tenure, ghatwali in its nature, inalienable and indivisible and incapable of being sold in execution of a decree against the person of the incumbent of the office of ghatwal for the time being.*

When the ghatwal's office has become hereditary in his family, alienation by him becomes impossible without infringing the right of his heirs; and when the office is of a public character and held for the general good, it is not enough to safeguard the superior's personal right of appointment, but it is also necessary to ensure that the lands and the services shall remain substantially connected, so that actual performance and not mere subordination may be assured, and this in-

volves that the lands must remain impartible and inalienable.

That in construing these grants, it should be presumed in the absence of evidence to the contrary, that the officers of Government were acting within their authority.

The law relating to ghatwali tenures stated.

Where services may be due in bulk and the obligation of the ghatwal consists not in personal guardianship of a particular post, but in providing the service of others who are competent to discharge the services in person (in this case the embodying and keeping up an armed force of 300 men with an appropriate staff of officers), the tenure may well be hereditary, the tenure in such a case being liable to forfeiture if the obligation of service is repudiated or if the heir be incapable of rendering even the vicarious service involved.

Though there was no express clause in the grants providing for forfeiture in case of non-compliance, in view of the very special and express words in which the terms of service were laid down, those terms should be regarded as the condition on which the ghatwal was to hold the lands.

Where a ghatwali tenure is created, as distinct from a mere personal employment, the tenure-holder has such an interest in the rendering of the services as entitles him to such benefit of the tenure as accrues from his readiness and willingness to perform his obligation. The service is not a mere burden on the land; it constitutes a personal right in so far as the land held on that condition is concerned and a personal obligation in so far as concerns the grantor which, being in the nature of a public obligation, cannot be waived by the grantor for his own advantage, nor being in the nature of a title to lands can be relegated to desuetude for the mere disadvantage of the ghatwal.

Readiness and willingness to perform the services when required may be inferred when there is no proof of any refusal to perform and where performance within a reasonable time, if required, is not shown to have become impossible. An actual appointment of the next heir to be ghatwal and actual performance of the stipulated ghatwali service is not required by law, for the maintenance of the ghatwali character of the tenure.

Government ghatwali tenures have to some extent lost, or appeared to lose, their identity by being included for revenue purposes in the assessment of Zemindari lands held by another and an independent proprietor. But the question whether or not a given ghatwali tenure is a Government ghatwali tenure must depend on the original grant; and unless the inclusion of the tenure in the assessment of Zemindari lands can be shown to have amounted to a release by the Government of the ghatwali services or to grant to a third party of the right to receive them and of the right to appoint the ghatwal, the tenure must remain as it originally was, a Government ghatwali tenure.

A local custom is one binding on all persons in the local area within which it prevails and differs entirely from a family custom, binding only on members of the family as to rules of descent and so forth. It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom and the evidence must be evidence as to the prevalence of the custom in that area. Except so far as analogy may

SATYA NARAIN SINGH *v.* SATYA NIRANJAN CHAKRAVARTI.

serve to explain anything that is in itself obscure the customs of other localities are not relevant and such rules in cases relating to other areas are not in point.

Held—*That the custom judicially found to exist in Kharakpur permitting alienation of ghatwali tenures within the Zemindari has no application to ghatwali tenures which like the present were found to be independent of the Kharakpur Zemindari, even though they may not be far off Kharakpur.*

Where the whole matter in dispute was whether the alienation by a tenure-holder was valid, the fact that in other transactions besides the one in dispute he purported to alienate and appeared to believe in his own power to do so proves nothing.

These were consolidated appeals from a decree, dated the 9th July 1918, of the High Court at Patna, which varied a decree, dated the 14th September 1914, of the 1st Court of the Subordinate Judge at Bhagalpore.

The suit out of which the appeals arise was filed on the 20th April 1910 by Raja Ramranjan Chakravarti to enforce a mortgage, dated the 14th July 1895, executed by Raja Udit Narayan Singh, the adoptive father of the Defendant-Appellant.

Transferees of portions of the mortgaged properties which include the Hundwa estate were joined as co-Defendants.

The Appellant raised the defence that the Hundwa estate was ghatwali and therefore inalienable beyond the life of Udit Narayan Singh.

The trial Judge held that the Hundwa Raj was an ancient Zemindari heritable and alienable obtained by conquest long prior to the British rule, that it was not held on ghatwali tenure either from the Government or from the Zemindar but was an "ordinary Istamrari Mokarari tenure," and the Raja's interest did not terminate with his death. He further held that as the mortgagor had represented the property to be heritable and transferable his son, was estopped from pleading that it was inalienable.

The High Court (Roe and Coutts, JJ.) differed on one point from the Subordinate Judge holding that on a true construction of pattas granted in 1776 and 1794 to a predecessor-in-title of Udit Narayan Singh the grantee was a Moghul ghatwal prior to the Dewanee. They were of opinion, however, that Udit Narayan Singh did not hold as a ghatwal, that he was merely a *de facto* holder without licence from the ruling power of the lands attached to the post of ghatwal, and as such mortgaged his right, title and interest. His son succeeded to his rights and could not challenge his title.

The appeal was accordingly dismissed. The 2nd Defendant appealed to His Majesty in Council and the Plaintiffs cross-appealed against the amount of the interest decreed by the High Court.

Sir Geo. Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellant.—The main question is whether Udit's tenure was ghatwali and, if so, whether it was a Government or a Kharakpur ghatwali. The Appellant's case is that it was a Government ghatwali, and as the Appellant was not allowed to bring the Government on the record the onus is on the Plaintiff to show that it has ceased to be a Government ghatwali. The Commissioner was not called as a witness and the onus was never discharged.

The High Court have decided that the tenure had ceased to be ghatwali from the time of Purandar Singh about 1808, but

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

in that event it is not clear what estate his successor takes.

It is true that as services have been exacted from ghatwals in modern times but Government has never released the ghatwals from their liability nor have the latter refused to discharge their duties when called upon to do so.

Once it is shown that the estate is ghatwali it is established by the Courts that the tenure is hereditary, *Durga Prosad Singh* v. *Tribeni Singh* (18), and passes on the death of one holder to the next intact subject to service.

It is well established that it is not transferable, nor divisible, nor subject to sale in execution except with the consent of Government. *Nilmoni Singh Deo* v. *Bakranath Singh* (7). Moreover if the estate is ghatwali there can be no estoppel.

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Respondents.—For the creation of a ghatwali tenure there must be a grant in specific terms. Hundwa was originally an independent Raj obtained by conquest by Bijai Singh about A. D. 1500. It was subsequently conquered by Kharakpur who levied tribute from it when he was strong enough to do so.

In 1776 the estate was settled by Capt. Brown. Brown's patta was a settlement with an existing Zemindar which involved no hereditary right. That so-called grant was different from a ghatwali grant in that although services had to be rendered the grant was not in consideration of services.

The document in 1776 was not a grant by Government. It was merely a pottah which is the confirmation of a title by the Settlement Officer.

In 1810 the dispute was whether Hundwa was a dependency of Kharakpur or an independent Zemindar. It was never suggested that it was a Government ghatwali.

In 1819 the question was decided and Hundwa was not included in the list of ghatwals prepared by Government.

The fact that Hundwa was included under Kharakpur by the Permanent Settlement shows that it was not independent of Kharakpur. Had it been a Government ghatwali it would have been resumed by Government. It was not so resumed because it was considered as a part of Kharakpur.

Leelanund Singh v. *Government of Bengal* (6).

The Plaintiffs contend that Hundwa was a proprietary zemindary which cannot be ghatwali.

The sanads are incapable of being construed as strict ghatwali grants, they are the ordinary sanads granted to a Zemindar appointing him as Zemindar with police and other duties.

[Field's Bengal Regulation's Introduction, p. 36, sec. 34.]

Further they are granted by officers who were incapable of making valid ghatwali grants and in any event ghatwali grants were extinguished by the Permanent Settlement.

In the records Hundwa is registered as "Istamrari Mokurari" which is inconsistent with a ghatwali tenure.

The High Court suggests that Hundwa is on the same footing as Pachete and Kharakpur which have been held to be alienable.

Kali Pershad Singh v. *Anund Roy* (12).

In any case now that the police services

(7) L. R. 9 I. A. 104, 121: s. c. I. L. R. 9 Cal. 187 (1882).
(18) L. R. 45 I. A. 251 (1918).

(6) 6 M. I. A. 101 (1855).
(12) L. R. 15 I. A. 18: s. c. I. L. R. 15 Cal. 471 (1887).

have been abolished Hundwa would have become alienable.

Malayandi Appasami Naicker v. *Midnapore Zemindary Co., Ld.* (16) and in Kharakpur even ghatwali lands are alienable by local custom. They also referred to Harington's Analysis, Vol. I, p. 459.

Macpherson's Settlement Report p. 26 and passim.

Rajaa Venkata N. Appa Row v. *Rajaa Narayya Appa Row* (19), *Bhagwat Baksh* v. *Sheo Pershad* (20), *Lelanund Singh* v. *Munorunjdn Singh* (3) and *Radhabai* v. *Anantrao* (21).

Mr. Lowndes, K. C. in reply.

It is incorrect to say that Brown and Dixon had no authority to make the grants.

Their authority has never been called in question and the grants have been treated as sanads by this Board.

Lelanund Singh v. *Munorunjan* (3) and *Leelanund Singh* v. *Government of Bengal* (6).

The term "Zemindar" is not inconsistent with "ghatwal." Zemindars were originally mere revenue collectors and the name did not imply a free-hold title.

There is no evidence of the alleged local custom of the alienability of Kharakpur ghatwalis.

Hiranath v. *Ram Narayan* (11).

(3) 3 W. R. 84 (H. C.) (1865); L. R. I. A. Sup. Vol. 181; 13 B. L. R. 124 (P. C.) (1873).
(6) 6 M. I. A. 101, 113 (1855).
(11) 9 B. L. R. 274 (1872).
(16) L. R. 48 I. A. 100: s. c. 26 C. W. N. 106 (1921).
(19) L. R. 7 I. A. 38 (1879).
(20) 18 C. L. J. 277 (1913).
(21) I. L. R. 9 Bom. 198 (1885).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—This was a suit to enforce by sale certain mortgages of lands, which may be shortly called the Hundwa estates, created by the late Udit Narayan Singh of Lagma, in Pergana Hundwa, a jungleterry taluq in the Santal Parganas District. The suit was defended on behalf of Kumar Satya Narayan Singh, whom the widow of Udit Singh adopted under his testamentary authority as his son, and the ground of defence was that the Hundwa estates were and are inalienable and passed unencumbered to this Defendant as successor on the death of Udit Singh, the mortgages notwithstanding. Two main questions arose: the first, whether the estates were ever inalienable at all; and the second, even if so, whether before the dates of the mortgages they had not become alienable in full. Both Courts rejected the defence: the Subordinate Judge mainly on the first point; the High Court of Patna, while accepting the original inalienability of the estates, definitely upon the second. This Defendant now appeals.

The title and tenure asserted by the Appellant rest on an alleged grant and subsequent confirmation of a permanent ghatwali tenure made to his ancestor Subha Singh by Captain Brown and Mr. Dickinson, officers of the ruling power, in 1776 and 1794 respectively. The Respondents' case is that nothing more took place than an ordinary revenue settlement of these estates, then belonging to Subha Singh, confirmed at the Permanent Settlement, and subject to no tenure or condition of inalienability.

In a very elaborate judgment the learned Subordinate Judge examined the whole history of Hundwa for over a century and a half, and his conclusions may

be thus summarised. Hundwa was originally acquired in absolute ownership in or before the sixteenth century by a Khetauri family driven from its earlier home by Rajput pressure from the west. Subsequently, at a date unknown, it became annexed to the Kharakpur Raj and was tributary to it, but, for their own purposes and not under obligation to any overlord, the Rajas of Hundwa continued to appoint their own ghatwals in Hundwa and to maintain an armed force of *jaghirdars*. Hundwa was at this stage of its history, when the East India Company obtained the Dewani in 1763 and, in assessing revenue on the mahal of Hundwa, included it as part of the Kharakpur estate for fiscal purposes. When the Santal Parganas came under martial law the landed proprietors *ex majori cautela* obtained pottas and sanads from the military officers in charge confirmatory of the rights which they had enjoyed in quieter times. They were, as was the whole population, liable to military service if called upon, and no doubt they accepted in their pottas mention of a service which arose out of the state of the country. When about the end of the century peace had been fully re-established in the district, no further service of the kind was requisite, and, in spite of the language of the pottas, none was ever required. Such was the case of Hundwa, as of many other estates. Nothing more had been done by its proprietors than the ordinary rural police work, which fell on all landed proprietors of consideration, and, although in a country where names die hard the old tradition of the existence of ghatwals in Hundwa, and with it the name, continued to survive, there was in fact no correspondence between the old and the recent state of things. The Raja of Hundwa himself never was a ghatwal, either appointed by the Mogul power at Delhi or by the East India Company. He was, when he chose, a grantor of ghatwali holdings of his own creation, but, subject only to his payment to the Zemindars of Kharakpur, he was an independent proprietor and not the holder of any service tenure.

The learned Judge thus made light of the title deeds, on which the Defendant relied, regarding them as mere recognitions, not very accurately expressed, of pre-existing rights, for which view he thought that he found conclusive record and authority in the reports of various officers of the company, which have been published from time to time. From similar sources, and to the like effect, was derived a whole series of other incidents and of official acts which he considered to be of capital importance.

At the beginning of the last century the Collector of Bhagulpore prepared a list of the ghatwals in Kharakpur, and this list does not mention the Defendant's ancestor, who was then in possession of the Hundwa estate and must have held it, according to the Defendant, as a ghatwali tenure. A few years later Mr. J. P. Ward reported, in 1833, that Hundwa was held by the Defendant's ancestor as a ghatwali tenure, but as a ghatwali tenure under the Raja of Kharakpur, though he added that this dependency had been successfully disputed. Mr. Ward records this without making any suggestion that it was really held from the Government direct, except that Captain Brown and Mr. Dickinson are spoken of as having respectively made and continued a "grant." In 1838 Government took proceedings under Reg. XI of 1819 to resume Hundwa, on the ground that it was lying unassessed to revenue, though it had been included in the Permanent

Settlement of Mahalat Kharakpur in 1796, when Kadir Ali was the Kharakpur Raja. The claim failed, and the Government acquiesced in the decision, although an entry in the Settlement Register of Mokurrari Istamrari Jumma of Bhagulpore for 1801-1802 recorded in regard to Hundwa that after the Dewani a mokurrari potta had been granted subject to ghatwali and mentioned as the foundation for this record Captain Brown's potta for the whole Pargana Hundwa, dated 1776, and Mr. Dickinson's sanad of 1794. In 1863, after the adverse decision of their Lordships' Board, reported in 6 Moore's Indian Appeals, the Government agreed with the Raja of Kharakpur of that day, in consideration of an annual payment of Rs. 10,000, to surrender its right to the advantage of having ghatwals regularly appointed for the performance of public police services, whose jaghirs the Raja would have to provide himself. For this purpose a list had been prepared of the ghatwals, to whose services the Government might lawfully lay claim, but Hundwa is not in the list. It is, of course, matter for argument whether the reason for the omission is that Hundwa, as a ghatwali tenure, was not included in the Zemindary of Kharakpur, not being the subject of a public service as to which the Raja of Kharakpur had any responsibility, or whether, as the learned Judge thought, the true reason is that the Raja of Hundwa held his lands as an independent proprietor and not by any manner of ghatwali service at all. It certainly is of some importance that such a list should have been made for such a purpose without any mention of Hundwa and without any explanation of the reason why it was not mentioned. In subsequent years various less important proceedings took place, as to which the observation is that the official ignorance of the fact, if fact it was, that Hundwa was held direct from the Government on a ghatwali tenure is singular in any case and doubly so in view of the existence of Captain Brown's and Mr. Dickinson's grants, which could hardly have been entirely lost sight of. Thus in 1867 part of the lands of Hundwa were acquired for a public road and paid for without any indication that Hundwa differed from any other of the lands under Kharakpur. A similar incident, of no great importance in itself, was given in evidence when more land was required for the road in 1872. In 1875 the Commissioner for the Division called on the Collector of the district for information as to all ghatwali tenures, from which police services were then demandable, and again Hundwa was omitted from the replies, as though all trace had been lost of the Government right to call for ghatwali service. From his comments on these events the learned Judge appears to have thought that, if a Government could be conceived to be capable of losing sight of rights of great antiquity and small value, legal consequences would follow in the lapse of years, disabling the Government, to the advantage of the proprietor, from enforcing its claims. He recites, however, in his judgment, extracts from official correspondence from 1869 onwards, which show that the writers themselves were alive to the fact, that there might be still existing ghatwali tenures in the districts in question as to which, for various reasons, the demand of services had in fact ceased, and contrasts them with other passages, from which he infers, not without reason, that the writers had not lost sight, at any rate, of Hundwa, but were clearly, if erroneously, of opinion that it was not a Government ghatwali, but probably was a

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

shikmi tenure under the estate of Kharakpur.

The Subordinate Judge finally attached very great importance to the entries in the record-of-rights relating to Hundwa, in which at the settlements made in 1874-79 and 1898-1907 the taluqas in question were entered as the Istamrari Mokurrari property of the Raja of Hundwa without any qualifying addition, such as might have been made and in the case of other ghatwali properties was made, and he regarded the record-of-rights as being "the clearest possible positive evidence of the fact that Hundwa is not a ghatwali at all, whether under the control of the Government or of the Zemindar."

Undoubtedly this long series of administrative acts, records and reports, which either affirmatively declare Hundwa to have been a shikmi ghatwali of Kharakpur or negatively treat it as, at any rate, wholly free from any ghatwali services to the Government, is, as the learned Subordinate Judge found it, a very impressive circumstance. If the problem had been to infer the true original grant, which, in the absence of the text of it, could only be collected from the evidence of what was done and left undone in connection with Hundwa by the ruling power, it would, no doubt, have been difficult to infer, as the explanation which best fitted all the facts, that the right originally granted consisted of a ghatwali tenure, held from the East India Company direct. The production of the authentic texts of the original grants completely alters the question, and it becomes in the first instance one of construction. The reports of the Government officers are not even *contemporanea expositio*, for the earliest one must have been based on hearsay accounts, already one or two generations old, and presumably not on any inspection of the original grants, since they are not mentioned.

In the High Court the learned Judges differed from the conclusion of the learned Subordinate Judge, holding that Hundwa was originally a Mogul ghatwali, hereditary in the family of the Defendant's ancestors, which Captain Brown and Mr. Dickinson confirmed but did not originate, by the potta and sanad in question. They arrived at this conclusion on the construction of the two documents, read in the light of contemporaneous conduct and of prior history, which they conceived to have been sufficiently established or to be common knowledge. Roe, J., thus states their conclusions :—

"The Hundwa tenure was, prior to the Dewanee, a Mogul ghatwali. The effect of assumption of jurisdiction over the jungle Terai Mahals by the East India Company was at most to convert the allegiance of the ghatwal from an allegiance to the Mogul Empire to an allegiance to the East India Company. The permanent settlement did not destroy the Company's right to enforce nor relieve Purander Singh from liability to render that allegiance. Nothing that has since been done has altered the position. The descendants of Purander Singh have never specifically refused to render services as ghatwals. . . . The entry of the ghatwali service attached to the Mahal in Ex. F still stands. . . It may be that the power to enforce these services has lapsed by limitation. That question was not argued at the bar and could not be raised in this suit. I am satisfied that the right has not been destroyed by any definite act."

As the construction, which was put upon these documents in the High Court, was strenuously contested at their Lordships' bar by the Respondents, who prayed that the judgment of the Subordinate Judge on this point should be restored, the first question for decision will be whether or not the lands of

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

Hundwa were at any material time a ghatwali tenure at all or not. Without proceeding upon the same line of reasoning as that adopted in the High Court, their Lordships are of opinion that they were. Formidable as the series of official acts and reports above-mentioned appears to be, their Lordships think that, as soon as the texts of original instruments, such as the potta and sanad in question, dating from a time anterior to all these matters, are produced and put in evidence, the nature of the estate of Hundwa rests upon their true construction and import and not upon the notions entertained about them in later generations.

The instrument of 1776 is one of a considerable number of similar instruments executed by Captain James Brown of the East India Company's service, who gave a full account of the district, which was published in India Tracts, 1787. He was one of the officers employed in introducing order into the five jungle Terai Mahals, including Birbhum and Kharakpur. Though the originals of the two documents in question are not now forthcoming and probably have been lost, they had been so often produced and accepted in numerous suits for the last eighty years and more, that the translations used in the present case have been accepted without question as truly representing authentic originals. The document of 1776 is headed "Patta in terms of Kabuliyat granted," etc. (which Kabuliyat, however, is also not forthcoming), and is entitled in the commencement thus: "This Istamrari Mokurrari Patta is granted to you . . . . at a varying consolidated jumma, Rs. 2,701, in respect of Pergana Hundwa." The document itself sets out no parcels for Pargana Hundwa, though there is an express exception of Brahmottar and other lands, "jagirs granted to archers and Barkandases, perquisites of Imlah lands and other Zemindari expenses." Then follow certain clauses which may not go beyond duties then ordinarily discharged by Zemindars, though among them occur the words "You should go round your village, escorted by archers and Barkandases holding jagir grants, as per details given below, and protect the villages"; but further on occurs this most significant clause: "When called by the Hazur you should be escorted by a body of archers and Barkandases 307 in number, of whom the Sardars will be 7 and archers and Barkandases will be 300, and should appear before the Huzur, and you ought to be careful about the boundaries and limits of your village."

There follows a sort of summary or schedule headed "Annual jama of the Istamrari Mokurrari settlement . . . . . Barkandases and archers," with details showing how Rs. 2,701 are made up, which throw no light on the present question. It is clear that the whole sum payable to the revenue is payable by Raja Subhao Singh. There is, further, a contemporaneous Dowl, which, it is common ground, supplies the parcels intended to be included in this settlement. It is admitted that the lands in mortgage are lands to which the instrument of 1776 applied, but it has to be observed that, when Hundwa is mentioned in the interval, since then, it cannot always be concluded that the whole of the lands so referred to were either lands covered by this instrument or lands belonging to the family of Subhao Singh and Udit Singh. Their content seems to have changed from time to time. These facts add to the obscurity of the past history of Hundwa, but as no issue turned on these discrepancies in the

SATYA NARAIN SINGH *v.* SATYA NIRANJAN CHAKRAVARTI.

Courts below, their Lordships are of opinion that they do not affect the present question one way or the other.

Importance has further been attached to the persons named in the instrument of 1776 and to the manner in which they are referred to. It is expressed to be granted to "Raja Subhao Singh, Babu Udit Singh, Babu Gopal Singh, Babu Lal Singh and others, ghatwals of Pargana Hundwa appertaining to Kharakpur." No doubt the senior of the kinsmen is called Raja out of respect. The term does not mean that Subhao Singh was an independent proprietor, while the other kinsmen were not but were ghatwals only; the whole class are ghatwals of Hundwa, though varying in social importance. In the operative part it is mandatory, though always in general terms—"You should always obey the Government," and so forth. The Dowl mentions Subhao, Gopal, Lal and Udwant (who may really be Udit), in connection respectively with the Taluqas Khandwa, Phuljheri, Kesri and Sarji, and it names six or seven other persons whom the instrument itself does not name at all. These discrepancies, for the same reason as that above stated, seem to their Lordships not to require further discussion.

In 1794 this instrument was perused and considered by Mr. Dickinson, the Government officer then in charge of this district, and he issued a Parwana, which is also relied on by the Appellant as part of his title and, in view of the fact that it purports to be a substantive confirmatory grant, has throughout been accepted on both sides as being one with the instrument of 1776 for purposes of construction of the title. It is in the name of the East India Company. It is addressed to the Mutsaddis, present and future, of Pargana Hundwa, and ultimately directs them to "treat the said Pargana as a mokurrari tenure," to "receive the fixed Jama of the said Pargana by regular instalments each year from Raja Purandar Singh, Zemindar, and others"; and it adds, "You shall not demand anything in excess, nor shall you demand production of fresh sanads every year."

The rest of this Parwana consists of recitals of details and parcels and of words of grant. It records that, since Captain Brown granted Hundwa, "old Zemindari of Raja Subhao Singh," "as permanent Mokuarrari to him, Udit Singh, Gopal Singh, Lal Singh, Bishun Singh, Fatêh Singh, and other ghatwals of the said Pergunna," all these persons except Gopal Singh have died, and Subhao Singh's nephew, Purandar Singh, has been in possession of the shares of his uncle and also of Udit Singh and of Gopal Singh, paying the Government revenue; while in the case of the others, sons in each case have succeeded to fathers' shares. The Parwana concludes: "Therefore, taking into consideration their right of inheritance, so much of the said Pargana as formed the share of Raja Subhao Singh, Zemindar, and of Udwant Singh and Gopal Singh, ghatwals, is granted as before to Raja Purandar Singh, Zemindar, and so much of it as belongs to Lal Singh has been granted to Budhan Singh, the share of Bishun Singh to Manik Singh, the share of Fatêh Singh to Rohan Singh and other ghatwals, and to their descendants as permanent Mokurrari tenure." The rent, "excepting the Jagir lands of Barkandases and archers," is Rs. 2,701. The obligations of the document of 1776, as to looking after the villages and appearing before the Huzur with a force 307 strong, are referred to, but whether for the purpose of reciting that these obligations have hitherto been performed, or of directing

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

the Mutsaddis to see that they are performed in the future, is not, as a matter of drafting, quite clear. What is clear is that there is nothing to take away from the earlier document in this respect and that, reading the two instruments together, effect must be given to these provisions as part of their terms. What, then, must that effect be?

The Respondents' contention, briefly, is that these provisions are nothing more than the expression of duties then currently required of Zemindars, and whether required or not, discharged by them in their own interests and in the interests of their ryots; that the mention of ghatwals does not include Subhao Singh or Purandar Singh themselves; and that the "other" ghatwals mentioned do not include them in one class but are ghatwals subordinate to them, whose duties are of earlier origin than either of these instruments and are not based upon them. The language employed is relied upon in support of the view that Hundwa was, before 1776, an independent Zemindari in the family of Subhao Singh, held subject only to payment of Government revenue; that such ghatwals as then existed, were his shikmi ghatwals, and that all that Captain Brown and Mr. Dickinson did was to settle what eventually became the permanent revenue payments due in respect of the whole estate and to signify this in an ordinary settlement potta, confirmed by the later Parwana. These contentions their Lordships think unsound.

It may be advisable to consider generally the law relating to ghatwali tenures, partly for the purpose of determining whether the construction adopted by their Lordships is in any way inconsistent with that law, and partly for the purpose of deciding the incidents which the law attaches to the form of tenure resulting from that construction. In the Santal Parganas there are for practical purposes three classes of ghatwali tenures, (a) Government ghatwalis, created by the ruling power; (b) Government ghatwalis, which since their creation and generally at the time of the Permanent Settlement have been included in a Zemindari estate and formed into an unit in its assessment; and (c) Zemindari ghatwalis, created by the Zemindar or his predecessors and alienable with his consent. The second of these classes is really a branch of the first. The matter may, however, be looked at broadly. In itself "ghatwal" is a term meaning an office held by a particular person from time to time, who is bound to the performance of its duties, with a consideration to be enjoyed in return by the incumbent of the office. Within this meaning the utmost variety of conditions may exist. There may be a mere personal contract of employment for wages, which take the form of the use of land or an actual estate in land, heritable and perpetual, but conditional upon services certain or services to be demanded. The office may be public or private, important or the reverse. The ghatwal, the guard of the pass, may be the bulwark of a whole country-side against invaders; he may be merely a sentry against petty marauders; he may be no more than a kind of gamekeeper, protecting the crops from the ravages of wild animals. Ghatwali duties may be divided into police duties and *quasi*-military duties, though both classes have lost much of their importance, and the latter in any strict form are but rarely rendered. Again, the duties of the office may be such as demand personal discharge by the ghatwal and personal competence for that discharge; they may, on the other hand, be such as can be discharged vica-

SATYA NARAIN SINGH *v.* SATYA NIRANJAN CHAKRAVARTI.

riously, by the creation of shikmi tenures and by the appointment and maintenance of a subordinate force, or they may be such as in their nature only require to be provided for in bulk. It is plain that where a grant is forthcoming to a man and his heirs as ghatwal, or is to be presumed to have been made though it may have since been lost, personal performance of the ghatwali services is not essential so long as the grantee is responsible for them and procures them to be rendered [*Shib Lall* v. *Moorad Khan* (1)]. So much for the ghatwal. The superior, who appoints him, may also in the varying circumstances of the organisation of Hindostan be the ruling power over the country at large, the land-holder responsible by custom for the maintenance of security and order within his estates, or simply the private person, to whom the maintenance of watchmen is, in the case of an extensive property, important enough to require the creation of a regular office. It would not be easy to draw with precision the distinction in the duties performable by him between a person who might properly be called a ghatwal, and a person, who is only to be styled a chowkidar, though the legal incidents of the respective positions are clearly different. At the other end of the scale the term "ghatwal" may be the honourable badge of a great proprietor, who in his day was a veritable Warden of the Marches. In the minor senses of the word, "ghatwal" can hardly be said to connote a tenure at all. A jaghir, assigned for the support and remuneration of a ghatwal, may be no more than wages in kind, arising from the use of a plot of land customarily in the occupation of the ghatwal for the time being, and in such a case personal service by the employee and personal selection and appointment by the employer may well be in every case essential incidents of the relationship. Incompetence and misconduct on the part of the employee may be causes for removal of the ghatwal and resumption of his holding [*Neelanund* v. *Surwan Singh*, (2)]; actual appointment may be the necessary initiation and seal of his office; personal selection may be the whole basis of his service and mere family claims valueless in the matter. On the other hand, there are great estates, whose proprietors are found holding them or parts of them upon the terms of providing that ghatwali services shall be forthcoming, either regularly or when required; services, which it is impossible for the proprietor himself to render in his own person, and which become possible to him and to those to whom he renders them simply by virtue of his possession of the lands thus granted. In such cases the ghatwali tenure, even if not originally granted as heritable, easily becomes so, and is commonly found on the death of an incumbent of the office to descend to some member of his family, if not necessarily to the senior member. Thus in Kharakpur ghatwals have a perpetual hereditary tenure at a fixed jumma [*Munrunjun* v. *Lelanund* (3)]. A recognised right to be appointed ghatwal, then takes the place of a formal appointment; a recognised right in the superior to dismiss the ghatwal, if he is no longer able and willing to render the service required by his tenure, and to appoint another person to the office and the tenure of the lands, then readily suffices to maintain in perpetuity the incidents of the tenure. Women of rank have thus in some instances come to be the recognised holders of ghatwali lands [*Doorga Pershad* v.

(1) 9 W. R. 126 (1868).

(2) 5 W. R. 282 (1866).

(3) 3 W. R. 84 (1865).

SATYA NARAIN SINGH *v.* SATYA NIRANJAN CHAKRAVARTI.

Doorga Kooeri (4)]. The case of Rani Surbessuri occurred in 1783 in Kharakpur, and there are said to have been many such cases in Birbhum. A further incident of such a tenure is the inalienability of the ghatwali lands; for it is obvious that, if the whole lands were alienated together at the choice of the ghatwal, he would be in a position either to make his own alienee, possibly a person non-resident or unfit, the ghatwal in succession to himself without the consent of his superior, or to deprive himself of the whole of the means provided to enable the services to be rendered, while himself retaining the office, whose obligations he could in consequence no longer fulfil. The office cannot, except by special custom, grant or other arrangement, either run with lands or be severed from them. If the lands are alienated piece-meal—and this must be involved in a right to alienate them at all—the same difficulty arises in another form, for here, the office being indivisible, the question is to which of a number of several purchasers of the lands is it to pass? *Hurlal Singh* v. *Jorawun Singh* (5), *Lelanund Singh* v. *Government of Bengal* (6), *Nilmoni Singh* v. *Bakranath Singh* (7) and *Munrunjun* v. *Lelanund* (3). It is true that, so far as the superior is concerned, the inconveniences which would arise from allowing to the ghatwal a free right of alienation may be met by reserving to the superior the right of withholding consent to the alienation and thus defeating it, and this, coupled with the right to appoint a successor to the office when it falls vacant, may in practice be sometimes all the protection that the superior requires, but in two points affecting others it is insufficient. First of all, when the ghatwal's office has become hereditary in his family, alienation by him becomes impossible without infringing the right of his heirs; and secondly, when the office is of a public character and held for the general good, it is not enough to safeguard the superior's personal right of appointment, but it is also necessary to ensure that the lands and the services shall remain substantially connected so that actual performance and not mere subordination may be assured, and this involves that the lands must remain impartible and inalienable. These considerations peculiarly apply where the superior, by whom ghatwals are appointed and of whom ghatwali lands are held, is the ruling power itself. In Mogul times such grants were common; nor did their existence by any means come to an end with the assumption of the Dewanny. Government ghatwali tenures have to some extent lost, or appeared to lose, their identity by being included for revenue purposes in the assessment of Zemindary lands held by another and an independent proprietor, but the question whether or not a given ghatwali tenure is a Government ghatwali tenure must depend on the original grant, and unless the inclusion of the tenure in the assessment of Zemindary lands can be shown to have amounted to a release by the Government of the ghatwali services or to a grant to a third party of the right to receive them and of the right to appoint the ghatwal, the tenure must remain, as it originally was, a Government ghatwali tenure.

In view of these considerations, their

(3) 3 W. R. 84 (H. C.) (1865); L. R. I. A. Sup. Vol. 181; 13 B. L. R. 124 (P. C) (1878).

(4) 20 W. R. 154 (1873).

(5) 6 S. D. A. Rep. 169, 170 (1837).

(6) 6 M. I. A. 101 (1855).

(7) L. R. 9 I. A. 104: s. c. I. L. R. 9 Cal. 187 (1882).

Lordships think that there is nothing in the general law to limit the interpretation of these documents according to their natural sense, and they are unable to accept the argument, which the Respondents base on the special words employed in them. Even now the words "raja," "zemindari," "potta" and "istamrari mokurrari" are not so strictly used as always to bear a precise meaning or to refer invariably to cases, in which nothing is due but an annual Government jumma for an absolute estate in lands. There is even less ground for so holding when the documents under construction are nearly 150 years old. No authority is forthcoming to show that a holding on the terms of both yielding a jumma and rendering a *quasi*-military service may not be consistent with the use of these words. Whether the service tenure is made a term or not, the holder might be a "Zemindar" or land-holder and his holding be "perpetual" and "on fixed terms," and the position of Subhao Singh depends not on his being styled "raja" and Zemindar, which are general expressions of consideration, but upon the conditions upon which he held the land. Their Lordships are further unable to refer the obligation to furnish a force of 307 men to any ordinary police administration of a Bengal Zemindari. The force is precise and it is large; it is military rather than civil; it does not vary according to the needs of the moment, but is fixed at a standing number at all times, and attendance on the Huzur with the whole force on demand is clearly beyond the scope of mere constabulary duties. Effect must be given to these very special and express words, and although no forfeiture is stated in case of non-compliance with them, it is only possible to do so by regarding them as descriptive of an obligatory service tenure, whether of the ordinary ghatwali type or not, and as the condition on which the ghatwal holds the lands.

It is, however, objected that the authority of Captain Brown and Mr. Dickinson to make a grant on combined terms of revenue rental and *quasi*-military service is an essential matter and that, as servants of the East India Company, then only exercising the Dewanny of Bengal, Orissa and Behar, these officers would naturally be concerned only with military action and with revenue revisions, and not with making new grants of old estates. It may be conceded that there is no evidence to show that the holder of this estate prior to 1776, who appears to have been Subhao Singh himself, had conducted himself in any way that would have justified a forfeiture of it, nor is it shown that, if it were so, Captain Brown had any authority to forfeit the lands into the Company's hands. He was acting under martial law it is true, in a time of acute disturbance in this region, but that of itself would not make him a person to exercise such a power. The answer to these objections appears to their Lordships to be this. It must be presumed that for anything done by Captain Brown in the purported discharge of his functions some valid authority existed until the contrary is proved, especially in a matter which was repeatedly brought before Government officials and Courts of law within but a short time of the event without once, so far as their Lordships know, having any doubt cast upon its validity. It is very probable, though not absolutely proved, that before 1776 some ghatwali tenure of these lands had existed in this family for many years and that Captain Brown's policy was to confirm what he found already existing. The grant to Subhao Singh of land previously held by

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

that proprietor would be explicable and regular, if Subhao Singh either surrendered this estate, already held on a ghatwali tenure, in consideration of a re-grant from the new ruling power on satisfactory terms as to jumma and service, or if, being already holder on joint rent and service terms, subject to revision at the will of the old ruling power, which is known historically to have been common in Mogul times, he now received and accepted from the new ruling power a grant, which fixed his rent and his service favourably and for a term, which was expected to be, and soon actually became, a term in perpetuity. It is probable enough that Subhao Singh would turn from the setting to the rising sun and make new terms if he could. It is certain, from the map in Mr. Macpherson's report and from the history of the district, that, if Hundwa was not a ghatwali tenure, whatever be the time of its first creation, a singular and perilous gap was left for no discoverable reason in the line of defences consisting of ghatwali tenures, which was devised to protect the lands, known as the Dâman-i-Kôh. In upholding old titles, of which the authentic records are still forthcoming, their Lordships are justified in making all reasonable presumptions to explain them and give them validity. Certainly in making either of these assumptions they are not trespassing beyond the bounds either of actual probability or of legal precedent, and as the alternative would be either to disregard express words and to leave them no force at all, or else to assume that what has been treated as a good title for over a century is really an instance in which an official, unsuspecting and unsuspected, has outstepped the limits of his unknown power, their Lordships have no hesitation in saying that the grants of Captain Brown and Mr. Dickinson created a valid permanent service tenure of the estate of Hundwa.

It must be conceded that from the time of Purandar Singh to the present day no Zemindar of the Hundwa estate has ever been personally appointed ghatwal either by Government sanad or otherwise. The fact is common ground. It may be observed that, if the fact be material in this case, the consequences would not be those contended for by the Respondents, for if a person enters into possession of a ghatwali jaghir, not having obtained the appointment which is required to make him the lawful holder of it, his possession is without title at all, and until by prescription or otherwise he acquires a right which he is capable of alienating—a question which does not arise here—the lack of a sanad of appointment is really the proof of the defect of his title, not of the completeness of it. In this case, however, the grant of 1794 expressly makes the tenure hereditary without any renewal of the appointment. It is a grant to the named persons and their descendants, and the direction to the Mutsaddis is, "Nor shall you demand production of fresh sanads every year." Nor is this inconsistent, as the Respondents contend, with the grant being a service grant at all. Their Lordships are unable, however, to accept the argument that in this case the lands are merely subjected to a pecuniary charge, so that the personality or the appointment of the holder would be of no importance. The tenure-holder has to raise and maintain the force, not merely to pay for it. Whatever may be the other incidents, it is clear that these grants impose on him the duty of providing a specific armed force and of attending with it upon the competent Government officers

whenever this service is required of him. What can this be but a service tenure?

Again, it is objected that true heritability is inconsistent with a ghatwali tenure when the office is of a personal character. A jaghir may, it is true, be held by a ghatwal on the terms of personal employment and service of the strictest kind and in the most complete subordination. In such a case selection and appointment are the natural commencement of the service, and its determination in fact involves the determination of this highly personal tenure. Where everything depends on personal qualifications and exertions a heritable tenure is out of place. On the other hand, services may be due in bulk and the obligation of the ghatwal may consist, not in personal guardianship of a particular post, but in providing the service of others who are competent to discharge the services in person. The obligation to embody and keep up an armed force of 300 men with an appropriate staff of officers is pre-eminently an obligation of this kind. It is personal in that the grantee under this tenure is himself bound to the provision of this force from time to time and is not merely chargeable in respect of the expense, or bound to make a contribution to the expense of forces embodied and kept on foot by others. It is personal in that the lands are granted upon this tenure in order that out of their produce the obligation in question may be discharged by the grantee. It is, however, impersonal in that the very nature of the service is rather one of purveyance than of arms. For this purpose the ghatwal must be a person of property, and for that reason he is the grantee of lands as ghat wali lands; but he need not be himself a soldier or watchman, and for that reason also the lands, though ghatwali lands, may descend to heirs without personal selection and appointment, as is the case here. Since the tenure is a service tenure, the lands are liable to forfeiture if the obligation of service is expressly repudiated, while the rights of the ruling power are similarly sufficiently safeguarded by holding that the succession of an heir incapable of rendering even the vicarious service involved in the provision of this armed force, might be treated as being in itself a ground of forfeiture in the person of that successor, if not in the persons of the entire family, for it is what might be called an anticipatory repudiation. It is enough to indicate this principle as an answer to the argument that the absence of actual appointments and the presence in the Parwana of 1794 of an actual dispensation from periodic sanads are both fatal to the existence of any true ghatwali tenure. It is not necessary to decide whether and to what extent an appearance of personal unfitness in a particular heir would operate to disable him from succession as ghatwal.

In view of the considerations above set out, their Lordships have arrived at the following conclusions with regard to the construction and effect of the potta of 1776 and the sanad of 1794 :—

(1) The instruments contain words of grant and purport to make grants on behalf of and in the name of the East India Company. They must be so interpreted, nor can this construction be defeated merely because there may be ground for thinking that the grantees were already holders of these lands under earlier grants or on customary service terms. The tenure is therefore a Government tenure. A similar construction was adopted by the High Court of Calcutta in *Raja Lelanund's* case (3).

(3) 3 W. R. 84 (H. C.) (1865); L. R. I. A. Sup. Vol. 181; 13 B. L. R. 124 (P. C.) (1873).

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

(2) As the grants are expressed to be istimrari mokurrari grants, and as in fact the lands have for generations descended in the family of the Defendant from ancestor to heir, they are a perpetual and hereditary tenure. A similar conclusion was arrived at in *Munrunjun Singh's* case (3) when a sanad of 1777, granted by Captain Brown in similar terms, was under construction.

(3) The express obligation imposed on the grantees, as an integral part of the grant, to support a specified number of Barkandases, and with them to attend the Huzur when required, shows that the tenure is a service tenure and is ghatwali in its nature.

(4) A tenure so granted is inalienable and indivisible [*Hurlal Singh* v. *Jorawun Singh* (5)] and cannot be sold in execution of a decree against the person of the incumbent of the office of ghatwal for the time being [see *Nilmoni's* case (7) and *Joykishen Mookerjee* v. *Collector of Burdwan* (8)].

(5) Neither by the terms of the grant nor by the general law applying to such ghatwali tenures is an actual appointment of the next heir to be ghatwal in the room of his predecessor requisite, nor is actual performance of the stipulated ghatwali services from time to time necessary. Readiness and willingness to perform them when required may be inferred where there is no proof of any refusal to perform and where performance within a reasonable time, if required, is not shown to have become impossible.

At the last stage of this argument the Respondents' counsel raised the further contention that Hundwa is in any case locally in Kharakpur, and that, by a well-established local custom, now always recognised, Kharakpur ghatwali lands are alienable. They disclaimed any contention that a family custom existed, and put the point solely as one of local custom. Their Lordships might well have refused to entertain this contention, for it involves important considerations of fact as well as of law, and it had not been determined or even discussed in the Courts in India. It was, however, said to rest on a series of decisions of long standing, and their Lordships, loth to appear to cast any doubt upon such authorities by refusing to take account of them on the ground of a rule of procedure, have determined, under the circumstances, to deal shortly with this contention.

The proposition that Hundwa is in Kharakpur must, in consequence of the litigation of 1812 to 1819, to be mentioned hereafter, be now regarded as a purely topographical statement. What the area or the site known as Kharakpur may be is a matter for evidence, and no evidence was given about it. It is further a matter as to which the Courts in Bengal have original means of knowledge which their Lordships do not possess, and for this reason the fact that the contention was never submitted to those Courts becomes doubly significant. If it is well founded, the whole of the discussions and proofs, which led to two long hearings and two elaborate judgments, would have been obviated *in limine*, for the whole point of the defence disappeared, if Hundwa was by binding custom and by decisions recognising that custom an alienable tenure. If such a crucial point was never made, it was probably because the local knowledge of the Courts themselves would have compelled

(3) 3 W. R. 84, 87 (H. C.) (1865); L. R. I. A. Sup. Vol. 181; 18 B. L. R. 124 (P. C.) (1873).

(5) 6 S. D. A. Rep. 169 (1837).

(7) L. R. 9 I. A. 104; s. c. I. L. R. 9 Cal. 187 (1882).

(8) 10 M. I. A. 16; 1 W. R. (P. C.) 26 (1864).

them to overrule the point as soon as stated.

A local custom is one binding on all persons in the local area within which it prevails, and differs entirely from a family custom, binding only on members of the family as to rules of descent and so forth [*Rajkishen* v. *Ramjoy* (9)]. It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence as to the prevalence of the custom in that area [*Marquis of Anglesey* v. *Lord Hatherton* (10) and *Hiranath* v. *Ram Narayan* (11)]. Except so far as analogy may serve to explain anything that is in itself obscure, the customs of other localities are not relevant and such rules in cases relating to Birbhum or Pachete are not in point.

It has been long held that certain ghatwali tenures in this district are alienable with the consent of the Zemindar. This was decided after an elaborate examination of the evidence in *Kali Pershad* v. *Anund Roy* (12) by their Lordships' Board. This authority has repeatedly been followed and applied in India, and, so far as the reports show, without proof of the custom being required over again. What, however, does this amount to? Their Lordships' Board pointed out that ghatwali tenures are generally inalienable but that evidence may be given to show that in a certain district they are by local custom subject to special incidents in this regard. Such evidence was forthcoming and was to the effect that many transfers had taken place in Kharakpur without being questioned or questionable, provided that the Zemindar of Kharakpur expressly assented to and accepted the transferee as his ghatwal or indicated an implied acceptance by an absence of objection after twelve years' notice of the transfer. This evidence satisfied both the High Court and the Judicial Committee. It is plain that the custom depended on the proof, and as the tenure in question was one in the Zemindari of Kharakpur and under its Zemindar, it could have no reference to ghatwali tenures not under him or forming part of his Zemindari. The personal intervention or omission to intervene on the part of the Zemindar could not be material unless the ghatwali tenure, to which it applies, was one as to which the Zemindar had the right to appoint to the office of ghatwal, and this view is confirmed by the further observations of Lord Fitzgerald, that the conclusion arrived at is encouraged by the fact that the purposes for which the Kharakpur ghatwals were originally appointed no longer existed. In sundry cases, both previously and subsequently decided in India in conformity with this decision, the ghatwali lands appear always to have been held under the Zemindar of Kharakpur [*Lelanund* v. *Doorgabutty* (13)]. The explanation of the customary rule, that the Zemindar's consent is necessary, is said in *Sartuk Chunder* v. *Bhugut Bharut Chunder* (14), which was followed in *Lelanund* v. *Doorgabutty* (13) to be that the Zemindar is responsible to Government if the ghatwal's services, which are public services, are not performed, and so ought in self-defence to have a veto on any transfer. If this is so, it is an additional reason for saying that, until the Government releases

(9) I. L. R. 1 Cal. 186 (P. C.) (1872).
(10) 10 M. & W. 218 (1842).
(11) 9 B. L. R. 274 (1872).
(12) L. R. 15 I. A. 18: s. c. I. L. R. 15 Cal. 471 (1887).
(13) W. R. [1864], p. 249.
(14) S. D. A. Rep., 1858, p. 900.

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

or abolishes the services in some effective and lawful manner, the tenure-holder remains bound and holds the lands without power of alienation [see too *Nilmoni's* case (7)].

With regard to Hundwa this is not so. All that can be said of *Ram Chandra Marwari* v. *Keshobati Kumari* (15) is that, if the Udit Narain Singh then concerned was the Appellant's father, as may be the case, no one seems to have thought it advisable on that occasion to rely on the inalienability of his tenure. Nothing, therefore, comes of it. Their Lordships see no ground for thinking that the custom of Kharakpur, relied on by the Respondents' counsel, has any application to ghatwali tenures, which, like Hundwa, are independent of the Kharakpur zemindari, even though they may be not far off Kharakpur.

The ultimate conclusion of the High Court was that "the property mortgaged by the late Udit Narain Singh was a ghatwali tenure not held by him as a ghatwal," and it was on this ground that they decided the suit in favour of the mortgagee. The proposition requires somewhat close examination.

It is true that Udit Singh neither himself rendered the services prescribed in Captain Brown's potta, nor appeared to be conscious of any legal restrictions upon his power of alienating the lands of Hundwa. In the first respect he differs little, if at all, from the position of his predecessors after the time of Purandar Singh; in the latter he certainly stands alone, for he was the spendthrift of the family and purported to dissipate the estate of Hundwa by all forms of alienation, nor in his life-time did anyone venture to say him nay. As, however, there is no question here of any actual assent being given either by his family or by the Government, and as the whole matter in dispute is whether his alienations were valid, the fact, that in other transactions besides the present, he purported to alienate and appeared to believe in his own power to do so, proves nothing. What is singular is that from the time of Purandar Singh the officials of the ruling power never required that the services in question should be rendered, and for long periods and in important connections even seem to have been unaware that any obligation of the kind existed.

The first matter to be cleared up is the relation of Hundwa to Kharakpur. As early as 1781 a Parwana, signed by Mr. Hastings as Governor-General in Council, records that the duties of Zemindar of the Pargana Kharakpur have been conferred on Raja Kadir Ali, and includes, at a revenue payment of Rs. 2,800, Hundwa among the estates, to which the Parwana applies. A Potta and Kabuliyat of 1796 are next forthcoming, which purport to include in Raja Kadir Ali's Zemindari of Kharakpur the Pargana Hundwa. To these documents, however, and to the transactions, whatever they were, out of which they arose, no ancestor of the present Appellant was a party, and although the East India Company itself is a party, still, as they relate only to the jumma payable and to other ordinary obligations of Zemindars, and as the jumma for Hundwa was in fact paid through the Raja of Kharakpur, these documents do not greatly advance matters. What is of more significance is that in 1802 the result of the Permanent Settlement for Hundwa was registered as involving the annual payment of a jumma of Rs. 2,701 under

(7) L. R. 9 I. A. 104: s. c. I. L. R. 9 Cal. 187, 208 (1882).

(15) L. R. 36 I. A. 85: s. c. 13 C. W. N. 1102 (1909).

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

Captain Brown's potta; that Purandar Singh is then recorded as the present possessor, personal and not hereditary; and that in the "Remarks" column it is stated that the potta was "subject to ghatwali," while the Parwana of 1794 is recorded as a sanad, under which the persons named, other than Purandar Singh, were in possession as heirs of their father.

Between 1809 and 1819 protracted litigation was carried on between Kadir Ali, then Zemindar of the Kharakpur Mahals, and the family of Purandar Singh, recently deceased, with reference to the estate of Hundwa. Kadir Ali asserted a right to nominate the ghatwal, who was to succeed to Purandar Singh, a claim which eventually Jhabban Singh disputed, asserting that he was mokuraridar of Pargana Hundwa with heritable rights. Though he was also described as malik Zemindar, this is not enough in such a context to show that he alleged that his estate was not a ghatwali tenure. In order to inform itself as to the ownership of the disputed Taluqas, the Court referred it to the Collector of the District to report, who the Zemindar of the lands in litigation really was, although this would appear to have been one of the very questions which arose for the determination of the Court itself. This report, which is now not forthcoming, was in favour of the Raja of Kharakpur. Nevertheless, when the case was heard in the Civil Court of Bhagulpore in 1812 and on appeal in the Court at Murshidabad in 1819, both judgments were in favour of Jhabban Singh, the ancestor of the present Appellant. Accordingly, no further appeal being taken, the claim of the Raja of Kharakpur to be entitled to appoint the ghatwali of Hundwa, whenever a vacancy occurred, was finally dismissed. It is not necessary to consider how far, if at all, these judgments, which as between the holders of the two estates are *res judicata*, would technically preclude the present Respondents, as mortgagees from one of the holders of Hundwa, from re-opening this question as against their mortgagor's heir, for in fact no attempt has been made to do so, and in no event after the lapse of a century would their Lordships have been disposed to entertain or to make criticisms upon judgments, arrived at upon ampler documentary materials than those now available, which have, for long, laid at rest a claim once so keenly advocated.

These decisions, which separate Kharakpur from Hundwa so far as this appeal is concerned, have a profound effect on the position of Hundwa. Whatever else Hundwa may be now, it is not nor ever was for present purposes a ghatwali estate under Kharakpur and its rajas. Comment is, however, justly made that, with the documents of 1776 and 1794 before them, neither Court pointed out nor apparently was invited to hold that, as they granted Hundwa to Subhao Singh and to Purandar Singh on the terms of services to be rendered to the Government, the holders of Hundwa were therefore Government ghatwals and could not be the ghatwals of the Raja of Kharakpur. Furthermore, as has been already stated, the reports relating to the Santal Parganas generally and to Kharakpur and Hundwa in particular, nowhere mention Hundwa as an original and direct Government ghatwali. Thus Mr. Sutherland in 1819 records the history of the estate of Hundwa, but nowhere suggests that the holders owed military service to the ruling power. In 1833 a Special Commissioner, Mr. Ward, deals with the relations of the Rajas of Kharakpur and Hundwa from Mogul times downwards and refers in some detail to the potta of 1776, to the Parwana

SATYA NARAIN SINGH *v.* SATYA NIRANJAN CHAKRAVARTI.

of 1794 and to the litigation above discussed, and records his conclusion thus :—

"24. Under the foregoing history of Hundwa the tenure under which the jagir is held can only be considered ghatwali subject to the payment of a certain fixed rent and other conditions of service, but claimed by Jhuban Singh as a Zemindari for which no revenue has been paid since 1828."

All that can be said of these and similar passages from other and later reports is this. The writers were dealing with large tracts of country and were chiefly concerned with questions strictly affecting the Government revenue. Ghatwali services, as services to be actually called for and performed, were not in question. Their sources of information were largely hearsay. Dr. Buchanan, for example, records that he was only told the family account of Hundwa matters and did not hear the other side. It is doubtful if they had the opportunity of seeing the actual documents of 1776 and 1794, but if they had, the interest of the Government in the service of the Barkandases of Hundwa was so inconsiderable that it is small wonder if the somewhat complex language of those instruments did not deeply engage their attention. High as the reputation of these reports for care and research deservedly stands, there can be nothing surprising if an error is made in the account given of particular rights connected with a single estate, where the value of those rights to the Government must be trivial and on the whole problematical, and where their relevancy, as this case shows, chiefly regards the private rights of heirs as against the incumbent for the time being. If, in the result, their conclusions were erroneous, they can, fortunately, be corrected by attaching the real weight to the potta and the sanad and upholding the rights as disclosed therein, without further considering the mistaken accounts of them given by some officials and the pardonable ignorance of them displayed by others. Nor must it be forgotten that the entry in the register of permanent mokurrari right in 1802 is a precise statement to the contrary and rests on a precise reference to the material documents of title, and that the entries in the record-of-rights of 1874-79 and 1898-1907 are not inconsistent, to say the least of it, with the same state of things; [see observations in *Lelanund Singh* v. *Munrunjun Singh* (3)].

The High Court appears to have attached little or no importance to the express direction in the sanad of 1794 that "production of fresh sanads every year is not to be demanded," and dwells on the fact that since the death of Purandar Singh no proprietor of Hundwa had applied for a renewal of the Istamrari Mokurrari ghatwali grant or had been required to do so. For a hundred years no muchlika or kabuliyat, undertaking military service, had been given. No ghatwal of Hundwa had been appointed by Government. Udit Narain Singh "was merely *de facto* holder, without licence from the ruling power, of the lands attached to the post of ghatwal," and it was as such that he mortgaged these lands to the Plaintiffs. His son, who succeeds by inheritance, cannot, it is concluded, impugn his title or ask that it should be investigated, for, the ruling power not being represented, its permanent title cannot be gone into.

It appears to their Lordships that, as this decision does not purport to rest on prescription or adverse possession of the

(3) 3 W. R. 84 (H. C.) (1865); L. R. I. A. Sup. Vol. 181; 13 B. L. R. 124 (P. C.) (1873).

lands by Udit Narain or his predecessors against the Government, it must be rested on legal assumption that, if during a sufficiently long period the incumbent of the office of ghatwal does not happen to be called on to render the services which he is bound to render when required, the quality and incidents of his tenure of ghatwali lands change, at any rate so long as this abeyance of the services lasts, and that he becomes, to the prejudice of his heirs—who are, be it said, heirs of ghatwali lands with the advantages as well as the disadvantages attaching thereto—a full mokurrari istamrari proprietor for the time being. This seems to be involved in the argument, on which Roe, J., bases his conclusion, for he propounds this dilemma. If the Defendant's right to succeed was a right to succeed to Udit Singh's interest as ghatwal, there was nothing to succeed to, for Udit Singh, if ghatwal at all, held nothing heritable in virtue of that office. If, on the other hand, the right to succeed was a right to succeed to the right and interest, which Udit Singh then had even *pro tempore*, that right was one which Udit Singh could and did encumber in favour of the Plaintiffs, and since the Defendant is not in a position to discharge the encumbrance, he must suffer the legal consequences and submit to have these lands alienated from him. In truth the Defendant is not asking, as the learned Judge seems to have thought, to have the Government's title investigated. He is relying on his own interest in the tenure of the Hundwa estate, which on the true construction of the original grants bears the character of a ghatwali tenure with its legal incidents. He does not set up a *jus tertii;* his case is not that there is an interest outstanding in a stranger to the suit—the Government, to wit—in which he seeks some defence against a decree for sale against himself, but he alleges a title in himself to succeed his father in the enjoyment of lands which, as against himself, his father had held without any right to encumber them in favour of strangers. This, and this alone, is the relevancy in the present suit of the circumstance that the lands are held on ghatwali tenure, for the ghatwali services themselves have long been so insignificant that little remains in the tenure, except potentially, beyond the quality of being heritable, impartible and inalienable.

To terminate the ghatwali character of the lands, it seems to their Lordships that it is necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of a surrender and re-grant of the lands on new terms, or, at any rate, of a release of the right to appoint the ghatwal and call for the performance of the services. Nothing of this sort, at any rate, is shown. The burden of proof is on the mortgagees, and the Government not having been made a party, such proof may even have been for the time being inadmissible. Even the corps of Barkandases was still in existence within living memory, whether in embryo or in dissolution does not matter. Not to mention the dubious exploits of this force in the Santal rebellion of 1855, when with their bows and arrows they were said to have slain 300 rebels at the cost of three casualties, there was called as a witness a veteran member of the force, who still held a jagir as such, and down to twenty years before had continued to receive from the Raja presents of money on the occasion of weddings in his family. The trial Judge does not deal with this evidence at all, though he comments naturally and adversely on the

SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTI.

supposed battle, by which the force of Barkandases quelled the revolt of the Santals.

As is well known, the estate of Kharakpur was the subject of long and complicated litigation arising out of claims to re-assess or to resume ghatwali lands where, as was no doubt generally the case, ghatwali services had ceased to be of practical importance. Long before 1765 ghatwali tenures under the Zemindar of Kharakpur had been created by the various holders of those lands for their own purposes, and as late as 1770-1785 Mr. Cleveland, who managed the estate during the minority of Kadir Ali, followed the same policy. The lands thus made the subject of ghatwali tenure were included in the Permanent Settlement of the whole Kharakpur estate in 1796, and the Government of Bengal sought long afterwards to re-assess these lands to a further jumma beyond that fixed in 1796, on the ground that local Zemindars had ceased to be called on to render police services, since the Government had itself undertaken the necessary Thanadari organisation (Regulations 49 and 50 of 1792). The claim was finally dismissed by their Lordships' Board in 1855 [*Raja Lelanund* v. *The Government of Bengal* (6)]. Now there is a clear distinction between the case where the Government thinks fit itself to perform duties theretofore performed by ghatwals and the case where the ghatwali service is formally abolished or discharged [*per* Sir Barnes Peacock, *Lelanund* v. *Munrunjun* (3) and see the analogous case as to a palayam in Madras—*Malayandi Appasami Naicker* v. *Midnapur Zemindary Co.* (16)]. In the Kharakpur district it does not appear that there has been any formal termination by law of ghatwali public services apart from the above-mentioned composition *inter partes* with the Zemindar of Kharakpur.

It is true that in Appendix XVII to Mr. Macpherson's Report on the Santal Perganas, which contains extracts from Dr. Buchanan's MSS., there occurs this passage: "By far the greater part of Hundwa is still in the possession of a Ksl etauri family, although it pays to the Raja of Kharakpur Rs. 2,372 a year; but it has been entirely exempted from military service." What foundation there may have been for this statement remains unknown. It may be a lax allusion to the Regulations of 1792. At any rate, Roe, J., records: "To this day no outpost has been set up in Pargana Hundwa, which is still a non-police tract." After 1855 there followed numerous suits, in which Raja Lelanund endeavoured to resume his shikmi ghatwali lands, alleging that he was entitled to disclaim the services and thereupon to oust the ghatwal, and also that by his agreement of compromise with the Government for an annual money payment in lieu of further services, the ground for the appointment of ghatwals and for the tenure of ghatwali lands had disappeared. These attempts failed, and it was held that he could not renounce the services without the consent of Government or some legislative or administrative extinction of them [*Kooldeep Narain* v. *The Government of India* (17) and *Lelanund* v. *Munrunjun* (3)]. As long as they were ready and willing to render services, if required, the Zemindar could not put an end to the ghatwals'

(3) 3 W. R. 84 (H. C.) (1865); L. R. I. A. Sup. Vol. 181; 13 B. L. R. 124 (P. C.) (1878).
(6) 6 M. I. A. 101 (1855).
(16) L. R. 48 I. A. 100: s. c. 26 C. W. N. 108 (1921).

(3) 3 W. R. 84 (H. C.) (1865); L. R. I. A. Sup. Vol. 181; 12 B. L. R. 124 (P. C.) (1878).
(17) 14 M. I. A. 247; 11 B. L. R. 71 (1871).

SATYA NARAIN SINGH *v.* SATYA NIRANJAN CHAKRAVARTI.

services, whether required or not, even by compromising with the Government and substituting a rent for the former services, for, as against the tenure-holders, this was *res inter alios acta* [see *Lelanund* v. *Munrunjun* (3)].

Although none of these decisions governs the present case, they involve the principle that where a tenure is created, as distinct from a mere personal employment, the tenure-holder has such an interest in the rendering of the services as entitles him to such benefit of the tenure as accrues from his readiness and willingness to perform his obligation. The service is not a mere burden on the land; it constitutes a personal right in so far as the land held on that condition is concerned, and a personal obligation in so far as concerns the grantor, which, being in the nature of a public obligation, cannot be waived by the grantor for his own advantage, nor, being in the nature of a title to the lands, can be relegated to desuetude for the mere disadvantage of the ghatwal. The truth is that, where rights can once be shown to have been established and continue to be vested in living persons, obsolescence and desuetude are popular expressions rather than solid legal grounds for refusing a continuing recognition to the right as originally established.'

One circumstance remains to be mentioned, if only for the purpose of pointing out that no definite conclusion can be drawn from it one way or the other. For a time the revenue assessment on the Hundwa lands was paid to the Government direct, but now and for a century or so past—in fact ever since the time of the Permanent Settlement—it has been paid to the Zemindar of Kharakpur by the Hundwa proprietors, he being assessed to the revenue on the lands both of his own Zemindari and on those of Hundwa too, and paying the revenue contribution direct in respect of both. As it is now settled that Hundwa is not an under-tenure to Kharakpur, one obvious inference from these facts is finally negatived. The other, that there is a direct liability of Hundwa for revenue payments, which are for convenience collected indirectly, is, after all, immaterial when once it has been decided that the ghatwali tenure of Hundwa, as it now exists, rests on grants made directly by the East India Company. The explanation suggested for the bare fact is that in disturbed times the transport of treasure through the jungles from Lagwa in Hundwa to Bhagulpore was precarious, but as it is not shown to have been any safer from Kharakpur to Bhagulpore, and as in any case Hundwa's money must have run the risks of transport to Kharakpur, the explanation is unconvincing. Fortunately, it is also academic.

In the result the appeal succeeds. The judgments of the High Court and of the Subordinate Judge in favour of the Plaintiffs-mortgagees ought to be set aside and their action should be dismissed with costs both here and in both Courts below. There is a cross-appeal by them consolidated with the Defendant's main appeal, which refers to the interest to be allowed to them upon a decree, if any, in their favour, and this cross-appeal fails and should be dismissed with costs.

Their Lordships will humbly advise His Majesty to the above effect.

Solicitors: *Messrs. Watkins & Hunter* for the Defendant-Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Plaintiffs-Respondents.

G. D. M.

(3) 3 W. R. 84 (H. C.) (1865); L. R. I. A. Sup. Vol. 181; 13 B. L. R. 124 (P. C.) (1873).

PRIVY COUNCIL

[Appeal from Bombay.]

Lord Dunedin.
Lord Phillimore.
Sir John Edge.
Mr. Ameer Ali.
Sir Lawrence Jenkins.
1923,
Heard, 19, October.
Judgment,
19, October.

Khanderao Vithoba Kore, since deceased (now represented by Bhimabai), Appellant,
v.
The Municipal Corporation of Bombay and anr., Respondents.

City of Bombay Municipal Act (III of 1888, Bom), secs. 91, 296—Street improvement scheme—Power of municipality to acquire additional land for recoupment.

The language of sec. 296 of the City of Bombay Municipal Act clearly authorises the Commissioners to acquire land outside the regular line of the street proposed to be improved but contiguous to it for the purpose of leasing, selling or otherwise disposing of the same with a view to recoupment. The discretionary power given to the Commissioners is not untrammelled, being subject under sec. 91 of the Act to the discretionary power of the Government.

Trustees for the Improvement of Calcutta *v.* Chandra Kanta Ghosh (1) *and* Galloway *v.* London Corporation (2) *referred to.*

This was an appeal from a decree of the High Court of Bombay dated the 21st October 1920.

The suit in which that decree was passed was brought by the Appellant on behalf of himself and other land-owners of the Mahim Land-owner's Association for a declaration that the Respondents were not entitled to take from the Plaintiff and other land-owners more land than was actually required for the extension and widening of 2 roads in the Mahim District. The Respondents claimed the right to acquire such land under sec. 296 of the Bombay Municipal Act (III of 1888) as it had seemed and did seem expedient for them to do so.

The suit was heard by a Division Bench composed of Macleod, C. J. and Fawcett. J., who decided that the proposed acquisition was within the powers of the Corporation.

The Appellant appealed to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and *Kenworthy Brown* for the Appellant contended that sec. 296 of the Bombay Municipal Act, III of 1888, did not give the Corporation power to acquire land for the purposes of recoupment.

The municipality might possibly purchase surplus property for ornamental or any other purpose which would come within the term "Improvement" but their powers are limited to the requirements of the street.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Respondents were not called upon.

Their Lordships' Judgment was delivered by

Lord Dunedin.—In this case the question arises upon what is proposed to be done by the Municipality of Bombay in connection with a projected improvement of a public street. The municipality propose in improving a certain street, not only to widen it, but to take a certain amount of extra ground contiguous to, but beyond, the actual limits of the widened street, with the avowed intention of erecting new buildings thereon and afterwards reselling the land with the buildings upon it. The powers of the municipality with

(1) L. R. 47 I. A. 45: s. c. I. L. R. 47 Cal. 800; 24 C. W. N. 881 (1919).
(2) L. R. 1 H. L. 34 (1866).

regard to this matter are dealt with in sec. 296 of the City of Bombay Municipal Act, 1888, which is as follows :—

"(1) The Commissioner may, subject to the provisions of secs. 90, 91 and 92—(a) acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street or of making any new public street, and the buildings, if any, standing upon such land; (b) acquire, in addition to the said land and the buildings, if any, standing thereupon, all such land, with the buildings, if any, standing thereupon, as it shall seem expedient for the corporation to acquire outside of the regular line, or of the intended regular line, of such street; (c) lease, sell, or otherwise dispose of any land or building purchased under cl. (b)."

Reference has been made to certain cases, but it is perfectly clear that in cases of this sort each must be determined upon its own circumstances, and its circumstances consist first and foremost of the precise terms of the Act in question and secondly of the thing which is proposed to be done. In one sense no other case is an authority; but at the same time certain principles have been very clearly laid down by this Board in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1). In that case what was proposed to be done was similar to what is proposed to be done in the present case, that is to say, the land was going to be acquired for the purposes of future sale and, if prices realised their expectancy, part of the expense to which the municipality had been put would be recouped. Sec. 42 of the Calcutta Improvement Act, 1911, provided :—

"Any improvement scheme may provide for—(a) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme."

Lord Parmoor, in delivering the judgment of their Lordships, says this at page 53 :—

"It is not immaterial to observe that there was at the date of the passing of the Calcutta Improvement Act no novelty in the recoupment principle."

Then he cites *Galloway* v. *London Corporation* (2) and continues :—

"But whether this principle has been sanctioned in the Calcutta Improvement Act must be determined on the language used, and the case of *Donaldson* v. *South Shields Corporation* (3) shows, if authority is necessary, that where an Act authorises land to be taken for the actual works only, a local authority, or other public body, will be restrained from taking more than is actually necessary for such works."

Their Lordships have no doubt that that is the correct principle. One, therefore, has to find in the Act something more than the mere possibility of acquiring land for the purposes of the improvement where it is proposed to do what is proposed to be done in this case. When their Lordships come to this Act they find that the case is *a fortiori* of the Calcutta Case. It appears to their Lordships that it is clear beyond all doubt, not only that the municipality may acquire land for the purpose of making a street, but that they may acquire, if it seems expedient, land outside the regular line of such street. If the matter had ended there it might have been said that the land outside the street was only meant to form an appendage to such street; but then comes cl. (c) which says : that they may "lease, sell, or otherwise dispose of any land or building purchased under cl. (b)." This seems to their Lordships to point to recoupment with almost the greatest certainty that could be expressed in words. The powers no doubt are drastic, but they are not alto-

(1) L. R. 47 I. A 45: s c I. L R. 47 Cal. 500; 24 C. W. N. 881 (1919).

(2) L. R. 1 H. L 34 (1866).

(3) 79 L. T. 685; 68 L. J. Ch 102, 162 1899).

gether untrammelled, because when sec. 91, which is one of the sections to which sec. 296 is subject, is looked at, it is found that if the Commissioner is unable to acquire any property by agreement Government may, in their discretion upon the application of the Commissioner made with the approval of the Standing Committee, order proceedings to be taken for compulsory acquirement; so that in the discretionary power of the Government would always be found a certain limitation over and above the limitation which their Lordships think necessarily follows from the fact that what is done must be done in the course of making or widening the street, for it appears to their Lordships that the municipality certainly could not take land which was not in contiguity. Their Lordships think that this result would follow notwithstanding any of the somewhat more vague words which are used in the earlier sections of the Act.

In these circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: *Messrs. Hughes & Sons* for the Appellant.

Solicitors: *Messrs. Sandersons & Orr, Dignams* for the Respondents.

G. D. M.

[CRIMINAL REVISIONAL JURISDICTION.]

PRIVY COUNCIL APPLICATION.

MOOKERJEE, J. CHATTERJEA, J. 1923, Heard, 5, October. Judgment, 8, October.	BARENDRA KUMAR GHOSE, Petitioner, v. THE KING-EMPEROR, Opposite Party.

Calcutta High Court Letters Patent, cl. 41—Leave to appeal, on behalf of a convicted prisoner, to the Judicial Committee of the Privy Council, when may be granted—Principles regulating the Judicial Committee's practice in granting or refusing leave to appeal in criminal cases

The prisoner was tried at the High Court Criminal Sessions, Calcutta, by a Judge and a special jury on a charge of offences punishable under secs. 302 and 394 of the Indian Penal Code. He pleaded "guilty" to the charge under sec. 394, and "not guilty" to the charge under sec. 302. The jury brought a verdict of "guilty" of murder with the result that he was convicted and sentenced under sec. 302. The Advocate-General granted a certificate under cl. 26 of the Letters Patent. It was contended inter alia *at the hearing of the reference under cl 26 that the trial Judge had misdirected the jury on a point of law relating to the interpretation of sec. 34 of the Indian Penal Code. The Full Bench who heard the reference dismissed it. Thereupon the prisoner applied for a certificate under cl. 41 of the Letters Patent that his case was a fit one for appeal to His Majesty in Council:*

Held, granting the certificate—*That the case was a fit one for appeal to His Majesty in Council inasmuch as the judgments by the Full Bench at the reference established that there has been a deep-seated divergence of judicial opinion in every superior Court in India as to the true interpretation of sec. 34 and inasmuch as the interpretation of the section not only goes to the root of the matter, but is of great and general importance and of frequent occurrence in the administration of criminal law wherever the Indian Penal Code is in operation.*

Principles regulating the practice of the Judicial Committee in disposing of applications for leave to appeal in criminal cases adverted to.

Held, also, following the usual practice—*That the prisoner should not be re-*

quired to furnish security for the costs of the Crown.

DAL SINGH v. KING-EMPEROR (40) *referred to.*

The facts of the case will appear from the judgment.

Messrs. H. D. Bose, Arabinda Ray and *S. C. Chaudhuri* for the Petitioner.

Messrs. B. L. Mitter and *S. Ray* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is an application for leave to appeal to His Majesty in Council under cl. 41 of the Letters Patent, which is in the following terms :—

"41. And we do further ordain, that from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of Original Criminal Jurisdiction, or in any criminal case, where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised Original Jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to us, our heirs, or successors in Council: Provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advice of our Privy Council, hereafter make in that behalf."

The Petitioner Barendra Kumar Ghose was placed on his trial at the last Sessions, before Mr. Justice Page and a special jury, on charges under secs. 302 and 394, I. P. C. The jury returned a unanimous verdict of guilty on the charge of murder and Mr. Justice Page thereupon sentenced the prisoner to death. A certificate was then obtained on his behalf from the Advocate-General, under cl. 26 of the Letters Patent, that in his judgment, whether an alleged direction and an alleged omission to direct the jury did not in law amount to a misdirection should be further considered by the High Court. The question was accordingly argued before a Full Bench. On the 26th September 1923, the Full Bench delivered judgment and ordered that the application made by the prisoner under cl. 26 do stand dismissed. The present application was made on the 3rd October 1923 for a certificate under cl. 41 that the case is a fit one for appeal to His Majesty in Council. The matter has been exhaustively argued before us on behalf as well of the prisoner as of the Crown and our attention has been invited to the relevant authorities on the subject.

It is indisputable that as His Majesty the King is supreme over all persons and Courts within his dominions, a right of appeal in all cases, civil and criminal, to the King in Council, exists, from the highest Court of each separate colony, province, state or possession, whether it be a Court of error or not, except so far as the prerogative in this behalf has been expressly surrendered; *Cushing* v. *Dupuy* (1) and *Re*: *Wi Matua's Will* (2). Criminal proceedings, however, are, in practice, reviewed, only if it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. The

(40) L. R. 44 I. A. 137; I. L. R. 44 Cal. 876; 25 Cox. 705; 22 C. W. N. 818 (1917).

(1) L. R. 5 A. C. 409 (1880).
(2) [1908] A. C. 448.

BARENDRA KUMAR GHOSE v. THE KING-EMPEROR.

Judicial Committee do not, as a rule, advise His Majesty to grant appeals in criminal cases, except where questions of great and general importance, likely to occur often, are raised, and where the due and orderly administration of the law is shown to be interrupted, or diverted into a new course, which might create a precedent for the future, and where there are no other means of preventing these consequences. Such appeals lie either by the right of grant, in pursuance of leave obtained by the Appellant from the Court appealed from, or by reason of special leave granted by the Judicial Committee. The latter appeals arise, either where the Court below does not possess power to grant leave to appeal, or where leave to appeal has been refused by the Court below, or where the leave to appeal was granted on some special point and the Appellant wishes to raise points not included in the leave to appeal; *R.* v. *Louw* (3), *Daily Telegraph Co.* v. *McLaughlin* (4), *Victorian Railway Commissioners* v. *Brown* (5) and *Albright* v. *Hydro-Electric Power Commission* (6). But whether leave is granted by the Court appealed from or by the Judicial Committee, it is plain that the answer to the question, whether the case is a fit one for appeal, must depend on the same considerations; the grant of the leave to appeal is a step ancilliary to the determination of the appeal, and the principles which regulate the ultimate decision of the appeal cannot obviously be ignored when an application for leave is examined: *Ibrahim* v. *R.* (7).

The judicial pronouncements on the subject fall broadly into two divisions, according as they were made in Indian cases or in Colonial cases. The decisions in Indian cases, again, may be conveniently considered in two groups, namely, first, those that had reference to sentences in original criminal trials governed by cl. 41 of the Letters Patent or a provision of like import, and secondly, those that arose out of Appellate decisions not subject to the operation of cl. 41 or a similar rule.

In the first group of Indian cases, the earliest decision which has been brought to our notice is that of *Poonea Khoty Moodlier* v. *R.* (8). The Appellant had been convicted at a Sessions held on the Crown side of the Court of the Recorder of Bombay on a charge of uttering a forged receipt for money, with intent to defraud the East India Company. The prisoner obtained leave to appeal from the Court of the Recorder. The Judicial Committee considered the appeal on the merits, affirmed the conviction in respect of one offence, but reversed the judgment as erroneous in respect of another offence. Important questions of law including a question of jurisdiction were involved in the appeal. The next case in point of time is that of *Aga Kurboolie Mahomed* v. *Queen* (9). The Appellants were tried on charges of assault and battery in the Supreme Court at Calcutta before Sir John Peter Grant and a jury and were convicted. A rule was granted to set aside the verdict but was discharged, Sir Edward Ryan, C. J., dissenting. The Supreme Court at the same time gave leave to appeal to Her Majesty in Council. The Judicial Committee heard the appeal on the merits and directed that the rule for new trial be made absolute; and they also intimated their hope that the indictment would not be further pro-

(3) [1904] A. C. 412.
(4) [1904] A. C. 776.
(5) [1906] A. C. 381.
(6) [1923] A. C. 167.
(7) [1914] A. C. 599, 615; 24 Cox. 174.
(8) [1835] 3 Knapp 348.
(9) [1843] 3 M. I. A. 164; 4 Moo. P. C. 239.

BARENDRA KUMAR GHOSE v. THE KING-EMPEROR.

secuted. It may be noted that when the Judicial Committee (Lord Brougham, Lord Campbell, Knight Bruce, V. C. and Dr. Lushington) heard the appeal, Sir Edward Ryan sat as assessor. These two cases, as we shall presently see, stand in a class by themselves, and were not followed in the case of *R.* v. *Eduljee Byramjee* (10). There the Petitioners applied for leave to appeal from a conviction for felony at a trial held in the Supreme Court of Bombay before Sir Henry Roper, C. J. and Sir Erskine Perry, J. and a jury who returned a verdict of guilty. Dr. Lushington who delivered the judgment of the Judicial Committee ruled that there was no power reserved to the Crown by the charter of the Supreme Court, 1823, which conferred on that Court and that Court alone full and absolute power and authority to allow or deny appeals in criminal causes. With this may be compared the decision of the Judicial Committee in *Ames* v. *R.* (11), where leave granted on an *ex parte* application to appeal from a criminal proceeding in Jersey, was recalled. The same view was reiterated in *Queen* v. *Alloo Paroo* (12), We next come to the case of *Nga Hoong* v. *Queen* (13), where an appeal was allowed from a judgment on a conviction by the Supreme Court at Calcutta in a case of murder. The prisoner was tried before Sir James Colvile, C. J. and a jury, who returned a verdict of guilty. A question of jurisdiction, which had been reserved, was argued before the full Court. The Chief Justice and Buller, J. held that the Court had jurisdiction, while Jackson, J., held that the Court had no jurisdiction. The question turned upon the construction of sec. 56 of Stat. 9, Geo. IV, c. 74. The Judicial Committee held that the Court had no jurisdiction and annulled the conviction. In *Macrea* v. *R.* (14), which was approved in *Re: Rajendra Nath Mookerjee* (15), the prisoner was convicted of offences under secs. 420 and 511, I. P. C. and was sentenced to imprisonment. The High Court of Allahabad refused to certify under sec. 32 of the Letters Patent of 1866 that the case was a fit one for appeal to His Majesty in Council. The Judicial Committee declined to grant special leave. Lord Halsbury observed that there were no doubt very special and exceptional circumstances in which leave to appeal was granted in criminal cases, but it would be contrary to the practice of the Board and very mischievous, if any countenance were given to the view that an appeal would be allowed in every case in which it could be established that there had been a misdirection by the Judge who tried the case. In *Gangadhar Tilak* v. *Queen-Empress* (16), the Judicial Committee refused to grant leave to appeal. The question raised related to the true construction of sec. 124A, I. P. C., which, it was urged, had been erroneously interpreted by Strachey, J., in his charge to the jury. Lord Halsbury observed that taking a view of the whole of the summing up, there was nothing in that summing up which called upon their Lordships to indicate any dissent from it nor any necessity to correct what was therein contained, looking at the summing up as a whole and looking at each part of what was said

(10) 3 M. I. A. 468; 5 Moo P. C. 276 (1846)
(11) 3 Moo P C 409 1844.
(12) 3 M. I. A. 488; 5 Moo P. C. 296 (1847).
(13) 7 M. I. A. 72; 4 W. R. P. C. 109 (1857).
(14) [1893] A. C. 346; L. R. 20 I. A. 90; 17 Cox. 702 (1893).
(15) L. R. 26 I. A. 242: s. c. I. L. R. 22 All. 49 (1899).
(16) L. R. 25 I. A. 1; s. c. I. L. R. 22 Bom. 528 (1897).

BARENDRA KUMAR GHOSE *v.* THE KING-EMPEROR.

by the light of what else was said. In *Subramaniya* v. *King-Emperor* (17), the Appellant was tried in contravention of sec. 234, Cr. P. Code, on an indictment in which he was charged with no less than 41 acts extending over a period of two years. The Judicial Committee annulled the conviction and sentence on the ground that the trial was prohibited in the mode in which it was conducted. In *Re: Bal Gangadhar Tilak* (18), the accused was tried before Davar, J. and a jury on charges under sec. 124A, I. P. C. and was convicted. Sir Basil Scott, C. J. and Batchelor, J. declined to grant leave and ruled that before a certificate could be granted the Court must be satisfied that there was reasonable ground for thinking that grave and substantial injustice might have been done by reason of some departure from the principles of natural justice. Reference was made to the decisions of *Dinizulu* v. *A.-G., Zululand* (19), *Ex parte Carew* (20) and *In re Dillet* (21). To the same effect are the decisions in *Clifford* v. *King-Emperor* (22) and *Arnold* v. *King-Emperor* (23), where leave to appeal was refused. It is worthy of note that in the second case, there was a clear indication that even if the Judicial Committee could sit as a Court of Criminal Appeal, it was hardly doubtful that the appeal would fail. In the first case, Viscount Haldane pointed out that it would be contrary to their constitutional duty, if the Board were to assume the position and functions of a Court of Criminal Appeal, a Court which could go into questions of evidence and procedure and could deal with the case on the same footing as an ordinary Court of Appeal. In the same way, in *Besant* v. *A.-G., Madras* (24), where important questions arose as to the scope and effect of the provisions of the Indian Press Act, 1910, the High Court of Madras refused to give a certificate. The Judicial Committee granted special leave to appeal; the decision of the High Court was, however, ultimately affirmed on the merits and the appeal was dismissed.

In the second group of Indian cases, we have instances where, in the absence of a provision like that of cl. 41 of the Letters Patent, application for special leave was made to the Judicial Committee. It will be re-called in this connection that, as pointed out in *R.* v. *Reay* (25), *Chintamon Singh* v. *King-Emperor* (26), *Ataur Singh* v. *King-Emperor* (27) and *Billinghurst* v. *King-Emperor* (28), where there is no provision like cl. 41 applicable, no Indian Court can grant leave to appeal to His Majesty in Council, and this was apparently overlooked by Wilson, J., in *Queen-Empress* v. *Nilmadhab Mitter* (29). In such cases, the remedy is by an application for special leave to His Majesty in Council. The earliest instance is afforded by the case of *Joykissen Mookerjee* v. *Queen* (30). The Judicial Committee came to the con-

(17) L. R. 28 I. A. 257: s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 866 (1901).
(18) I. L. R. 33 Bom. 221 (1908).
(19) 61 L. T. 740 (1889).
(20) [1897] App. Cas. 719; 18 Cox 625.
(21) 12 App. Cas. 459; 16 Cox. 241 (1887).
(22) L. R. 40 I. A. 241: s. c. I. L. R. 41 Cal. 569; 18 C. W. N. 374 (1913).
(23) [1914] A. C. 644; L. R. 41 I. A. 149; I. L. R. 41 Cal. 1023; 18 C. W. N. 785 (1914).
(24) L. R. 46 I. A. 176: s. c. 23 C. W. N. 986 (1919).
(25) 7 Bom. H. C. R. 77 (1870).
(26) 18 C. L. J. 119 (1908).
(27) 18 C. L. J. 121 (1913).
(28) 38 C. L. J. 406 (1923).
(29) I. L. R. 15 Cal. 60n (1888).
(30) 9 M. I. A. 172; 1 Moo. P. C. N. S. 272 (1862).

BARENDRA KUMAR GHOSE *v.* THE KING-EMPEROR.

clusion that justice had not been very well administered in the case and yet refused the application. Dr. Lushington observed that the consequences of granting an appeal in cases of this description were so exceedingly strong, they were so entirely destructive of the administration of all criminal jurisprudence, that the Board could not for a single moment doubt that they were of the greatest importance in guiding their Lordships to form a judgment. The application was thus refused, because, if it were granted, "not only would the course of justice be maimed, but in very many instances it would be entirely frustrated." This standpoint was emphasised by Sir Michael Westropp, C. J., when he was invited to grant a certificate in the case of *R.* v. *Pestonji* (31). The decision in *Maharaja Madhab Singh* v. *Secretary of State* (32) does not directly touch the question, because there the decision impeached was that of the Governor-General in Council which might be treated as a political act—an act of State—not a decision of a Court from which an appeal lay to His Majesty in Council. Similar observations apply to *Exp. Mgomini* (33), where the Judicial Committee declined to interfere with an act of the executive Government of Natal, as later on in *Tilonko* v. *Attorney-General of Natal* (34). The decisions of what were undoubtedly criminal Courts were sought to be challenged before the Judicial Committee, by special leave, in *Painda Khan* v. *King-Emperor* (35), *Muhammad Yusufuddin* v. *Queen-Empress* (36), *Birch* v. *King-Emperor* (37), *Vaithinatha Pillai* v. *King-Emperor* (38), *Balmukund* v. *King-Emperor* (39), *Dal Singh* v. *King-Emperor* (40), *Bugga* v. *King-Emperor* (41), *Kalinath Roy* v. *King-Emperor* (42), *Sayyapureddi* v. *King-Emperor* (43) and *Muruga* v. *King-Emperor* (44). In *Muhammad Yusufuddin* v. *Queen-Empress* (36), the appeal was allowed on the ground that the Magistrate who had taken cognizance of the alleged offence and had issued a warrant against a subject of the Nizam, had "acted without jurisdiction. In *Vaithinatha Pillai* v. *King-Emperor* (38), which was an appeal by special leave in a murder case, the appeal was allowed and the conviction was set aside. The Judicial Committee came to the conclusion that there was no evidence which could support a conviction for murder or abetment of murder. In *Sayyapureddi* v. *King-Emperor* (43), the sentence of transportation for fourteen years was held to be illegal, and the case was remitted to the High Court with instructions to pass a sentence according to law. In *Dal Singh* v. *King-Emperor* (40), *Bugga* v. *King-Emperor* (41), *Kalinath Roy* v. *King-Emperor* (42) and *Muruga Goundan* v. *King-Emperor* (44), special

(31) 10 Bom. H. C. R. 75, 93 (1873).
(32) L. R. 31 I. A. 239 (1904).
(33) [1906] 21 Cox. 154.
(34) [1907] App. Cas. 93 and 461.
(35) 8 C. W. N. 63 Short notes (1903).
(36) L. R. 24 I. A. 137; s. c. I. L. R. 25 Cal. 20; 76 L. T. 813 (1897).
(37) 13 C. L. J. 129; s. c. 13 Bom. L. R. 9 (1910).
(38) L. R. 40 I. A. 193; s. c. I. L. R. 38 Mad. 501; 17 C. W. N. 1110 1913.
(39) [1915] A. C. 629; L. R. 42 I. A. 133; I. L. R. 42 Cal. 739; 19 C. W. N. 674 1915.
(40) L. R. 44 I. A. 137; I. L. R. 44 Cal. 876; 25 Cox. 705; 21 C. W. N. 818 (1917).
(41) L. R. 47 I. A. 128; s. c. 24 C. W. N. 650 (1920).
(42) L. R. 48 I. A. 96; s. c. 25 C. W. N. 701 (1920).
(43) 25 C. W. N. 514 (P. C.) (1920).
(44) 26 C. W. N. 57 (P. C.) (1921).

leave was granted, but the appeal in each instance ultimately failed on the merits. On the other hand, in *Painda Khan* v. *King-Emperor* (35), *Birch* v. *King-Emperor* (37) and *Balmukund* v. *King-Emperor* (39), the application for special leave to appeal was dismissed.

In the series of cases which came before the Judicial Committee from Colonial Courts, the earliest is the decision of *Falkland Islands Co.* v. *Queen* (45), where Lord Kingsdown quoted with approval the observations of Dr. Lushington in *Joykissen Mookerjee* v. *Queen* (30). This set the tradition, as it were, and it came to be recognised that though it was the settled prerogative of the Crown to receive appeals in all Colonial cases [*In re Bishop of Natal* (46)], the inconvenience of entertaining such appeals in cases of a strictly criminal character was so great, the obstruction that it would offer to the administration of justice in the Colonies was so obvious, that it was only on rare occasions, in exceptional circumstances, that applications of that description should be encouraged or entertained by the Judicial Committee. This doctrine will be found to permeate the stream of later decisions. Amongst these may be mentioned *Levien* v. *Queen* (47), *In re McDermott* (48), *R.* v. *Bertrand* (49), *R.* v. *Murphy* (50), *R.* v. *Coote* (51), *Esnouf* v. *Attorney-General, Jersey* (52), *Riel* v. *R.* (53), *In re Dillet* (21), *Dinizulu* v. *Attorney-General, Zululand* (19), *Macleod* v. *A. G. N. S. W.* (54), *Ex parte Deeming* (55), *Makin* v. *A. G. N. S. W.* (56), *Kops* v. *Queen* (57), *Sprigg* v. *Sigcau* (58), *Ex parte Carew* (20), *Brown* v. *Attorney-General for New Zealand* (59), *R.* v. *Marais* (60), *Ex parte Aldred* (61), *Nelson* v. *R.* (62), *Rex* v. *Louw* (3), *Badger* v. *Attorney-General, New Zealand* (63), *Teshingumudi* v. *Attorney-General of Natal* (64), *Armstrong* v. *R.* (65), *Lanier* v. *R.* (66) and *Ibrahim* v. *R.* (7). It is not necessary to set out here a detailed analysis of all the observations of their Lordships in the cases mentioned; their essence will be found concisely stated by Lord Watson in *In re Dillet* (21), which has been repeatedly followed :—

"The rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that by a disregard of the forms of legal process or by

(30) 9 M. I. A. 172; 1 Moo. P. C. N. S. 272 (1863).
(35) 8 C. W. N. 63 Short notes (1903).
(37) 18 C. L. J. 129: s. c. 13 Bom. L. R. 9 (1910).
(39) [1915] A. C. 629; L. R. 42 I. A. 133; I. L. R. 42 Cal. 739; 19 C. W. N. 674 (1915).
(45) 1 Moo. P. C. N. S. 299; 9 Cox. 351 (1863).
(46) 3 Moo. P. C. N. S. 115, 156 (1864).
(47) L. R. 1 P. C. 536 (1866).
(48) L. R. 1 P. C. 260 (1866).
(49) L. R. 1 P. C. 520 (1867).
(50) L. R. 2 P. C. 535 (1869).
(3) [1904] A. C. 412.
(7) [1914] A. C. 599; 24 Cox. 174.
(19) 61 L. T. 740 (1889).
(20) [1897] App. Cas. 719; 18 Cox. 625.
(21) 12 App. Cas. 459 (467); 16 Cox. 241 (1887).
(51) L. R. 4 P. C. 599 (1873).
(52) 8 App. Cas. 304 (1883).
(53) 10 App. Cas. 675 (1885).
(54) [1891] App. Cas. 455.
(55) [1892] App. Cas. 422.
(56) [1894] App. Cas. 57.
(57) [1894] App. Cas. 650.
(58) [1897] App. Cas. 238.
(59) [1898] App. Cas. 234 (1897).
(60) [1902] App. Cas. 51.
(61) [1902] App. Cas. 81; 20 Cox. 149.
(62) [1902] App. Cas. 250.
(63) [1907] 97 L. T. 621; 21 Cox. 589.
(64) [1908] App. Cas. 248.
(65) [1913] 30 T. L. R. 215.
(66) [1914] App. Cas. 221; 24 Cox. 53.

BARENDRA KUMAR GHOSE *v.* THE KING-EMPEROR.

some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done."

This principle was successfully invoked on behalf of the Crown in the cases of *R.* v. *Bertrand* (49), *R.* v. *Murphy* (50) and *R.* v. *Coote* (51); where a Colonial Court had, in each instance, set aside a conviction and granted a new trial in excess of its jurisdiction. There was no occasion to apply the doctrine in *Levien* v. *Queen* (47), as the prisoner obtained a free pardon and was discharged from prison before his appeal could be heard; the Judicial Committee held that as the prisoner had obtained the substantial benefit of a free pardon they would not enter upon the merits of the case or pronounce an opinion upon the legal objections to the conviction. But the principle was successfully invoked on behalf of the accused in the cases of *Falkland Islands Co.* v. *Queen* (45), *In re McDermott* (48), *In re Dillet* (21), *Macleod* v. *A. G. N. S. W.* (54) and *Nelson* v. *R.* (62). A noteworthy instance of successful appeal will be found in *Lanier* v. *R.* (66), where the conviction was for embezzlement, and this may be taken along with *Vaithinatha Pillai* v. *King-Emperor* (38) which was, as we have seen, a successful appeal against conviction for murder and sentence of death. In this connection, the following passage from the judgment of Lord Sumner in *Ibrahim* v. *R.* (7) may be usefully re-called :—

"Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal: *Clifford* v. *King-Emperor* (22). Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists, *Riel* v. *Reg.* (53) : nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done' : *In re Dillet* (21). It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing : *Riel* v. *Reg.* (53) and *Ex parte Deeming* (55). The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity, as such, will not suffice : *Exp. Macrea* (14). There must be something

(21) 12 App. Cas 459; 16 Cox. 241 (1887).
(38) L. R. 40 I. A. 193 : s. c. I. L. R. 38 Mad. 501; 17 C. W. N. 1110 (1913).
(45) 1 Moo. P. C. N S [299; 9 Cox. 351 (1863).
(47) L. R. 1 P. C. 536 (1866).
(48) L. R. 1 P. C. 260 (1866).
(49) L. R. 1 P. C. 520 (1867).
(50) L. R. 2 P. C. 535 (1869).
(51) L. R. 4 P. C. 599 (1873).
(54) [1891] App. Cas. 455.
(62) [1902] App. Cas. 250.
(66) [1914] App. Cas. 221; 24 Cox. 53.

(7) [1914] A. C. 599, 614; 24 Cox. 174.
(14) [1893] A. C. 346; L. R. 20 I. A. 90; 17 Cox. 7(2 (1893).
(22) L R 40 I. A. 241 : s c. I. L. R. 41 Cal. 569; 18 C. W. N. 374 (1913).
(53) 10 App. Cas. 675 (1885).
(55) [1892] App. Cas. 422

which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future : *Reg.* v. *Bertrand* (49)."

The same principle was emphasised by Viscount Haldane in *Dal Singh* v. *King-Emperor* (40) :—

"It is well-settled that the unwritten principles of the constitution of the Empire restrain the Judicial Committee from being used in general as a Court of review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. Their Lordships have now heard full arguments in the case before them, and have examined the procedure and evidence with minuteness. Before considering the result, it is right that they should state what they conceive to be, in a case such as that before them, the character of the limitation of their function. The constitution of the Empire is tending to develop in the direction of regarding as final decisions given in the local administration of criminal justice. The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right, to review the course of justice in criminal cases, in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as, for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below."

The principles thus enunciated must be deemed well-settled, though there may be considerable room for refinement of argument and divergence of opinion in their application. This is amply indicated by the fact that cases are by no means rare where leave to appeal has been granted after full examination, and yet the appeal has not ultimately been sustained; two such instances are furnished by *Ibrahim* v. *King-Emperor* (7) and *Besant* v. *Attorney-General, Madras* (24). Here it may be re-called that as stated by Lord Watson in *Robinson* v. *Canadian Pacific Ry. Co.* (67) their Lordships of the Judicial Committee, when called upon to grant special leave to appeal in civil cases, do take into consideration the general importance of the question raised and the fact that it has evoked great difference of judicial opinion.

In the case before us, the legality of the conviction rests upon the correct construction of sec. 34 of the Indian Penal Code. The judgments delivered by the Full Bench establish that there has been a

(40) L. R. 44 I. A. 137; I. L. R. 44 Cal. 876; 25 Cox. 705; 21 C. W. N. 818 (1917).

(49) L. R. 1 P. C. 520 (1867).

(7) [1914] A. C. 599; 24 Cox. 174.

(24) L. R. 46 I. A. 176; s. c. 23 C. W. N. 986 (1919).

(67) [1892] A. C. 471, 485.

deep-seated divergence of judicial opinion in every superior Court in India as to the true interpretation of that section. The question not only goes to the root of the matter in the present case, but is of great and general importance and of frequent occurrence in the administration of criminal law wherever the Indian Penal Code is in operation. It is not the function of this Bench to pronounce an opinion upon the question of the construction of sec. 34; we cannot arrogate to ourselves the authority which belongs to their Lordships of the Judicial Committee under cl. 41 of the Letters Patent. But this is plain that if sec. 34 has not been correctly interpreted by the Full Bench, substantial and grave injustice has been done to the prisoner. In the view we thus take, we shall not express an opinion, whether there may not be other questions also in the appeal, such as the question of the true construction of cl. 26 of the Letters Patent, which by themselves bring the case within the limited category of criminal proceedings reviewable, according to established practice, by their Lordships of the Judicial Committee. On anxious consideration of the character of the questions involved in this case and full recognition of the principles which regulate the functions of the Judicial Committee in respect of criminal proceedings, we have come to the conclusion that we should declare that this case is a fit one for appeal to His Majesty in Council under cl. 41 of the Letters Patent. We direct accordingly that a certificate be granted to this effect.

We further direct that as a certificate under cl. 41 has been ordered, the execution of the sentence under appeal be stayed, subject to such orders as may be passed by their Lordships of the Judicial Committee. We are not unmindful of the observations of their Lordships in *Balmukund* v. *King-Emperor* (39) made under different circumstances. In that case, an application for special leave to appeal from conviction and sentences of death, was made to the Judicial Committee. The application was made a few days before the date fixed for the carrying out of the sentences. Counsel for the Petitioners stated that they were not in a position to proceed with the petition for leave to appeal as the transcripts of the judgment of the Chief Court and of the evidence had not reached them, and they asked the Board to make an order or a recommendation to the Government of India for the postponement of the execution of the sentences pending the hearing of the petition. Viscount Haldane intimated that their Lordships were unable to advise His Majesty to make any order on the petition for special leave to appeal at that stage or to interfere to stay execution. The attention of their Lordships was not drawn to the fact that in *Re: Ames* (11) when special leave to appeal was granted by the Judicial Committee on the 7th July 1838, the sentence against the Petitioners was suspended; this is not affected by the fact that the leave granted *ex parte* was subsequently revoked. Be that as it may, the Petitioners in *Balmukund* v. *King-Emperor* (39) were left to notify the Government of India that an application for special leave was pending before the Judicial Committee; this they did, and they were in fact reprieved, pending the hearing of the petition, which was ultimately dismissed as no ground of appeal was shown to bring the matter within the limited class of cases where the Judicial Committee intervenes in criminal

(11) 8 Moo. P. C. 409 (1844).
(39) [1915] A. C. 629; L. R. 42 I. A. 133; I. L. R. 42 Cal. 789; 19 C. W. N. 674 (1915).

proceedings. In the case before us, a certificate has been directed under cl. 41, and there is consequently an appeal pending from the sentence. Cl. 42 ordains that this Court shall, in all cases of appeal to His Majesty in Council, conform to and execute such judgments and orders as His Majesty in Council might think fit to make in the premises; and this has to be read along with sec. 21 of the Judicial Committee Act, 1833 (Stat. 3 and 4 Will. 4, c. 41) which renders it obligatory on every Court of justice to carry into effect the order or decree of His Majesty in Council on any appeal from its order, sentence or decree. In such circumstances, it is essential in this case that the sentence passed by this Court should be suspended in order that the appeal to His Majesty in Council may not be frustrated. There is more than one instance where the Court which had passed the sentence stayed execution thereof pending decision of the questions in controversy by their Lordships of the Judicial Committee; see *Nga Hoong* v. *Queen* (13) decided by the Supreme Court of Calcutta: *In re Levien* (68) decided by the Supreme Court of Jamaica; and *Ibrahim* v. *Rex* (7) decided by the Supreme Court of Hongkong. Reference may in this connection be made to the decision in *Nanda Kishore Singh* v. *Ramgolam Sahu* (69), where this Court, in exercise of its inherent power to stay proceedings pursuant to its own order, stayed proceedings in a civil matter in view of an application to the Judicial Committee for special leave to appeal to His Majesty in Council. We may add that the applicability of the doctrine of inherent power to criminal cases was expressly recognised by a Special Bench of this Court in *Pigot* v. *Ali Mahamed Mandal* (70).

The prisoner will not be required to furnish security for the costs of the appeal. As Viscount Haldane observed in *Dal Singh* v. *King-Emperor* (40), where the appeal by special leave was ultimately dismissed, "there will, as hitherto has been usual in such cases, be no order as to costs." The order for costs made in the case of *Besant* v. *Attorney-General, Madras* (24) must consequently be deemed an exception to the ordinary rule, justifiable only in the special circumstances of that case. We observe that in *Vaithinatha Pillai* v. *King-Emperor* (38), Sir Robert Finlay, on behalf of the prisoner whose appeal had succeeded, asked for costs against the Crown. But Lord Atkinson, referring to *Johnson* v. *King* (71), stated that their Lordships were of opinion that the application should not be granted. This accords with *Poonea Khoty* v. *R.* (8) and *Nelson* v. *R.* (62). But in *Lanier* v. *R.* (66), which was heard shortly afterwards, before the Board differently constituted, their Lordships, looking to the exceptional nature of the case, held that the Crown should pay to the Appellant the costs of the appeal. A precedent for this course may be found in *Macleod* v. *A. G. N. S. W.* (54). We can-

(7) [1911] A. C. 599, 601; 24 Cox. 174.
(13) 7 M. I. A. 72; 4 W. R. P. C. 109 (1857).
(68) 10 Moo. P. C. 31 (1855).
(69) I. L. R. 40 Cal. 955; s. c. 16 C. W. N. 1089; 16 C. L. J. 508 (1912).

(8) (1835) 3 Knapp. 348, 375.
(24) L. R. 46 I. A. 176: s. c. 23 C. W. N. 986 (1919).
(38) L. R. 40 I. A. 193: s. c. I. L. R. 38 Mad. 501; 17 C. W. N. 1110 (1913).
(40) L. R. 44 I. A. 137; I. L. R. 44 Cal. 876; 25 Cox 705; 21 C. W. N. 818 (1917).
(54) [1891] App. Cas. 455.
(62) [1902] App. Cas. 250, 256.
(66) [1914] App. Cas. 221, 230.
(70) I. L. R. 48 Cal. 522, 531, 532 (Spl. B.) (1920).
(71) [1904] A. C. 817, 824.

BARENDRA KUMAR GHOSE v. THE KING-EMPEROR.

not and do not express an opinion as to the costs of the present appeal before the Judicial Committee: we merely hold that in view of the observation of Viscount Haldane in *Dal Singh* v. *King-Emperor* (40) as to the usual practice in this class of cases, the prisoner be not required to furnish security for the costs of the Crown.

We finally direct, under cl. 42, that a complete copy of the record (to be printed in the usual manner) be transmitted for the use of their Lordships of the Judicial Committee. This will be prepared, as is done in capital cases, at the cost of the Crown and will include

(*i*) the record of the proceedings before the committing Magistrate;

(*ii*) the record of the proceedings at the Sessions. An accurate copy must be obtained of the notes of the trial Judge;

(*iii*) the record of the proceedings under cl. 26 of the Letters Patent;

(*iv*) the record of the present proceedings under cl. 41 of the Letters Patent.

We further direct that the memorandum furnished by Mr. Justice Page to the members of the Full Bench (from which an extract was read out in open Court) be printed in its entirety as a confidential document and be transmitted in a sealed cover, to be placed before their Lordships for such use as their Lordships may determine. We consider it essential that all the materials available to this Court should be placed at the disposal of their Lordships.

Let six copies of the paper-book when printed be furnished free of charge to the prisoner.

Messrs. K. K. Dutt & Co., Solicitors for the Prisoner.

Mr. Gooding, Solicitor for the Crown.

P. K. C.

(40) L. R. 44 I. A. 137; I. L. R. 44 Cal. 876; 25 Cox. 705; 21 C. W. N. 818 (1917).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 649 OF 1923.

SUHRAWARDY, J.
CUMING, J.
1923,
Heard, 17 and 21, August.
Judgment, 28, August.

BHUPENDRA KUMAR DUTT, Petitioner,
v.
THE KING-EMPEROR.

Indian Railways Act (IX of 1890), sec. 109, refusal to vacate a compartment reserved by the Railway for Europeans, if an offence under - Sec. (1) (b)—*Reserving a compartment for Europeans only in trains carrying passengers, if illegal—Sec. 42 (2), such reservation, if constitutes undue or unreasonable preference or advantage to any particular person or class "Passenger," significance of —"Another passenger," if includes a class of possible passengers.*

A passenger attired in Indian dress and seated in a third class railway compartment, reserved for Europeans only, was asked to vacate the compartment at Howrah by a ticket examiner, but he refused saying that he had as much right to occupy that compartment as any European. He was thereupon prosecuted and convicted:

Held *per* SUHRAWARDY, J.—*That setting apart of a compartment for Europeans is not apparently intended to accord invidious treatment to a particular class of passengers but the object is to secure the convenience of the travelling public with due regard to the diversity of their habits, customs and prejudices. A European, specially of the class which ordinarily travels in such reserved third class compartments may be more disagreeable to his Indian fellow passengers, particularly of the orthodox type and peaceful disposition.*

The word "passenger" which has not been defined in the Railways Act is used in sec. 109 of the Railways Act

BHUPENDRA KUMAR DUTT *v.* THE KING-EMPEROR.

in the ordinary sense of the word and includes a possible traveller and "another passenger" includes a class of passengers.

EMPEROR *v.* NARAYAN KRISHNA GOGTE (1) *followed.*

That the departmental rule under which compartments are reserved for Europeans is not made under sec. 47 of the Act but is framed in exercise of the general power of administration by the Railway which the Company possesses as manager of the concern. If the rule is not inconsistent with any express provision of the law in the general scheme of the Act, it should not be held ultra vires *of the powers of the Company in the absence of the Governor-General's sanction. In the Company is vested the management of the Railway and ordinarily they should be deemed to hold the power, unless expressly curtailed by law, to make such arrangements as they consider necessary for the convenience of their customers and in their own interests.*

PERTH GENERAL STATION COMMITTEE *v.* ROSS (2) *and* IN RE KOMARAN (3) *referred to.*

It cannot be denied that the action of the Railway Company in reserving compartments exclusively for Europeans does tend to give preference to a particular class of persons to the consequent prejudice or disadvantage to others. And in particular circumstances the reservation of a compartment for a class of passengers or intending passengers without remuneration may amount to undue preference within the meaning of sec. 42 (2) of the Act and a violation of the terms of the section, but the Company has a general power to regulate its traffic and arrange for the accommodation and convenience of its passengers so long as it does not bring itself within that section. If it had been proved that no room was available for the accused in the train except in the reserved compartment, the reservation for a particular class might amount to undue preference, which would be unreasonable and disadvantageous to other passengers. But no such circumstance having been proved the preference cannot be said to be undue.

EMPEROR *v.* NARAYAN KRISHNA GOGTE (1), EMPEROR *v.* BRIJBASI LAL (4) *and other cases referred to.*

Per CUMING, J.—*That a Railway Company has an absolute right to regulate its own traffic in its own way so long as it does not contravene any express provision of the law. It is one of the duties of the Company to see to the comfort and convenience of its passengers, and in making a reservation for a class of passengers it must be supposed to have acted as it is entitled to do on one or other of these motives.*

PERTH GENERAL STATION COMMITTEE *v.* ROSS (2) *and* IN RE KOMARAN (3).

That there is no section in the Act which gives the Company any power to reserve accommodation for any one. But the fact that there are sections in the Act to punish persons who interfere with such reserved accommodation shows that by implication the Act recognises the right of the Railway Company to reserve such accommodation.

That sec. 42 (2) does not provide that the Railway shall not show preference to

(1) I. L. R. 47 Bom. 465 (1922).
(2) [1897] A. C. 479.
(3) I. L. R. 45 Mad. 215 (1921).

(1) I. L. R. 47 Bom. 465 (1922).
(2) [1897] A. C. 479.
(3) I. L. R. 45 Mad. 215 at p. 220 (1921).
(4) I. L. R. 42 All. 327 (1920).

BHUPENDRA KUMAR DUTT *v.* THE KING-EMPEROR.

Taluqdar regards as the sheet-anchor of his case, has not been able to accept it. I have not been induced by anything that has been urged by the learned vakil to hold a contrary view. The point seems to me so simple that it does not require serious consideration.

It is next contended that "passenger" means a person who is travelling or is about to travel having purchased a ticket for the purpose, or, in other words, a *bonâ fide* passenger and not a person who may or is likely to travel by that train. It is admitted that at the time of occurrence there was no European passenger in the compartment travelling or about to travel. I am unable to accept this restricted sense of the term. "Passenger" has not been defined in the Act and it is used in the ordinary sense of the word including a possible traveller. To attach to it the restricted meaning contended for by the Petitioner would render the provisions of sec. 47 *(1)* *(b)* of the Railways Act too narrow and unworkable, for if the word "passenger" in that clause were regarded as signifying passengers who are actually travelling by a particular train having purchased tickets therefor, an unreasonable demand would be made on the Railway Company to provide for the "accommodation and convenience of passengers" at the start of each train in view of the particular kind of passengers travelling by it. Besides there may be passengers eligible to travel in that compartment waiting at some intermediate stations.

The next point pressed is that a Railway administration has no power under the law to make a rule setting apart a compartment for a particular passenger or passengers, except in cases provided by the Act, as in the case of female passengers under sec. 64. No doubt every Railway Company is empowered under sec. 47 to make general rules consistent with the Act for, *inter alia*, providing for the accommodation and convenience of passengers but such rules shall not take effect until they have received the sanction of the Governor-General in Council and been published in the Gazette of India; but the present rule is not so sanctioned and published. It is submitted by the Railway Company that the departmental rule under which compartments are reserved for Europeans is not made under sec. 47 of the Act; it is framed in exercise of the general power of administration of the Railway which the Company possesses as manager of the concern. In my view, if this particular rule which, as has been proved, is based on a recommendation to this effect by the Railway Board, is not inconsistent with any express provision of the law or the general scheme of the Act, it should not be held *ultra vires* of the powers of the Company in the absence of the Governor-General's sanction. The Petitioner has not succeeded in maintaining that this rule contravenes any specific provision of the law, leaving sec. 42 of the Act out of consideration for the present, which will be discussed later, but has argued on the general frame of the Act that the Company have not been vested with any such power. This argument is mainly founded on sec. 64 which enacts that "every Railway administration shall, in every train carrying passengers, reserve for the exclusive use of females one compartment at least of the lowest class of carriage forming part of the train." It is argued that if the Railway administration were free to arrange for the accommodation of a particular class of passengers, the legislature would not have vested it with special power in favour of this particular section of the travelling public and therefore, according to the accepted canon of

BHUPENDRA KUMAR DUTT v. THE KING-EMPEROR.

construction of statutes, this special authorisation denies the general authority of the Company in the cases of other classes. As I read the section, it helps the assertion of the Railway Company more than that of the Petitioner. It acknowledges the right of the Company to secure reserved accommodation for females which must exist in the Company as an ordinary right as manager of the concern, but it makes obligatory on it to provide at least one compartment for female passengers. In the Company is vested the management of the Railway and ordinarily they should be deemed to have the power unless expressly curtailed by law, to make such arrangements as they consider necessary for the convenience of their customers and in their own interests. See the remarks of Lord Halsbury in *Perth General Station Committee* v. *Ross* (2), quoted by Oldfield, J., in the case of *In re Komaran* (3). In coming to this conclusion I have not lost sight of the fact that the East Indian Railway Company are monopolists and a statutory body which exists for the benefit and convenience of the public and has more limited powers than those of a private concern. The action of the Company challenged in this case is not calculated to further its pecuniary interest—it is rather detrimental to it—but is taken, according to the view of the Company, as conducive most to public convenience and comfort.

The view that I have above expressed in regard to the general power of the Company to make arrangements for the accommodation and convenience of its passengers is strengthened by the wording of sec. 109 of the Act which supposes in the Company the existence of such power though there is no express authorisation in that respect in the Act.

I now turn to the most substantial question in the case, namely, whether the departmental rule entitling the Railway Company to reserve a compartment for Europeans contravenes the provision of sec. 42 (2) of the Railways Act and consequently beyond the rule-making power of the Company as limited by sec. 47. Sec. 42 (2) is thus worded "A Railway administration shall not make or give any undue or unreasonable preference or advantage to or in favour of any particular person . . . . in any respect whatsoever, or subject any particular person . . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." It is argued that the action of the Railway Company under consideration is calculated to give undue preference to a particular class of passengers to the undue prejudice of other passengers. The expression "undue preference" has not been defined in the Railways Act. The definition of the term is to be found in the English Act known as the Railway and Canal Traffic Act, 1888, on which the Indian Act is modelled. Sec. 55 of that Act says: "The term 'undue preference' includes an undue preference or an undue or unreasonable prejudice or disadvantage, in any respect, in favour of or against any person or particular class of persons or any particular description of traffic." It is conceded and it cannot be denied, that the action of the Railway Company to which exception is taken does tend to give preference to a "particular class of persons" to the consequent prejudice or disadvantage to others. The controversy therefore turns on the question, whether the preference thus given is undue or unreasonable, which two words stand as synonymous and explanatory of each other.

(2) [1897] A. C. 479.
(3) I. L. R. 45 Mad. 215 (1921).

BHUPENDRA KUMAR DUTT *v.* THE KING-EMPEROR.

Mr. Mukerji, who appears for the Railway Company, in his usual fairness, has conceded that the act of the Company in reserving a Railway compartment for any particular class of passengers may amount to undue preference provided other circumstances exist and are proved to render such act unreasonable and disadvantageous to other passengers, for instance, if it is proved that the train by which the Petitioner wanted to travel was full and no room was available for him except in the reserved compartment, that as the Petitioner, so argues the learned vakil, has not alleged or proved any such circumstance, the question of undue preference or otherwise does not arise in this case. I have given this case my best consideration and I have come to the conclusion that the contention of the learned vakil for the Railway Company must prevail. There is no evidence that the Petitioner looked for and could not secure a seat in any other compartment, nor has he proved any other circumstance showing his inability to travel by that train except in the compartment so reserved. As I have remarked above, he has rested his case solely on the question of law which I have formulated. I agree that in particular circumstances the reservation of a compartment for a class of passengers or intending passengers without remuneration may amount to undue preference within the meaning of sec. 42 (*2*) of the Railways Act and to this extent I am in full agreement with the view expressed by Shah, A. C. J., in *Emperor* v. *Narayan Krishna Gogte* (1). I am unable to accept the view which has found favour with some of the Judges who are parties to the reported cases to which I propose to refer later that it is within the absolute right or power of the Railway Company to reserve a compartment for Europeans only. Now the effect of such reservation is that a European, or one who is included in that term, for whom a compartment is reserved may travel in any compartment he likes but an Indian suffering from the disability of not being classed as a European is debarred from travelling in the European reserved compartment. I am unable to concede that such an apparently invidious distinction is not to be considered preference in favour of one community to the prejudice or disadvantage of another.

This question came up for consideration before the Allahabad High Court in the case of *Emperor* v. *Brijbasi Lal* (4). Walsh, J., held that sec. 42 of the Railways Act was no bar to the power of the Railway Company to reserve a compartment as in the present case, chiefly on the ground that that section concerned itself with facilities for traffic by which was understood the carriage of goods only and not of passengers. The attention of the learned Judge does not seem to have been drawn to the definition of the word "traffic" in sec. 3 of the Railways Act. This case was considered in *Emperor* v. *Narayan Krishna Gogte* (1) and expressly dissented from on this point. Its authority is accordingly so weakened that it may not be necessary to consider it further. In the case of *In re Komaran* (3), the point now before us did not actually arise and the judgment of Oldfield, J., not necessary for the purposes of that case, must be regarded as an *obiter*. The case in which the question directly came for consideration is that of *Emperor* v. *Narayan Krishna Gogte* (1). The two learned Judges who originally heard it came to different conclusions and it was referred

(1) I. L. R. 47 Bom. 465 (1922).

(1) I. L. R. 47 Bom. 465 (1922).
(3) I. L. R. 45 Mad. 215 (1921).
(4) I. L. R. 42 All. 327 (1920).

to a third Judge who upheld the view in favour of the Railway Company. The only other case which has some bearing on the present question is that of *Visvanath Ganesh* v. *G. I. P. Ry.* (5). But there also as in the Madras case the expression of opinion was un-called for. On a consideration of all these cases and of the full and elucidating arguments of the learned vakils appearing on both sides, the conclusion I have come to is that the departmental rule enabling the Company to reserve a compartment for a class of ordinary passengers may be a violation of the term of sec. 42 (*2*) in certain circumstances but the Company has a general power to regulate its traffic and arrange for the accommodation and convenience of its passengers so long as it does not bring itself within that section.

In the above view of the matter, this rule fails and should be discharged.

CUMING, J.—The facts of the case in which this rule has been granted are these :—

The Petitioner one Bhupendra Kumar Dutt was a passenger by the train known as the 3 Up Bombay Mail from Howrah on the 9th March last. He intended to go to Dehri-on-Sone.

He got into a third class compartment which was labelled for Europeans. There were a number of Indian gentlemen already in the same compartment. The ticket examiner asked them to vacate the compartment as it was reserved for Europeans. The Indian gentlemen who were in the compartment did so. The Petitioner apparently with the idea of, as he says, making a test case in order to dispute the right of the Railway Company to reserve a compartment for Europeans refused to do so. He was therefore ejected by the police. He was prosecuted for obstructing a Railway servant in the execution of his duty and was convicted and sentenced under secs. 109/121 to pay a fine of Rs. 5.

Mr. Taluqdar who has appeared in support of the rule argues that sec. 109 of the Railways Act (Act IX of 1890) does not cover the present case. He contends that the expression "passenger" as used in sec. 109 does not include a class of passengers. That it only covers the case of a person who has taken or intends to take a ticket and for whom a compartment has been reserved and does not cover the case of a class of possible passengers who may or may not intend to travel by the train. That the only class of passengers for whom the Railway Company may reserve a compartment are females, which power, he contends, is given by sec. 64 of the Act. That sec. 42 (*2*) of the same Act prohibits the Company from showing any undue or unreasonable preference to any particular person or any particular class of traffic and to reserve a compartment for Europeans is showing undue preference. Now in the words of Lord Halsbury [*Perth General Station Committee* v. *Ross* (2)] "a Railway Company has an absolute right to regulate its own traffic in its own way, its own interest being the best security that its strict legal right to do so will not be abused" and I may add so long as it does not contravene any express provision of the law. It is one of the duties of the Company to see to the comfort and convenience of its passengers and as Oldfield, J., remarked, in making a reservation for a class of passengers it must be supposed to have acted as it is entitled to do on one or other of these motives [*In re Komaran* (3)].

Mr. Taluqdar argues that its power to

(5) I. L. R. 45 Bom. 1324 (1921).

(2) [1897] A. C. 479.

(3) I. L. R. 45 Mad. 215 at p. 220 (1921).

BHUPENDRA KUMAR DUTT *v.* THE KING-EMPEROR.

reserve compartment for ladies only is given by sec. 64 of the Act and that as the Act here expressly gives the Railway powers to reserve compartment for ladies it must be held by implication that it has no power to reserve accommodation for any other class of passengers.

This argument is obviously based on a mis-reading of sec. 64. Sec. 64 does not give the Company power to reserve accommodation for ladies. It makes it compulsory to reserve at least one compartment of the lowest class in every train for females, failure to do which is punishable under sec. 95 of the Act. This section certainly gives the Company no powers to reserve 1st or 2nd class compartments for ladies.

There is no section in the Act which does give the Company any powers to reserve accommodation for any one. But the fact that there are sections in the Act to punish persons who interfere with such reserved accommodation shows that by implication the Act recognises the right of the Railway Company to reserve such accommodation. It has been argued further that to reserve accommodation for a particular class of passengers is to show that class undue or unreasonable preference. Now sec. 42 (2) does not provide that the Railway shall not show preference to any passenger or class of passengers. It provides that it shall not show undue or unreasonable preference. What is or is not undue preference obviously depends on the facts of each particular case. In the present case there is no evidence that there was not other equally good accommodation in the train which the Petitioner could have availed himself of, if he had been so disposed. The evidence shows that one compartment alone had been reserved for Europeans. Mr. Taluqdar argues that he could have no grievance whatever if some compartments were reserved for Indians only and that if this was done he could not argue that to reserve a compartment for Europeans only was showing undue preference. If this is really a grievance the remedy might well be sought for by a representation made in the proper quarter. It has nothing to do with the present question. It is not likely that persons for whom a compartment is set apart will go and avail themselves of other accommodation to the exclusion of those entitled to that accommodation. It may be that some persons owing to difference in habits and customs will travel more conveniently both as regards themselves and also as regards other people if they travel by themselves and in making arrangements so that they can do so the Company had in mind not only their convenience but the comfort and convenience of the entire body of passengers. The arrangements made admittedly had the sanction of the Railway Board.

I am of opinion that the Railway Company have not by making the reservation shown undue preference to any passenger or class of passengers.

The last argument to be considered is whether admitting that this Company had the right to reserve such a compartment for Europeans, the Petitioner by refusing to vacate such a compartment when required to do so by the Railway authorities comes within the mischief of sec. 109. Mr. Taluqdar contends that the expression "passenger" used in the sentence reserved by a Railway administration for the use of another passenger means a definite person for whom that particular compartment has been reserved on the understanding that he would take a ticket and travel by that particular train and not for an indefinite person who may

BHUPENDRA KUMAR DUTT *v.* THE KING-EMPEROR.

or may not avail himself of the accommodation provided.

I see no reason to restrict the expression "passenger" in this way and I am of opinion that the expression "passenger" in sec. 109 includes a class of passengers. This is the view that has commended itself to the High Courts of Bombay, Madras and Allahabad [see *Emperor* v. *Narayan Krishna Gogte* (1), *In re Komaran* (3) and *Emperor* v. *Brijbasi Lal* (4)] and I see no reason to differ from it.

Under sec. 13 of the General Clauses Act (X of 1897) words in the singular include the plural. The expression "another passenger" may therefore be read as "other passengers" and it is doing no violence to the language to hold that other passengers include a class of passengers. It seems to me that it does. An attempt has been made to convert what is clearly only a question of Railway administration into racial question. So far as I can see no racial question whatever is involved in this case and it is to be regretted that attempts should have been made to make it one.

The order of the learned Magistrate is right and I would discharge the rule.

J. N. R. *Rule discharged.*

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.	CHAMPSEY BHARA
LORD ATKINSON.	& Co., Appellants,
LORD WRENBURY.	*v.*
1923,	THE JIVRAJ BALLOO
Heard, 6, 8 and	SPINNING AND
9, February.	WEAVING CO., LD.,
Judgment, 6, March.	Respondents.

Arbitration—Award when open to question in Court, as being illegal on the face of it—Jurisdiction of arbitrator, question for Court—Reference, clause of, determines—Jurisdiction—Jurisdiction of arbitrator to decide questions of both law and fact.

An error in law on the face of an award, such as will justify the Court in setting it aside, must be an error in some legal proposition to which the arbitrators have tied themselves, the same being found in the award or a document actually incorporated therein (as for instance, in a note appended by the arbitrators stating the reasons for their judgment), and which is the basis of the award. It does not mean that if in narrating the facts the arbitrators refer to the contention of one party that opens the door to seeing first what that contention is and then going to the contract on which the parties' rights depend to see if the contention is right.

HODGKINSON *v.* FERNIE (2), BRITISH WESTINGHOUSE COMPANY *v.* UNDERGROUND ELECTRIC RAILWAYS COMPANY (3) *and* LANDAUER *v.* ASSER (1) *referred to.*

The question whether an arbitrator acts within his jurisdiction is for the Court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference.

Where relying on an award given as to the quality of goods delivered, the buyers rejected them and then the parties referred the whole of the dispute (other than that of quality) arising out of the contract to arbitration:

Held—*That upon the reference it was for the arbitrators and not for the Court to decide what was the effect of a rejection based on an award as to quality. The whole question whether it depended on law or fact, with the exception only of the dispute as to quality, came for deter-*

(1) I. L. R. 47 Bom. 485 (1922).
(3) I. L. R. 45 Mad 215 (1921).
(4) I. L. R. 42 All. 227 (1920).

(1) [1905] 2 K. B. 184.
(2) 3 C. B. N. S. 189 (1857).
(3) [1912] A. C. 673.

mination by the arbitrators who therefore had jurisdiction.

These were consolidated appeals from two orders, dated the 29th July 1919 and 20th November 1919 of the High Court at Bombay reversing two orders, dated the 13th March 1919 and 4th August 1919 of a single Judge of that Court and setting aside awards, dated the 23rd September 1918 and the 10th March 1919.

Champsey Bhara & Co. entered into two contracts for the sale of cotton to the Jivraj Balloo Spinning and Weaving Co., Ld. The contracts were subject to the rules of the Bombay Cotton Trade Association, Limited.

The buyers alleged that the quality of the cotton was inferior, and on arbitration they were awarded an allowance. The buyers therefore contended that the cotton offered was not a valid tender under the contract and refused to take delivery. The sellers claimed damages for such refusal and there was a further reference to arbitration under r. 13 of the rules of the Association. The buyers contended that the arbitrators had no jurisdiction and that the sellers being the party in default were unable to claim damages. The award was in favour of the sellers and this suit was brought by the Spinning Co. to have the award set aside.

The suit was dismissed by the trial Court (Pratt, J.) on the ground that there was no error patent on the face of the award to justify setting it aside.

On appeal the High Court (MacLeod, C. J. and Heaton, J.) reversed that decision and set aside the award.

In the 2nd appeal the same Bench of the High Court held that on the facts before them there was no error apparent on the face of the award.

In each case there was an appeal to His Majesty in Council and the two appeals were heard together.

Messrs. W. H. Upjohn, K. C. and *W. Wallach* for Champsey Bhara & Co., Appellants.—The Courts will not enquire whether the conclusion of the arbitrators is right or wrong unless an error appears on the face of the award or on some document so closely connected with it as to be regarded as part of the award.

This was the rule laid down in *Hodgkinson* v. *Fernie* (2) and approved in *Attorney-General for Manitoba* v. *Kelly* (5).

"Document forming part of the award" does not include every document referred to in the award by way of recital. It must be an integral part of the adjudication. The doctrine of the High Court based on *Landauer* v. *Asser* (1) is erroneous and if pushed to its logical conclusion would nullify every award. An award can only be upset if it is clear on the face of it that it was based on a question of law.

[LORD DUNEDIN referred to *Holmes Oil Co., Ltd.* v. *Pamplurston Oil Co., Ltd.* (6)].

Sir G. Lowndes, K. C., Messrs. E. B. Raikes and *Claughton Scott* for the Respondents.—The award was without jurisdiction. The agreement to refer had come to an end after the first award and the consequential rejection by the buyers of the cotton.

The arbitrators have misinterpreted r. 52.

[LORD DUNEDIN.—The question turns on r. 13, *viz.*, is this a dispute arising out of the contract.

The very fact that you have to refer to

(1) [1905] 2 K. B. 184.
(2) 3 C. B. N. S. 189, 202 (1857).
(5) [1922] 1 A. C. 268, 281.
(6) [1891] 18 Rettie (H. of L.) 52.

r. 52 shows that it is a dispute arising out of a contract.]

There is no dispute because the contract out of which disputes might have arisen has come to an end.

There is a finding by the original award that the contract was at an end and nothing was then left to arbitrate on.

He also referred to *E. D. Sassoon & Co.* v. *Ram Dutt Ram Kissen Das* (7).

[LORD DUNEDIN referred to *Sanderson* v. *Armour* (4).]

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In these consolidated appeals it will be convenient to consider the first case by itself. The Appellants as sellers entered into two contracts with the Respondents as buyers of certain bales of cotton. The contracts were made subject to the rules and regulations of the Bombay Cotton Trade Association, Limited. R. 12 of the said Association provides :—

" All questions or disputes as to quality between buyer and seller shall be referred to the arbitration of two disinterested persons, one to be chosen by each disputant, such arbitrators having the power to call in a third arbitrator. The award made by such arbitrators or any two of them shall be final and binding subject only to the right of appeal to the Appeal Committee. All arbitrations held under this Rule must be held in accordance with Rule 5, and only shareholders and/or Directors shall be eligible to act on arbitrations held in the rooms of the Association. Associate members, however, shall be eligible to act as arbitrators when the arbitration is held in the seller's jetha and/or godown as provided under R. 5."

R. 13 provides :—

" All questions in dispute (other than that of quality) arising out of, or in relation to, contracts made subject to the Rules and Regulations of The Bombay Cotton Trade Association, Limited, provided one of the parties to the contract is a member or associate member of the Association, shall be referred to the arbitration of two disinterested persons being shareholders or directors of the Association, one to be chosen by each disputant; such arbitrators having the power to call in a third arbitrator who must also be a shareholder or director of the Association.

" The award made by such arbitrators or any two of them shall be final and binding on both parties, subject only to the right of appeal to the Board within 15 days of the date of the arbitrators' award on payment of Rs. 100."

The cotton was delivered but objected to by the Respondents as being not up to contract. Upon this an arbitration was entered into between the parties, and the arbitrators under sec. 12 made an award as to quality. Thereupon, the Respondents rejected the cotton. The Appellants retorted by claiming damages. This dispute was referred to arbitrators under sec. 13. They issued their award as follows :—

" To all to whom these presents shall come, we, Purshotamdas Thakoredas of Bombay, Hindu Inhabitant, and Vincent Alpe Grantham, also of Bombay, European Inhabitant, send greeting. Whereas by a contract dated 17th day of August 1918, Messrs. Champsey Bhara and Company had agreed to sell to the Jivraj Balloo Spinning and Weaving Company, Limited, 100 bales of Mundra M. G. Fully Good Staple cotton on the terms and conditions mentioned in the contract. And whereas by another contract dated 4th day of September 1918, the said Messrs. Champsey Bhara and Company had also agreed to sell to the said Jivraj Balloo Spinning and Weaving Company, Limited, 100 bales of New M G. Mundra Cotton Fully Good Staple on the terms and conditions therein contained. And whereas both the said contracts were made subject to the rules and regulations of the Bombay Cotton Trade

(4) [1922] S. C. H. L. 117.

(7) L. R. 49 I. A. 366 ; s. c. I. L. R. 50 Cal 1 ; 27 C. W. N. 660 (1922).

Association, Limited. And whereas the goods tendered under the said contracts by the said Messrs. Champsey Bhara and Company were rejected by the Jivraj Balloo Spinning and Weaving Company, Limited, on the grounds contained in their letters dated 25th November 1918, and 11th November 1918, respectively. And whereas the said Messrs. Champsey Bhara and Company claimed from the said Jivraj Balloo Spinning and Weaving Company, Limited, the sum of Rs. 25,000 (rupees twenty-five thousand) in respect of the aforesaid contracts. And whereas the said Jivraj Balloo Spinning and Weaving Company, Limited, denied liability in respect of the said sum or any part thereof. And whereas the said disputes were referred to the arbitration of us, Purshotamdas Thakoredas and Vincent Alpe Grantham, who were appointed Arbitrators by the Deputy Chairman of the Bombay Cotton Trade Association, Limited. And whereas on the 12th day of December the time for making our Award was extended by the Deputy Chairman to the 27th day of December 1918. Now know ye that we, the said Purshotamdas Thakoredas and Vincent Alpe Grantham, having taken upon ourselves the burden of the said reference, and having done all acts necessary to enable us to make a valid Award, hereby make our Award as follows, that is to say:—We award and direct that the said Jivraj Balloo Spinning and Weaving Company, Limited, do pay to the said Messrs. Champsey Bhara and Company the sum of Rs. 25,000 (rupees twenty-five thousand), and we do further award and direct that the said Jivraj Balloo Spinning and Weaving Company, Limited, do pay the costs of this our Award, which we assess at the sum of Rs. 55 (rupees fifty-five).

"In witness whereof we have hereunto set our respective hands this 23rd day of December 1918.

'Signed and Published this 23rd day of December 1918, by us, Purshotamdas Thakoredas and Vincent Alpe Grantham in the presence of
(Signed) J. A. GRANT."

(Signed)
PURSHOTAMDAS THAKOREDA
V. A. GRANTHAM.

An appeal was made to the Appeal Committee, who confirmed the award. The Respondents then presented a petition to the Court asking that the award should be set aside. They alleged two grounds (1) that there was no question referable to the arbitrators under sec. 13; (2) that there was an error of law on the face of the award. The case depended before Pratt, J., who dismissed the petition. Appeal was taken to the Appellate Division of the High Court, and they reversed the judgment holding that there was an error in law on the face of the award. The way that the learned Judges arrived at that conclusion was this: They said that the recital that the Respondents had rejected the cotton on the grounds mentioned in the letters of the 11th and 25th November 1918, respectively, allowed them to look at the letters. The letter of the 11th November is as follows:—

"To Messrs. Champsey Bhara and Company.

"Dear Sirs,

"Re: D/Order No. 27 dated 6-11-18 for
"100 bales N. M. G. Mundra.

"Please note that at the survey held this day on the above lot tendered by you against contract No. 56, dated 4-8-19 as the Arbitrators have in their award allowed Rs. 10½ off, we hereby reject the said lot and refuse to take delivery thereof.

"THE JIVRAJ BALLOO SPINNING AND WEAVING COMPANY, LTD."

The letter of the 25th November is in identical terms referring to the other contract. The learned Judges then held that if cl. 52 of the Regulations is looked at—it being the clause which deals with what is to happen when arbitrators, as to quality, make certain findings—it becomes apparent that the arbitrators here could only have arrived at their judgment if they entirely misinterpreted Art. 52.

They based their opinion upon the case of *Landauer* v. *Asser* (1).

The law on the subject has never been more clearly stated than by Williams, J., in the case of *Hodgkinson* v. *Fernie* (2) :—

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact . . . . The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, *viz.*, where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

This view has been adhered to in many subsequent cases, and in particular in the House of Lords in *British Westinghouse Company* v. *Underground Electric Railways Company* (3).

The question to be decided is : Does the error in law appear on the face of the award? In the *British Westinghouse* case (3), it clearly did. The arbitrator had stated a special case and got an opinion of the Divisional Court; in making his award he stated that opinion and founded his award upon it. The opinion as given was held to be erroneous, and so there was an error in law on the face of the award. In *Landauer* v. *Asser* (1), the state of affairs was different. The question was as to liability and interest on a policy of insurance effected by sellers for and on account of buyers, and the arbitrator framed his award thus :—

"I decide that as the parties to the contract dated the 3rd November, 1903, were by the terms thereof principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus 5 per cent., and that the buyers are therefore entitled to and only to the said amount, the balance one way or the other being due from or to the sellers."

The Court of Appeal held that this entitled them to look at the contract and to come to the conclusion that the decision was erroneous in law. The case of *Landauer* v. *Asser* (1) is not binding on their Lordships, and it was contended that it was wrongly decided, but in their Lordships' opinion it is not necessary to consider that point, for the present case differs from *Landauer's* case (1) in an essential particular. In that case the legal proposition was stated in terms on which the award proceeded. In the present case, no legal proposition at all is stated as a ground of the award. The reference to the letters is only in the narrative, and even when the letters are looked at they only contain the view of one party. To make this case equiparate with that of *Landauer* (1) the award would have to run somewhat thus :—"In respect of the ground of rejection contained in the letters of the 11th and 25th November, and in respect of cl. 52 of the articles, I decide that, etc"

Now the regret expressed by Williams, J., in *Hodgkinson* v. *Fernie* (2) has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the

(1) [1905] 2 K. B. 184.
(2) 3 C. B. N. S. 189 (1857).
(3) [1912] A. C. 673.

(1) [1905] 2 K. B. 184.
(2) 3 C. B. N. S. 189 (1857).

basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying : "Inasmuch as the arbitrators awarded so-and-so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting cl. 52." But they were entitled to give their own interpretation to cl. 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal erroneous.

The Counsel for the Respondents then argued the other point, which the learned Judges of the Court of Appeal found it unnecessary to decide, and which the trial Judge decided against them. He said that upon a proper construction of the contract the moment his client rejected the cotton in virtue of the decision by the arbitrators as to quality, he was entitled to do so, and the contract was repudiated or came to an end; that then the arbitration clause could no longer be appealed to, and he said that inasmuch as this was a plea to jurisdiction the Court ought to decide it.

Their Lordships think that this argument is based upon a confusion of thought. The question of whether an arbitrator acts within his jurisdiction is, of course, for the Court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in this case whether the dispute which has arisen is a dispute covered by cl. 13 of the articles. It clearly is so, because it is undoubtedly a dispute arising out of or in relation to a contract made subject to the rules and regulations of the Cotton Trade Association. Now that clause refers to the arbitrator the whole question whether it depends on law or on fact, with the exception only of dispute as to quality. It is, therefore, for the arbitrator and not for the Court to decide what is the effect of a rejection based on an award as to quality. In truth this point is decided in terms by the recent case of *Sanderson* v. *Armour* (4). It was a Scotch case, but in no way depended upon any peculiarity of the law of Scotland.

The decision of the first appeal in this sense disposes of the second appeal without further argument, as it is obvious that in that case even the reference in the narrative to the grounds of defence in the letters is absent, and there is nothing but the bare statement that a certain sum was awarded. It follows that in the first appeal, the appeal must be allowed and the judgment of the trial Judge restored; the Appellants must have their costs here and in the Courts below. The second appeal must be dismissed and the Respondents will have their costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors : *Messrs. T. L. Wilson & Co.* for Champsey Bhara & Co., Appellants in 1st appeal.

(4. [1922] S. C. H. L. 117.

CHAMPSEY BHARA & CO. v. THE JIVRAJ BALLOO SPINNING AND WEAVING CO., LD.

Solicitors: *Messrs. Hughes & Sons* for The Jivraj Balloo Spinning & Weaving Co., Ld., Respondents in 1st appeal.

G. D. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 855 (F) OF 1923.

MOOKERJEE, J.
CUMING, J.
1923,
Heard, 28 and 29, August.
Judgment, 18, September.

NANDI LAL AGRANI, Appellant, Petitioner,
v.
JOGENDRA CHANDRA DUTTA, Respondent, Opposite Party.

Court Fees Amendment Act (IV of 1922, B. C.), Sch. I, Art. 5, court-fee payable on an application for review of Appellate judgment where the appeal was filed under the old Act—"Leviable," point of time to which the expression has reference—Rights of a purchaser in execution of a mortgage decree, if can be defeated by taking advantage of an error in the boundaries in the mortgage-deed—Position of a purchaser in execution of a money decree, if better than the judgment-debtor's in the application of the doctrine of estoppel—Mortgagor, if can dispute validity of mortgage—Transfer of Property Act (IV of 1882), sec. 89, mortgage security, if extinguished after order absolute—Mortgagee, if debarred from proving that description of the property mentioned in the decree is erroneous—Court's power to rectify boundaries in the sale certificate after sale confirmed.

Where an application for review of an Appellate judgment was made, after the Bengal Court Fees Amendment Act of 1922 came into force, with one-half of the court-fee payable and paid on the memorandum filed before the new law came into force:

Held—*That neither under the Court Fees Act as originally framed in 1870 nor under the Court Fees Act as amended in 1922, can a Petitioner for review of judgment be called upon to pay court-fee on the basis of the fee which would be payable on the plaint or memorandum of appeal if it were to be filed on the date of the application for review. The amount must be calculated on the basis of the fee leviable (which, in the normal course of events, is the fee actually levied) on the plaint or memorandum of appeal according to the law in force when the plaint or memorandum was filed in Court. Therefore the application in the present case must be deemed to bear the correct court-fee.*

The expression "leviable" in Art. 5 has reference to the time when the plaint or memorandum was filed. As soon as a suit has been instituted, the amount of court-fees payable on a possible application for review of the prospective judgment in the suit becomes fixed.

JOHNSON v. SMITH (2), LAKHI NARAIN v. KIRTIBAS DAS (5), NOBIN CHANDRA v. MAHOMED UZIR ALI (7) *and several other cases referred to.*

Where a purchaser in execution of a money decree for arrears of rent wanted to defeat the rights of a previous purchaser in execution of a mortgage decree, taking advantage of a clerical error in the mortgage deed which was reproduced successively in the plaint, mortgage decree and the sale certificate and it transpired on enquiry that there was no land corresponding to the incorrect boundaries.

Held—*That by the sale in execution of the money decree for rent nothing could vest in the purchaser except the right, title and interest of the judgment-debtor and the purchaser would thus be bound by the same rule of estoppel as the judgment-debtor. Further, the judgment-debtor mortgagor was bound by the rule of estoppel not to dispute the validity of the mortgage. Therefore the purchaser in*

(2) [1760] 2 Burr. 950, 962.
(5) 18 C. L. J. 183 (1913).
(7) 3 C. W. N. 292 (1898).

NANDI LAL AGRANI *v.* JOGENDRA CHANDRA DUTTA.

execution of the money decree could not take advantage of a clerical error in the mortgage deed.

DEBENDRA NATH *v.* MIRZA ABDUL SAMED (26), RIGHT *v.* BUCKNELL (30), BEPIN KRISHNA ROY *v.* JOGESWAR ROY (33) *and other cases referred to.*

It may be conceded that under sec. 89 of the Transfer of Property Act, which regulated the rights of the parties as the decree was made before Or. 34, r. 5 of the new Civil Procedure Code came into operation, the mortgage security was extinguished as soon as the order absolute for sale was made, and the relative rights of the mortgagor and mortgagee were thenceforth regulated by the decree, but it does not follow that the mortgagee became thereby debarred from proving that the description of the property mentioned in the schedule to the decree itself was erroneous. There was nothing to prevent the Courts from granting relief as among the decree-holder, the auction-purchaser and the judgment-debtor and to rectify the boundaries in the schedule to the sale certificate. For this purpose, it was not material to go back behind the decree to the mortgage instrument itself. The clerical error having become apparent on the result of the local enquiry held on the basis of the boundaries in the sale certificate, the Court had ample authority as a Court of justice, equity and good conscience to mould the relief accordingly as between the original parties or their representatives in interest.

BIBIJAN BIBI *v.* SACHI BEWA (34), HETRAM *v.* SHADILAL (35), UMESH CHANDRA *v.* ZAHOOR (38) *and several other cases discussed.*

This was an application for review of judgment, dated the 29th August 1922, delivered by this Court in Appeal from Original Decree No. 314 of 1919, which had been preferred from the decree of the Subordinate Judge, 2nd Court, Howrah, passed dated the 18th September 1919.

The facts of the case were briefly as follows:—A tract of land measuring 30 bighas belonged to some Sahas, who mortgaged the same and a mortgage decree was obtained in September 1902. The property was sold in execution of the mortgage decree in May 1907, and the purchaser obtained the sale certificate in April 1908. The auction-purchasers sold the property to the present Plaintiff Jogendra Chandra Dutta. In the meantime the 6 as. co-sharer landlords of the Sahas obtained a money decree against the Sahas for arrears of rent in respect of the said 30 bighas of land in 1907. In the execution sale which followed on the 12th May 1908, the right, title and interest of the Sahas were purchased by one Sarkar, who in October 1908 sold the same to the present Defendant Agrani. The present suit was instituted by the Plaintiff to recover the said 30 bighas from the Defendant Agrani, who in defence relied on a clerical error in the boundaries scheduled in the mortgage deed. The error was successively reproduced in the plaint in the mortgage suit, in the decree and in the sale certificate. On an enquiry directed by the High Court upon the Defendant's appeal against a decree made in Plaintiff's favour in the trial Court, it transpired that there was no land corresponding to the boundaries given in the sale certificate. The appeal to the High Court was ultimately dismissed and the

(26) 10 C. L. J. 150 (1909).
(30) [1831] 2 B. & Ad. 278, 284; 36 R. R. 563.
(33) 34 C. L. J. 256 (1921).
(34) I. L. R. 31 Cal. 863: s. c. 8 C. W. N. 684 (Spl B.) (1904).
(35) L. R. 45 I. A. 130: s. c. I. L. R. 40 All. 407; 22 C. W. N. 1033 (1918)
(38) L. R. 17 I. A. 201 (1890).

NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

Appellant Agrani made the present application for review and obtained the present Rule.

Babus Sarat Chandra Ray Chaudhury, Panchanan Ghose and *Ramaprosad Mukherjee* for the Petitioner.

Babus Mohendra Nath Ray, Ram Chandra Majumdar and *Kanaidhan Dutta* for the Opposite Party.

Babu Surendra Nath Guha, Assistant Government Pleader, for the Secretary of State.

The JUDGMENT OF THE COURT was as follows :—

This is a Rule for the review of the judgment of this Court in *Nanda Lal Agrani* v. *Jogendra Chandra Dutta* (1).

A preliminary question of considerable importance has been raised with regard to the amount of court-fee payable on the application. We have heard the Assistant Government Pleader as the matter affects the public revenue and the point must be examined before we consider the application on the merits.

The subject-matter of the appeal was valued at 7,750 and on the 20th December 1919, a court-fee of Rs. 385 was paid on the memorandum in accordance with the table of rates of *ad valorem* fees embodied in Sch. I of the Court Fees Act, 1870. The appeal was thereupon registered and was heard in due course. Judgment was pronounced on the 29th August 1922, when the appeal was dismissed with costs. On the 21st November 1922, the Appellant presented the application for review of judgment now under consideration. The application bore a court-fee of Rs. 192-8-0, that is, one-half of Rs. 385, the amount payable and paid on the memorandum of appeal when it was lodged in this Court. The Stamp Reporter to whom the application was presented in the first instance, made a note that there was a deficiency of Rs. 115. In the opinion of the Stamp Reporter, the amount payable as court-fee was Rs. 307-8-0, that is, one-half of Rs. 615 which would have been payable on the memorandum of appeal, if it were lodged in this Court on the 21st November 1922, when the application for review was filed. At this stage, it is necessary to mention that after the 20th December 1919 when the memorandum of appeal was filed and before the 21st November 1922, when the application for review was lodged, the Bengal Court Fees Amendment Act, 1922 (Act IV of 1922, B. C.) had come into force on the 1st April 1922. Sec. 5 of this amending statute modified Art. 1 of Sch. I of the Court Fees Act, 1870, by enhancement of the rate of fee payable on plaints, written statements and memorandums of appeal. Sec. 9, as a corollary altered the table of rates of *ad valorem* fees appended to the same schedule. The consequence was that from the 1st April 1922 the amount of court-fee payable on a memorandum of appeal valued at Rs. 7,750 was raised from Rs. 385 to 615.

The determination of the question now raised before us depends upon the true construction of cls. 4 and 5 of Sch. I of the Court Fees Act. Art. 4 provides that the proper fee for an application for review of judgment, if presented on or after the ninetieth day from the date of the decree, is the fee leviable on the plaint or memorandum of appeal. Art. 5 provides that the proper fee for an application for review of judgment, if presented before the ninetieth day from the date of the decree, is one-half of the fee leviable on the plaint or memorandum of appeal. There is no dispute that as the application in the present case was made before the ninetieth day from the date of the decree, Art. 5 is

(1) 36 C. L. J. 421 (1922).

NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

applicable, and the argument has centred round the question, what is the point of time to which the expression leviable has reference.

The Assistant Government Pleader has invited us, on behalf of the Secretary of State for India in Council, to read into the third column of Arts. 4 and 5 the following expression: "If the plaint or memorandum of appeal were presented when the application for review is made." There are two obvious objections to the proposed construction: namely, first, it requires us to read into the articles words which are not to be found there: and, secondly, the fiction that is invoked is absolutely contradictory to the actual facts, because an application for review of judgment cannot be concurrent with a plaint or memorandum of appeal which must of necessity precede the judgment to be reviewed. As Lord Mansfield observed in *Johnson v Smith* (2), fiction has no place where substantial justice does not require its interference, still less where substantial justice would suffer from its operation. "The Court would not endure that a mere form or fiction of law, introduced for the sake of justice should work a wrong, contrary to the real truth and substance of the thing." This is an echo of what Lord Coke had said in *Butler and Baker's* case (3): "The law will never make any fiction, but for necessity and in avoidance of a mischief."

The Petitioner, on the other hand, urges that the Court Fees Act itself contains a provision which specifies when the fee is leviable on the plaint or memorandum of appeal and he invites our attention to sec. 6 which is in the following terms:—

"Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed, shall be filed, exhibited or recorded in any Court of justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

This shows conclusively that the requisite court-fee is leviable when the plaint or memorandum is filed; *Amjad Ali v. Muhamad Israil* (4). This is corroborated by the provisions of Or. 7 of the Code of Civil Procedure, 1908. R. 1 requires that the plaint shall, in addition to other particulars, contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees. R. 11 ordains that the claim shall be rejected, when written upon paper insufficiently stamped, if the Plaintiff has failed to supply the requisite stamp paper within a time to be fixed by the Court.

The Assistant Government Pleader urges that if the expression "leviable" refers to the time of presentation of the plaint or memorandum of appeal, the legislature might as well have replaced it by the word "levied." This argument is fallacious and overlooks the fact that what is leviable might not have been levied. In this connection, reference may be made to secs. 12 and 28 of the Court Fees Act.

"12. (i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(ii) But whenever any such suit comes before a Court of Appeal, reference or revi-

(2) [1760] 2 Burr. 950, 962.
(3) [1591] 3 Co. Rep. 25a (30a).
(4) I. L. R. 20 All. 11 (17) (F. B.) (1897).

NANDI LAL AGRANI *v.* JOGENDRA CHANDRA DUTTA.

sion, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of sec. 10, para. 11, shall apply."

"28. No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.

But, if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and, on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance."

Reference may also be made to sec. 149 of the Civil Procedure Code, 1908.

"149. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

It is plain that if the legislature had, in Arts. 4 and 5 used the expression "levied" instead of "leviable," the result would have been that if by mistake a smaller amount than what is leviable on the plaint or memorandum of appeal, has been levied, the applicant for review will be entitled to the continued benefit of the mistake. Conversely, if the amount levied is in excess of what is leviable, the Petitioner will be prejudiced, though he may be entitled to a refund of the sum paid in excess; *Lakhi Narain* v. *Kirtibas Das* (5) and *Re: Prasanna Chandra Roy* (6). There is thus ample reason why the legislature should have used the term "leviable" and not "levied." The use of the term "leviable" does not, in our opinion, justify the inference that the legislature intended to introduce a fiction into the law, namely, an imaginary presentation of the plaint or memorandum of appeal at the time when the application for review is filed.

We are fortified in this conclusion by another circumstance of a very special character. In the case of a suit or an appeal, the litigant is required to value the relief claimed and to pay court-fee accordingly. In the case of an application for review, the applicant is not required to value the relief claimed and to pay court-fee on the basis of such valuation. It is immaterial whether the applicant seeks a review of the judgment in respect of the whole or a fraction of the subject-matter of the controversy. The proper fee for the application is the fee leviable on the plaint or memorandum of appeal, whether the review affects the whole or a part of the decree: *Nobin Chandra* v. *Mahomed Uzir Ali* (7), *Imdad Hosein* v. *Badri Prasad* (8), *Re: Moqbul Ahmad* (9) and *Hussaina* v. *Shaheb* (10), though the decisions in *Anon* (11) and *Re: Manohar Tambekar*

(5) 18 C. L. J. 182 (1913).
(6) 11 B. L. R. 379n (1872).
(7) 3 C. W. N. 292 (1898).
(8) [1898] All. W. N. 212.
(9) I. L. R. 31 All. 294 (1909).
(10) [1918] P. L. R. 254; 10 P. W. R. 159.
(11) 7 Mad. H. C. R. App. 1 (1872).

NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

(12), may perhaps point to the opposite conclusion. The policy of the legislature is obvious. The substance of the matter is that for the purpose of ascertainment of the court-fee payable on the application for review, the application relates back to the plaint or memorandum of appeal, as the case may be : the amount is levied in a fixed proportion, independent of the scope of the application for review. To put the matter differently : as soon as a suit has been instituted, the amount of court-fee payable on a possible application for review of the prospective judgment in the suit becomes fixed.

We may note that the Assistant Government Pleader did not formulate the point for decision accurately when he stated that the question is, whether the case before us is excluded from the operation of the amending statute. The real question is, does the amending statute affect the decision of the question? The answer, in our opinion, must be in the negative : and we are supported in this view by two additional considerations. In the first place, the true construction of Arts. 4 and 5 must be determined irrespective of the amending statute which makes no reference to them. These articles found a place in the Court Fees Act as framed in 1870 : and the intention of the legislature, as expressed in the language used, cannot obviously be affected by the supposed object of the framers of the amending statute of 1922. There is nothing to show that the framers of the statute in 1870 anticipated and kept in view the contingency which has now arisen : there is equally nothing in the amending statute to indicate that the legislators of 1922 realised and provided for this case. Sec. 17 of Act IV of 1922, B. C., which was interpreted in *Thadeous Nahapiet* v. *Secretary of State for India in Council* (13) clearly does not advance the contention of the Assistant Government Pleader : on the other hand, the decision in *Taraprasanna* v. *Nrishinha* (14) militates against his argument. In the second place, we must bear in mind the elementary rule that, although as pointed out in *Inland Revenue* v. *Oliver* (15), provisions in fiscal statutes are not to be so construed as to furnish a chance of escape and a means for evasion, a fiscal statute must be strictly construed, and liability or additional liability cannot be imposed on the subject except by clear and unambiguous terms : *Stockton Ry. Co.* v. *Barrett* (16), *Partington* v. *A.-G.* (17), *Cox* v. *Rabbits* (18), *Pryce* v. *Monmouthshire Canal and Ry. Co.* (19), *Oriental Bank Corporation* v. *Wright* (20), *Tennant* v. *Smith* (21), *Secretary of State for India* v. *Scoble* (22), *Deputy Commissioner of Singbhum* v. *Jagadish Chandra* (23) and *Raj Rajeswari* v. *Gatikrishna* (24). From whatever point the question may be viewed, there is thus no escape from the conclusion that neither under the Court Fees Act as originally framed in 1870 nor under the Court Fees Act as amended in 1922, can a Petitioner for review of judgment be called upon to pay court-fee on the basis of the fee which would be payable on the plaint or memo-

(12) I. L. R. 4 Bom. 26 (1879).

(13) Reg. App. No. 235 of 1922 : decided 2nd July 1923. Unreported.
(14) Reg. App. No. 322 of 1922 : decided 4th July 1923. Unreported.
(15) [1909] App. Cas. 427.
(16) 11 Cl. & F. 590, 602.
(17) L. R. 4 H. L. 100.
(18) 3 App Cas. 473 (1878).
(19) 4 App. Cas. 197 (1879).
(20) 5 App. Cas. 842 (1880).
(21) [1892] App. Cas. 150.
(22) [1903] App. Cas. 299.
(23) 6 P. L. J. 411 (1921).
(24) Reg. App. No. 85 of 1923 : decided 2nd August 1923. Unreported.

NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

randum of appeal if it were to be filed on the date of the application for review. The amount must be calculated on the basis of the fee leviable (which, in the normal course of events, is the fee actually levied) on the plaint or memorandum of appeal according to the law in force when the plaint or memorandum is filed in Court. Tested in the light of this principle, the application in the present case must be deemed to bear the correct court-fee and must accordingly be heard on the merits.

To appreciate the ground for review, it is essential to recall the relevant facts which are set out in the following passage of our judgment :—

"The subject-matter of the litigation is a tract of land, measuring about 30 bighas, described in Sch. A to the plaint. The land belongs admittedly to the Sahas, who executed a mortgage in favour of Mallik on the 29th September 1900. The mortgagee sued to enforce his security and obtained a decree on the 27th September 1902. At the execution sale which followed in due course, on the 14th May 1907, Samalka became the purchaser. He obtained a sale certificate on the 28th April 1908. Samalka, it is said, was the nominal purchaser and bought in the property, one-third for the benefit of Ramdeo and two-thirds for the benefit of Rooya. On the 3rd June 1910, and on the 8th July 1910, respectively Rooya and Ramdeo, the beneficial owners, executed two conveyances in favour of Banerjee. The Plaintiff Dutt alleges that he was the real purchaser, and the conveyances were taken by him in the name of Banerjee. It would be a needless digression to narrate the story of the dispute between Dutt and Banerjee as to who became the beneficial owner under the conveyances: it is sufficient to state that Dutt may now be taken to have established his title against Banerjee, who has consequently disappeared from the scene."

The history of the title set up by the first Defendant who is the rival claimant may now be stated. In 1907, the Chaudhuries, who were the 6 annas co-sharer landlords, obtained against the Sahas a money decree for arrears of rent in respect of the disputed lands. This decree was executed, and at the sale which followed on the 12th May 1908, the right, title and interest of the judgment-debtor was purchased by one Sarkar. On the 14th October 1908, the first Defendant Agrani purchased the property from Sarkar on the basis of an alleged agreement for sale, dated 6th July 1908. In the interval, Sarkar had sold to Bose on the 20th July 1908, and on the strength of the title so acquired, Bose sold to the second Defendant, Dutt, brother of the Plaintiff, on the 25th May 1920. These transactions, it has been held, do not affect the purchase by Agrani from Sarkar, and were evidently attempts made by the Plaintiff to perfect his title, by buying in outstanding claims. The controversy between the Plaintiff and the first Defendant must consequently be determined on the following basis, namely, that the title of the Plaintiff is traced to the mortgage sale of the 14th May 1907 which itself rests on the mortgage of the 29th September 1909, while, on the other hand, the title of the first Defendant cannot be traced beyond the execution sale of the 12th May 1908 when the right, title and interest of the Sahas was exposed for sale. Before that date, the property had already vested in Samalka by virtue of the mortgage sale and could not again be brought to sale at the instance of the co-sharer landlords in execution of the money decree they held against the Sahas; we are consequently

NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

not called upon to consider what would have been the position, if the so-called rent decree were not a mere money decree and had the qualities of a true rent decree. The inference is thus irresistible that, *primâ facie*, the first Defendant has no title which can be successfully set up against the Plaintiff. What then is his answer to the claim? His defence, as will presently appear, is founded on a clerical error which crept into the mortgage instrument.

In the schedule to the mortgage bond, the boundaries of the hypothecated property were described as follows :-

"Within District Hoogly Sub-Registry Howrah, Station Golabari, Thana Golabari, Pargana Paik[illegible] village mouza Salikha, lies the Tantipara land measuring about 30 bighas :—

East—A place belonging to us called Bajaldanga.

West—Jatadhari [illegible]s land.

North—Biswambhar Saha's tank.

South—A place called Barabagan.

Maliks of 10 annas share are the Raja of Dighapatia and Bibi Jarao Kumari; the annual rent of Rs. 35 is payable to both the Sarkars : and the malik zaminder of 6 annas share is Gurudas Kundu Chaudhury to whom Rs 40 is payable as annual rent."

It has now transpired that, by mistake, the north and south boundaries were interchanged : what is stated as the south boundary was in fact the north boundary. The scribe evidently made a mistake and wrote "north" for "south" and "south" for "north." This erroneous description of the boundaries was in due course reproduced from the mortgage deed into the plaint, from the plaint into the decree, and from the decree into the sale certificate. The error appears to have been subsequently discovered, and in the conveyance by Rooya to Banerjee, dated the 3rd June 1910, the correct boundary is given in one portion of the deed though the incorrect boundary is also set out in the schedule. In the conveyance by Samalka to Banerjee, however, dated 8th July 1910, the incorrect boundary alone is reproduced. On these facts, the first Defendant urges that the Plaintiff has not purchased the disputed land at all, and must content himself with such land as may be found to lie within the incorrect boundaries set out in the mortgage deed. It is plain that if this contention prevails, the Plaintiff takes nothing. As the result of the further enquiry, which was directed by this Court on the 9th February 1921, it has transpired that there is no land which corresponds to the incorrect boundaries. There is no tract of 30 bighas which lies in Tantipara and is bounded on the east by Bajaldanga, on the west by Jatadhari Haldar's land, on the north by Bishambhar Saha's tank, and on the south by Barabagan. The fact that there has been a misdescription becomes manifest on a local inspection of the place, and this is confirmed, when the map is examined. There is, further, no plot of 30 bighas except the disputed land which, as stated in the mortgage bond, was held by the Sahas as tenants, 10 annas under Dighapatia and Jarao Kumari and 6 annas under the Chaudhuries. There is thus not the remotest doubt as to the facts. The only question is, whether the first Defendant is entitled in law to take advantage of the error in the mortgage deed and thereby to defeat the title of the Plaintiff.

It is plain that as the result of the execution sale, which was held on the 12th May 1908, by the co-sharer landlords on the basis of the money-decree held by them, nothing could vest in the purchaser Sarkar beyond the right, title and interest

NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

of the Saha judgment-debtors. The purchaser would thus be bound by the same rule of estoppel as the judgment-debtors.

We then proceeded to point out that tested in the light of this principle, the claim of the contesting Defendant could not be sustained, because the first Defendant was in no better position than the Sahas would have been if they had endeavoured to defeat the Plaintiff by reliance on the clerical error in the mortgage bond. In support of the view that the first Defendant was in the same position as the Sahas, we referred to the decision of the Judicial Committee in *Mahomed Mozuffer Hossein* v. *Kishore Mohun Roy* (25), where it had been ruled that the purchaser at the execution sale acquires the right, title and interest of the judgment-debtor and does not consequently occupy a position of greater advantage than the judgment-debtor does in the application of the doctrine of estoppel. In support of the view that the mortgagor is bound by the rule of estoppel not to dispute the validity of the mortgage, we referred to the decision in *Debendra Nath* v. *Mirza Abdul Samed* (26), where reference is made to *Good Title* v. *Bailay* (27), *Doe* v. *Pegge* (28) and *Doe* v. *Vickers* (29). To these may be added *Right* v. *Bucknell* (30), *Doe* v. *Stone* (31) and *Madell* v. *Thomas* (32). The two principles just mentioned cannot be and have not been disputed. They form the foundation of another decision whereon we also placed reliance, namely, *Bepin Krishna Roy* v. *Joyeswar Roy* (33), where a mistake was traced from the decree backwards, through successive stages of the judicial proceedings, to the mortgage instrument itself. It has now been argued that we overlooked that the decision last mentioned has no application, because in that case the rights of the parties were governed by Or. 34, rr. 4 and 5 of the Civil Procedure Code, 1908, and not by secs. 88 and 89 of the Transfer of Property Act, 1882, which were in force when the transactions in this case took place and must consequently regulate the rights of the parties.

It is not disputed that there is a substantial divergence between sec. 89 of the Transfer of Property Act and Or. 34, r. 5 of the Civil Procedure Code. Sec. 89 provided that in a suit for sale, upon the failure of the Defendant to pay the dues within the prescribed period, an order absolute for sale shall be made, "and thereupon the Defendant's right to redeem and the security shall both be extinguished." There was much divergence of judicial opinion as to the precise effect of the concluding clause of sec. 89, and it was ruled by a Full Bench of this Court in *Bibijan Bibi* v. *Sachi Bewa* (34) that "thereupon" means "after sale" and not "after the order absolute for sale." This view, however, was overruled by the Judicial Committee in *Hetram* v. *Shadilal* (35) and the clause itself was left out by the legislature when sec. 89 was replaced by Or. 34, r. 5. But this cannot affect the rights of litigants which accrued when sec. 89 was in force. The effect of that section has been considered by the Judicial Committee in *Hetram* v. *Shadilal* (35), *Mathu Mal* v.

(25) L. R. 22 I. A. 129: s. c. I. L. R. 22 Cal. 909 (1895).
(26) 10 C. L. J. 150 (1909).
(27) [1777] 2 Cooper 597.
(28) [1785] 1 Term. Rep. 758.
(29) [1836] 4 A. & E. 782.
(30) [1831] 2 B. & Ad. 278, 284; 36 R. R. 563.
(31) 3 C. B. 176; 71 R. R. 311 (1846).
(32) [1891] 1 Q. B. 230, 238.
(33) 34 C. L. J. 266 (1921).
(34) I. L. R. 31 Cal. 863: s. c. 8 C. W. N. 684 (Spl. B.) (1904).
(35) L. R. 45 I. A. 130: s. c. I. L. R. 40 All. 407; 22 C. W. N. 1033 (1918).

NANDI LAL AGRANI *v.* JOGENDRA CHANDRA DUTTA.

Durga Kunwar (36) and *Sukhi* v. *Ghulam* (37).

In *Hetram* v. *Shadilal* (35), a property had been twice mortgaged by way of simple mortgage, once in 1880 and again in 1881. Hetram purchased the property from the mortgagee in 1883. In 1885 the mortgagee of 1880 obtained against the mortgagor and Hetram a decree absolute for sale under sec. 89 of the Transfer of Property Act, 1882. He did not implead the mortgagee under the mortgage of 1881. He took no further steps under the decree and the property was not brought to sale. He died, and was succeeded by Hetram as his heir. In 1910 the mortgagee under the mortgage of 1881 instituted the suit. It was held that Hetram could not set the mortgage of 1880 as a shield, because the decree of 1885 was (1) barred by limitation, (2) inoperative as against the Plaintiff who had not been made a party to the suit and because the mortgage itself was gone, because of the terms of sec. 89 of the Transfer of Property Act, 1882.

In *Mathu Mal* v. *Durga Kunwar* (36), a property had also been the subject of two mortgages of 1872 and 1879 respectively. The mortgagee of 1872 obtained in 1881 a decree for sale under the same sec. 89 of the Transfer of Property Act, 1882, but omitted to implead the second mortgagee. A lady who was an assignee of the second mortgage raised suit in 1909. The owner resisted the decree unless he was paid the whole amount due under the first mortgage with interest calculated at the rate stipulated therein. The Plaintiff offered to pay the amount under the decree of 1884, but refused to pay the amount of the mortgage so calculated. The Subordinate Judge gave effect to the contention of the owner. The High Court altered the decree and gave effect to the offer of the Plaintiff. The owner then appealed. The Board adhered to the judgment of the High Court. The Judicial Committee, pressed with the decision in *Umesh Chandra* v. *Zahoor* (38), pointed out that at the time when the High Court delivered judgment, the case of *Hetram* v. *Shadilal* (35) had not been before the Board. That case decided that an order made under sec. 89 of the Transfer of Property Act, 1882 (Act IV of 1882), for the sale of mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. When the decree or order for sale in the case of *Umesh Chandra Sirkar* v. *Zahoor Fatima* (38) was made, the Transfer of Property Act, 1882, had not been passed and the procedure prescribed by that Act for suits for sales under that Act did not exist: that case was decided on the law as it then stood. The view thus adopted by the Judicial Committee fits in with the pronouncement in *Sundar Koer* v. *Shamkissen* (39), where Lord Davey observed that, after the expiration of the period of grace, if the property should not be redeemed, the matter would pass from the domain of contract to that of judgment and the rights of the mortgagee would thenceforth depend, not on the contents of his bond but on the directions in the decree.

In *Sukhi* v. *Ghulam Safdar Khan* (37),

(35) L. R. 45 I. A. 130: s. c. I. L. R. 40 All. 407; 22 C. W. N. 1033 (1918).

(36) L. R. 47 I. A. 71: s. c. I. L. R. 42 All. 364; 25 C. W. N. 397 (1919).

(37) L. R. 48 I. A. 465: s. c. I. L. R. 43 All. 469; 26 C. W. N. 279 (1921).

(35) L. R. 45 I. A. 130: s. c. I. L. R. 40 All 407; 22 C. W. N. 1033 (1918).

(37) L. R. 48 I. A. 465: s. c. I. L. R. 43 All 469; 26 C. W. N. 279 (1921).

(38) L. R. 17 I. A. 201 (1890).

(39) L. R. 34 I. A. 9: s. c I. L. R. 34 Cal. 150; 11 C. W. N. 249 (1906).

Lord Dunedin pointed out that Or. 34, rr. 3 and 5 of the Code of Civil Procedure, 1908, which now govern final decrees for foreclosure and sale, do not provide that after a decree thereunder the mortgage security is extinguished, as was prescribed by sec. 89 of the Transfer of Property Act in the case of a sale decree made under that section. On this ground, the decisions in *Hetram* v. *Shadilal* (35) and *Mathu Mal* v. *Durga Kunwar* (36) were distinguished. The inference follows that the law now under the Code of Civil Procedure, 1908, remains as it certainly was before the Transfer of Property Act, 1882, as expounded and applied in *Sunder Koer* v. *Shamkissen* (39).

In the case before us, the mortgage decree was made on the 27th September 1902 and the execution sale thereunder took place on the 14th May 1907. Sec. 89 of the Transfer of Property Act was in force till the Code of Civil Procedure, 1908, came into operation on the first day of January 1909. The rights of the parties must consequently be determined with reference to sec. 89 of the Transfer of Property Act and not Or. 34, r. 5 of the Civil Procedure Code. The decision in *Bepin Krishna* v. *Jogeswar* (33) is consequently distinguishable. There the mortgage decree was made on the 16th December 1909 and the sale in execution was held on the 18th September 1911. The rights of the parties thus fell to be determined only with reference to Or. 34, r. 5, C P. C. In addition to this circumstance the error in the mortgage instrument was discovered before the sale was completed; and a suit was instituted for rectification of the mortgage, before the sale could be held again. We must accordingly consider whether in view of sec 89 of the Transfer of Property Act as explained by the Judicial Committee in *Hetram* v. *Shadilal* (35) and *Mathu Mal* v. *Durga Kunwar* (36), the Plaintiff can establish, as against the Defendant, that there was an error in the description of the property and is entitled to succeed on that footing.

The Defendant has strenuously contended that under sec. 89 of the Transfer of Property Act, as soon as the order absolute for sale was made the security was extinguished, and the relative rights of the mortgagor and mortgagee were thenceforth regulated by the decree. This may be conceded. But it does not follow that the mortgagee became thereby debarred from proving that the description of the property mentioned in the schedule to the decree itself was erroneous. The Petitioner has contended in substance that the effect of sec. 89 is to place, at the stage of the decree, an impassable barrier across the path of enquiry from the sale certificate backwards to the mortgage instrument. The question we have to solve is, what is the property, covered by the sale certificate, which has passed into the hands of the Plaintiff. Enquiry has elicited two facts, namely, first, that there is no property in existence which corresponds to the property described in the schedule to the sale certificate and the decree, and secondly, that if the northern and southern boundaries be interchanged, there is a property of the judgment-debtor which fits in with that description, in every other

(33) 34 C. L. J. 256 (1921).

(35) L. R. 45 I. A. 130: s. c. I. L. R. 40 All. 407; 22 C. W. N. 1083 (1918).

(36) L. R. 47 I. A. 71: s. c. I. L. R. 42 All. 364; 25 C W. N. 397 (1919).

(39) L. R. 34 I. A. 9; s. c. I. L. R. 34 Cal. 150; 11 C. W. N. 249 (1906).

(35) L. R. 45 I. A. 130: s. c. I. L. R. 40 All. 407; 22 C. W. N 1083 (1918).

(36) L. R. 47 I. A. 71: s. c. I. L. R. 42 All. 364; 25 C. W. N. 397 (1919).

NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

respect to the minutest detail. No legal principle has been brought to our notice which, on these facts, prevents the Courts from granting relief as among the decree-holder, the auction-purchaser and the judgment-debtor. What is essentially requisite is the rectification of the boundaries in the schedule to the sale certificate. For this purpose, it is not material that we should go back, behind the decree to the mortgage instrument itself. The clerical error becomes apparent on the result of the local enquiry held on the basis of the boundaries in the sale certificate. The investigation of the proceedings in the suit itself, antecedent to the decree, only furnishes a historical explanation, as it were, how the error arose. But there can be no question that there is an error in the sale certificate, and in our opinion, the Court has ample authority as a Court of justice, equity and good conscience to mould the relief accordingly as between the original parties or their representatives in interest. In this view, it is needless to consider the scope of the questions which may be properly raised on an application for review of judgment as explained by the Judicial Committee in *Chhajju Ram* v. *Neki* (40).

The result is that the Rule is discharged with costs. We assess the hearing fee at two gold mohurs.

J. N. R. *Rule discharged.*

[CRIMINAL APPELLATE JURISDICTION.]

APPS. NOS. 408 AND 409 OF 1922.

C. C. GHOSE, J.
CUMING, J.
1923,
Heard, 4, 5 and 6, July.
Judgment, 27, July.

CHARU CHANDRA GHOSE and ors., Appellants,
v.
THE KING-EMPEROR.

Indian Penal Code (Act XLV of 1860), sec. 120B read with sec. 420, charge under, for deceiving Judges by habitually instituting false cases in Civil Courts and obtaining decrees in pursuance of conspiracy, how far tenable—Omission to put before the jury as to whether the evidence satisfied the ingredients of sec. 415, if a misdirection—Court, passing a decree in a suit, if can be said "to make a valuable security" or "to deliver property"—Evidence of Judges deceived, if necessary for proving the charge.

A sanction, given by the Munsif for prosecution of certain persons under secs. 193, 209, 467/114 and 471, I. P. C., for habitually bringing false cases in Civil Courts against innocent persons in pursuance of a criminal conspiracy, was revoked by the District Judge. While the proceedings were pending, the police submitted a charge-sheet alleging that the accused had conspired to cheat people by habitually bringing fraudulent civil suits. The accused were eventually tried on a charge under secs. 120B/420, I. P. C. of conspiring to deceive unsuspecting Judges of Civil Courts by bringing false cases against innocent persons and inducing them to pass decrees and thereby to make valuable securities and to cause delivery of properties and so on:

Held—*That in order to bring a case within the four corners of sec. 420, I. P. C., it would have to be seen whether the ingredients required by sec. 415, I. P. C., are present. A "decree," as defined in the Civil Procedure Code, does not come within the definition of a "valuable security" and even if a "decree" did satisfy the definition of a "valuable security," within the meaning of sec. 415, I. P. C., there is no delivery of any property when the Court passes a decree, because the original decree remains in Court, and the term "valuable security" can only apply to the original document and not to any copy of a decree which may be supplied on application to the parties. The same*

(40) L. R. 49 I. A. 144; s. c. 26 C. W. N. 697 (1922).

CHARU CHANDRA GHOSE *v.* THE KING-EMPEROR.

arguments would apply to orders in execution. The Judge misdirected the jury in that he did not draw the attention of the jury to the question as to whether the ingredients required by sec. 415, I. P. C. were present on the facts alleged by the prosecution.

Further, no evidence had been adduced by calling the "unsuspecting Judges" of Civil Courts to speak to the fact that they were deceived, whereas the language of sec. 415, I. P. C. requires that the persons deceived must have delivered properties, etc., and in the circumstances of this case the fact that these Judges were deceived could only have been spoken to by the Judges themselves.

Therefore the case of the prosecution could not be brought within the four corners of sec. 415, I. P. C., and therefore also of sec. 420, I. P. C. and the accused must be acquitted.

These were appeals under sec. 410 of the Criminal Procedure Code against an order of the Additional Sessions Judge of Burdwan (Mr. Paroda Kinker Mukherjee), dated the 19th July 1923.

The facts of the case are briefly as follows :—An application to the District Magistrate of Burdwan asking him to take action against a number of persons who were in the habit of instituting false cases in the Civil Courts against innocent persons, was forwarded by the District Magistrate to the Superintendent of Police in Burdwan for necessary action. The latter thereupon passed an order for arresting the persons mentioned in the petition and for starting a case under sec. 110, Cr. P. C., against them. A Police enquiry followed, but no report having been submitted for eight months, the Magistrate before whom the proceedings under sec. 110 were pending, directed the discharge of the said persons. Shortly after that a first information was lodged against the said persons, charging them with having committed offences punishable under sec. 420 read with sec. 120B, I. P. C. and the District Magistrate applied before the Munsif for sanction to prosecute five persons for offences under secs. 193, 209, 467/114 and 471 and also under some of these sections read with sec. 109 and also under some of these sections read with sec. 114, I. P. C., for being members of a criminal conspiracy for the purpose of fraudulently obtaining moneys and properties from innocent persons or depriving them of their lawful rights by instituting false and fraudulent suits. On the 25th September 1920, the Munsif granted the necessary sanction. On revision, however, the District Judge of Burdwan on 31st April 1921 revoked the sanction granted by the Munsif. While these proceedings were pending, the Police submitted a charge-sheet against certain persons on the 19th May 1920, alleging that the present accused, along with others, had conspired to cheat people by bringing fraudulent civil suits in Burdwan and in Shahabad and that they were professional swindlers and habitual conspirators.

The accused were eventually put on their trial on a charge under sec. 420 read with sec. 120B, I. P. C., charging them with being members of a criminal conspiracy to cheat, and as members thereof conspiring with one another to commit offences punishable under sec. 420, I. P. C., to wit, to deceive unsuspecting Judges of Civil Courts who tried the suits and also Judges who had ordered execution of the decrees therein and inducing or attempting to induce the said Judges, so deceived, to make valuable securities, to wit decrees, declaring that the accused persons were entitled to get properties or moneys from the victims of the said conspiracy and

thereby deceiving such Judges to order execution of the decrees, to attach or seize properties of the victims of the conspiracy and to sell or cause to be sold properties so attached and thereby dishonestly inducing them to deliver or cause to be delivered possession of the properties so sold and so on. The accused were eventually convicted by the Additional Sessions Judge of Burdwan, and against the said convictions the present appeals were preferred to the High Court.

Babus Manmatha Nath Mookerjee and *Punchanan Chaudhury* for the Appellants.

Babu Surendranath Guha for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Appellants in appeal No. 408 were four persons named Charu Chandra Ghose, Akhoy Kumar Rooj, Akhay Kumar Pal and Jiban Chandra Roy *alias* Jiban Krishna Ray; the latter died after the appeal had been filed and at the present moment the Appellants are the three first named persons. In appeal No. 409 the Appellants are three in number, namely, Ganpat Pandey, Rajani Kant Samui and Charitar Muchi *alias* Ram Charitar Muchi. The above-named seven persons, along with six others, were tried under sec. 120B, read with sec. 420, read with sec. 109 of the Indian Penal Code, before the Additional Sessions Judge of Burdwan and a jury. The jury convicted the said seven persons and the learned Judge agreeing with the verdict of the jury, sentenced the said seven persons to various terms of imprisonment as under, *viz.*, the accused Charu Chandra Ghose to three years' rigorous imprisonment; the accused Akhoy Kumar Rooj and Jiban Chandra Roy to two years' rigorous imprisonment; the accused Akhay Kumar Pal to one year's rigorous imprisonment; and each of the accused, Ganpat Pandey, Rajani Kant Samui and Charitar Muchi, to one year's rigorous imprisonment.

The facts connected with these two appeals, shortly stated, are as follows :— On the 17th July 1919, one Jiten Das (P. W. 67) made an application before the District Magistrate of Burdwan, asking the latter to take action against a number of persons who were in the habit of instituting false cases in the Civil Courts against innocent persons. Ten persons were named in Jiten Das's petition, which has been tendered as an exhibit in this case and which is exhibit 190. The District Magistrate forwarded the petition to the Superintendent of Police in Burdwan for necessary action. The latter on receipt of the petition passed an order on the 16th August 1919, for arresting the ten persons mentioned in Jiten Das's petition and for starting a case against them under sec. 110, Cr. P. C. A Police enquiry followed, but although the case under sec. 110, Cr. P. C. was started on the 18th of August 1919, the Police did not submit a final report even up to March 1920. On the 3rd March 1920, the Magistrate, before whom the proceedings under sec. 110, Cr. P. C. were pending, being of opinion that inasmuch as the Police report had not been submitted for a period of nearly eight months, directed the discharge of the said ten persons. On the 17th of March 1920, a first information was lodged against the said persons, charging them with having committed offences punishable under sec. 420 read with sec. 120B of the Indian Penal Code. On the 21st June 1920, the District Magistrate of Burdwan applied before the Munsif, first Court, at Burdwan, for sanction to prosecute five persons named, Prabhu Ram Pandey, Charu Chandra Ghose, Akhay Kumar Pal, Amrita Lal Samui and Upendra Nath

Naik, for offences under secs. 193, 209, 467/114 and 471 and also under some of these sections read with sec. 109 and also under some of these sections read with sec. 114 of the Indian Penal Code. In his petition the District Magistrate stated that Prabhu Ram Pandey was a veteran litigant and a proclaimed "tout" in the District of Burdwan, and the said other four persons were his creatures and associates, and that all of them with other person or persons unknown, were members of a criminal conspiracy for the purpose of, amongst others, fraudulently obtaining moneys or properties from innocent persons or depriving them of their lawful rights by instituting false and fraudulent suits against such persons on the basis of forged documents and by committing other offences punishable in law or by doing illegal acts with illegal means in connection with those false claims. Particulars were given by the District Magistrate in his said petition of the false and fraudulent suits alleged to have been brought by the persons, against whom sanction was applied for. On the 25th September 1920, the Munsif granted the necessary sanction. There was an application for revision of the order made by the Munsif before the District Judge of Burdwan and the latter, by his order dated the 31st of April 1921, revoked the sanction granted by the Munsif. While these proceedings were pending, the Police submitted a charge-sheet against certain persons on the 18th of May 1920. It was alleged that the present accused, along with others, had conspired to cheat people by bringing fraudulent civil suits in Burdwan and in Shahabad and that they were professional swindlers and habitual conspirators.

In order to understand the case against the accused persons, it is necessary to mention some of the details of the conspiracies in which they were, according to the Police, engaged. It appears that Prabhu Ram Pandey, whose name has already been mentioned, claimed to be the reversionary heir of one Sheo Balak, who died some time in 1903, leaving a widow called Jhalo Koer. After Sheo Balak's death, it is alleged that Prabhu Ram determined to get hold of Sheo Balak's properties and with that view instituted various suits. One Amar Dayal claimed to be the adopted son of Sheo Balak, having been adopted by Jhalo Koer, and it is said that he used to look after Jhalo Koer's properties. Prabhu Ram Pandey instituted certain suits against Amar Dayal in 1910 and 1911. It was alleged that these suits were false and fraudulent. It appears further that Jhalo Koer became involved in debt and mortgaged her lands on the 14th of Agrahayan 1318 F. S., corresponding with the 30th of November 1910, and executed and registered a deed in favour of Progar Ram, Raghubir Shaha and Badhu for a consideration of Rs. 500. Ram Dhyan Panday was a witness who identified Jhalo at the time of the registration of this deed. A few days after this, *viz.*, on the 8th of December 1910, the accused Jiban Krishna brought a criminal case at Burdwan against Ram Dhyan. Summons was never served on Ram Dhyan in this case and it is alleged that Ram Dhyan became aware of this for the first time when he was arrested in execution of a warrant at Sasaram. He came to Burdwan and met Prabhu Ram Pandey and invoked his assistance. Prabhu Ram demanded Rs. 10. Ram Dhyan paid Re. 1 and promised to pay the balance on return home, which he did. Later on, it is said that Prabhu Ram took Ram Dhyan to a temple and made him promise that he would not go against Prabhu Ram and in that case he would not be put to any

CHARU CHANDRA GHOSE *v.* THE KING-EMPEROR.

trouble. Prabhu Ram, it is further alleged, said that it was at his instance that the case had been instituted. On the 27th of January 1911, the accused Charu Chandra Ghose, instituted a Small Cause Court Suit No. 45 of 1911, in the Court of the Subordinate Judge of Burdwan against Ram Dhyan on an alleged note of hand dated the 28th October, 1908. The suit was decreed and compromised for Rs. 214 on the 20th of February 1911. It is alleged that Ram Dhyan never came and compromised the suit, nor had he borrowed any money from Charu Chandra Ghose and that Ram Dhyan came to know of this matter for the first time when his lands were sold some three years later in execution of the decree. Raghubir's name has already been mentioned. He was one of the mortgagees of Jhalo Koer and it is alleged that between 1912 to 1917 certain proceedings were taken by some of the accused against Raghubir. In other words, suits were instituted against Jhalo, Amar Dayal, Ram Dhyan and Raghubir. The above suits may be classed under one group, being false suits brought by the conspirators in respect of matters in connection with Jhalo Koer's properties.

Evidence as regards two other conspiracies was also adduced. It appears that there was a man called Jaherilal Sadhukhan, who happened to be a friend of Prabhu Ram Pandey. He died leaving a son named Kali Pado Sadhukhan and a widow named Manoda Sundari. One Nibaran Chandra Roy was a tenant of Jaherilal and there was a person named Gosto Behari Bose, who used to look after the properties and conduct litigation on behalf of Manoda Sundari. One Nityanand Shaha had a joint *karbar* with Manoda Sundari and Kali Pado. It appears that after Jaherilal's death, Manoda Sundari and Kali Pado were helped in the joint *karbar* and in looking after the properties of Jaherilal by these three persons, named Nibaran Chandra Roy, Gosto Behari Bose and Nityanand Shaha. It is alleged that on Jaherilal's death Prabhu Ram Pandey wanted to get hold of Jaherilal's properties and of the *karbar* and with that object a conspiracy was formed some time in 1910 and various suits and proceedings were brought between 1910 to 1916 and the victims of the said conspiracy were Manoda Sundari, Kali Pado, Nibaran Chandra Roy, Gosto Behari Bose and Nityanand Shaha. Nityanand, it may be mentioned in passing, was a witness to a *kobala* alleged to have been executed by Jhalo Koer in favour of Prabhu Ram Pandey.

The third conspiracy, in respect of which evidence was given, arose in this way. There was a man called Narain Shaha, who died leaving a widow called Jatika Moyee. Narain had a sister named Probhat Kumari, whose husband was one Rajani Kant Samui. On Narain's death, Rajani Kant Samui, it is alleged, wanted to get the house which Narain had left. It is alleged, however, that Narain had left a daughter and, therefore, Rajani Kant Samui could on no account get the house of Narain. Rajani Kant Samui's case, however, was that Narain had died childless and that the house was the *stridhan* property of Narain's mother, and therefore, in the usual course of things Narain's sister, Probhat Kumari, would be entitled to get the house. Litigation ensued in respect of this between 1918 to 1920, and it is alleged that the accused were members of a conspiracy formed to get hold of the property of Narain.

The charge framed against the accused, who are now before us, ran in these terms :—" That you between the 27th day of March 1913, and April 1920, at Natun-

CHARU CHANDRA GHOSE v. THE KING-EMPEROR.

ganj and Khojnerbar in the town of Burdwan, District Burdwan, and at Konpa, Arrah and Sasaram in the District of Shahabad and at other places in British India, were, along with others, members of a criminal conspiracy to cheat (which conspiracy had continued to exist since about 1903) and as members thereof did conspire with one another and Prabhu Ram Pandey, since deceased, Nader Ali Khan, since deceased, and other person or persons unknown, to commit offences punishable under sec. 420, I. P. C. (each of which is a part of the same scheme and transaction), to wit, to deceive unsuspecting Judges of Civil Courts who had tried the suits mentioned in Sch. A, attached hereto, and also Judges of Civil Courts who had ordered execution of such decrees in execution cases mentioned in Sch. B, attached hereto, by a process of your own, namely, firstly, you deceived the first above-mentioned trial Judges to entertain unsuspectingly false claims (on the false allegations that the predecessors in title of the Defendant or the Defendants respectively concerned in the said Civil suits had borrowed money or purchased goods on credit or assigned right to receive money from the Plaintiffs who were either one or more of your party or a relation or connection of one of your party therein respectively, at places within the local limits of jurisdiction of such above-named trial Judges, but which places were at great distance from the places of residence of the Defendants concerned, and that the debts so alleged to be due to the said respective Plaintiffs remained unpaid wholly or in part) and then by causing false evidence to be given before the first above-mentioned trial Judges, by one or more of your party, to prove due service of summonses (where summonses and copies of plaints were not served according to law) and claims (which were known by you to be false) deceived the first above-mentioned trial Judges respectively to believe that the claims in the suits aforesaid were true and proved as against the Defendants concerned therein, and thereby dishonestly induced or attempted to induce the first above-mentioned trial Judges, so deceived, to make valuable securities (to wit, decrees in Small Cause Court suits declaring that the Plaintiffs therein were entitled to get properties or moneys from the victims of the said conspiracy, *viz.*, the Defendants concerned in such suits or that the legal rights of some Defendants were extinguished) and you thereby obtained or attempted to obtain properties by deceitful means: and nextly, you deceived the said first above-mentioned trial Judges to transmit the decrees, which were passed in the suits aforesaid, for execution to last above-mentioned executing Judges (who had ordered execution of such decrees in the execution cases aforesaid and within the local limits of whose jurisdiction the Defendants respectively concerned in the said suits resided or had properties) and then deceived such executing Judges to order execution of the decrees, so transmitted, (on the representation of one or more of your party that the decree-holder was entitled to enforce his decrees with the assistance of the Court) in the execution cases aforesaid, to attach or seize or cause to be attached or seized the bodies or properties of the victims of the said conspiracy, *viz.*, the judgment-debtors concerned in the said execution cases respectively or to sell or cause to be sold properties so attached or seized by Court sale to one or more of your party, and thereby dishonestly induced them respectively to deliver or to cause to be delivered possession of the properties so sold

CHARU CHANDRA GHOSE v. THE KING-EMPEROR.

to one or more of your party as auction-purchasers at such sales or to deliver or cause to be delivered moneys realised in such execution cases to one or more of your party as decree-holders, or to consent to the retention of properties so sold or moneys so delivered by one or more of your party as decree-holders and you also deceived the Judges of Civil Courts who had decided the suits mentioned in Sch. C attached hereto and thereby dishonestly induced them or attempted to induce them respectively to give effect to the false defence set up knowingly by one of your party, and to make valuable securities (to wit decrees in such suits declaring that the Plaintiffs in such suits were not entitled to their respective lawful claims or part thereof) and thereby committed an offence punishable under secs. 120B/420 of the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge."

There are three schedules to the said charge, Sch. A, containing a list of the false and fraudulent suits alleged to have been brought by the members of the conspiracy, Sch. B, being a list of the execution cases which followed the decrees in the suits mentioned in Sch. A, and Sch. C, being the list of suits in which false and fraudulent defences were set up by the members of the said conspiracies.

The matters referred to in the said charge clearly came within the purview of secs. 209 and 210 of the Indian Penal Code and might properly have been made the subject-matters of proceedings against the accused under the provisions of the said two sections. The difficulty, however, in the way of the prosecution lay in the fact that under the provisions of sec. 195 of the Code of Criminal Procedure cognizance of any offence punishable under secs. 209 and 210, among others, could not be taken except with the previous sanction of or on the complaint of a Court in which such an offence has been committed, or of some other Court to which such Court was subordinate, and in this case the sanction which had been granted by the Munsif had been revoked by the District Judge, Mr. Cammiade, in April 1921. The prosecution, therefore, attempted to bring their case against the accused within the four corners of sec. 420 of the Indian Penal Code. Sec. 420 of the Indian Penal Code runs as follows:—

"Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person or to make, alter or destroy the whole or any part of a valuable security or anything which is signed or sealed and which is capable of being converted into a valuable security shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine." Now, in order to bring a case within the four corners of sec. 420, I. P. C., it would have to be seen in the first instance whether the ingredients required by sec. 415, I. P. C., are present in the facts alleged against the accused. We must, therefore, turn to sec. 415, I. P. C., in the first instance and see what the ingredients required by that section are. Sec. 415 runs as follows:— "Whoever by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is

CHARU CHANDRA GHOSE v. THE KING-EMPEROR.

said to cheat." The ingredients required by this section, therefore, are :—

(1) Deception of any person.

(2) (a) Fraudulently or dishonestly inducing that person

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Mr. Manmatha Nath Mookerjee, who has appeared on behalf of the Appellants, in support of these two appeals, has assailed the learned Additional Sessions Judge's charge to the jury on various grounds. It is unnecessary for us, in the view we have taken, to refer to all the grounds urged by Mr. Mookerjee, but we shall content ourselves with noticing the more important of Mr. Mookerjee's grounds. In the first place, it is argued that the charge was bad, inasmuch as there was not one conspiracy, which was referred to therein, but evidence was allowed to be given of three conspiracies in which the conspirators were different, the objects of the conspiracies were different, and the conspiracies were held at different times. It is complained that in the charge to the jury the above point was not mentioned and the attention of the jury was not drawn to it. In the second place, it is argued that the learned Judge's charge to the jury was defective inasmuch as the attention of the jury had not been drawn to the following points arising on a charge under sec. 420 or 415, I. P. C. In other words, it is argued that it bought to have been put to the jury that in order to make out the offence of cheating, not only should there have been delivery of property, but it had to be proved that it was property to which the accused was not entitled. Nextly it is argued that it ought to have been put to the jury that passing a decree is not tantamount to delivering property and there was no evidence whatsoever that anybody was deceived and that the person so deceived had delivered any property. It is also argued that there was no evidence as to the ingredients required in the second part of sec. 415 of the Indian Penal Code. It is further argued that it should have been put to the jury that there were specific sections in the Indian Penal Code covering the real offences alluded to in the charge and alleged to have been committed by the accused and that the prosecution were not entitled to institute the present case complaining of other offences alleged to have been committed by the accused when sanction, as a matter of fact, had been refused in respect of a prosecution for the real offences committed by the accused.

It has been represented to us on behalf of the Appellants that the case put before the Sessions Judge was wholly different from the one indicated in the first information. In the first information it was alleged that the accused persons conspired to cheat numerous persons by bringing fraudulent civil suits in the Courts at Burdwan and Shahabad. In the Sessions Court the prosecution changed their case and it was alleged that the real offence had been committed against Courts of justice. No sanction for the prosecution of offences against Courts of justice was available after the 30th of April 1921, when the District Judge revoked the sanction which had been previously granted by the Munsif and in consequence thereof, the prosecution, it is alleged, had to fall back upon sec. 420, I. P. C., because

CHARU CHANDRA GHOSE *v.* THE KING-EMPEROR.

it was realised that if the case could be brought under the provisions of sec. 420, I. P. C., it would not be necessary to rely on any sanction for the institution of the present proceedings.

The charge delivered by the learned Additional Sessions Judge of Burdwan to the jury is a very lengthy document. This has been scrutinised on behalf of the Appellants for the purpose of showing that the learned Judge misdirected the jury, in that he did not draw the attention of the jury to the question as to whether the ingredients required by sec. 415, I. P. C. were present in the facts alleged by the prosecution. The Appellants urge that there are various other misdirections in the charge bearing on the other grounds taken on behalf of the Appellants. In the view we take as regards the learned Additional Sessions Judge's charge on the question as to whether the ingredients required by sec. 415, I. P. C. are or are not present in the case on behalf of the prosecution, it will not be necessary for us to go into the other questions of misdirection argued on behalf of the Appellants. We, therefore, propose to confine ourselves to this ground, *viz.*, whether the learned Additional Sessions Judge's charge to the jury can or cannot be assailed on the ground that he had not put before the jury whether on the evidence adduced by the prosecution the ingredients required by sec. 415, I. P. C. were satisfied. On behalf of the prosecution it has been made clear to us that they did not seek to bring their case within the latter or the second part of sec. 415, I. P. C. The case for the prosecution is that unsuspecting Judges of Civil Courts were deceived by the Appellants, that the persons so deceived were induced by the Appellants to pass decrees in certain civil suits and thereby induced to deliver properties, and it is alleged that by reason of these steps having been taken by the Appellants, they committed the offence of cheating as defined in sec. 415, I. P. C.

It is argued on behalf of the prosecution that when Judges of Civil Courts passed decrees in suits brought by the Appellants or some of them, or when they passed orders in execution proceedings instituted by the Appellants or some of them, they made valuable securities within the meaning of the definition contained in sec. 30, I. P. C. and that they thereby delivered properties, and, further, they would not have delivered properties if they had not been fraudulently deceived by the Appellants or some of them, and that if that is so, the case is brought within the four corners of sec. 415, I. P. C. For the moment we will leave aside orders made in execution proceedings and confine ourselves to decrees. Now, "valuable security" as defined in sec. 30, I. P. C. denotes a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under a legal liability or has not a certain legal right. The word "decree" has been defined in the Civil Procedure Code and it means the formal expression of an adjudication which, so far as regards the Courts expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. Let us see therefore whether a decree satisfies the definition of a valuable security. In our opinion a "decree" does not come within the definition of a "valuable security"; a decree merely declares the existence of legal rights or the extinguishment, extension, transfer or restriction of legal rights, etc.; the rights are there, etc., and all that the decree does is

CHARU CHANDRA GHOSE *v.* THE KING-EMPEROR.

that it formally expresses the adjudication by the Court on the rights of the parties. Therefore a "decree" is not a "valuable security," but even if a "decree" did satisfy the definition of a "valuable security," there was no delivery of property within the meaning of sec. 415, I. P. C. When the Court passes a decree, it does not deliver any property, because the original decree remains in Court and the term "valuable security," assuming that the term is wide enough to include a decree, can only apply to the original document and not to any copy of a decree which may be supplied on application to the parties. The same arguments would apply to orders in execution. In the next place, who are the persons deceived according to the prosecution. They must be "unsuspecting Judges" of Civil Courts, according to the prosecution. No evidence has been adduced by calling the "unsuspecting Judges" of Civil Courts to speak to the fact that they were deceived, because the language of sec. 415, I. P. C. requires that the persons deceived must have delivered properties, etc., and in the circumstances of this case the fact that those Judges were deceived could only have been spoken to by the Judges themselves.

As has been stated above, the prosecution made it clear before us that they did not rely upon the second part of sec. 415, I. P. C.; it is therefore not necessary for us to enquire as to whether on any conceivable view of the matter, this case could have been brought within the second part of sec. 415, I. P. C. If it were necessary to do so, we might point out that the charge as framed does not cover a case coming within the second part of sec. 415, I. P. C. and that the evidence adduced does not satisfy the ingredients of the second part of sec. 415, I. P. C.

The learned Additional Sessions Judge's charge to the jury is defective in that it omitted to point out to the jury the matters to which we have drawn attention; there was, therefore, misdirection of a very grave character, and in the circumstances we are constrained to set aside the verdict of the jury. We are satisfied that on no conceivable view of the matter could the case of the prosecution be brought within the four corners of sec. 415, I. P. C. and, therefore, also of sec. 420 of the Indian Penal Code. In the view, therefore, which we have taken, it is not necessary for us to go into any details in respect of the other grounds taken by Mr. Mookerjee on behalf of the Appellants. It is not to be understood, however, that the other grounds of Mr. Mookerjee are not substantial. The materials on the record and especially the learned Additional Sessions Judge's charge to the jury, leave no other alternative to us but to come to the conclusion to which we have come. The prosecution was conducted during a very lengthy period and at great public expense; that it should have been conducted in the manner in which it has been done, is regrettable; but these appeals must stand or fall on the question of misdirection in the learned Additional Sessions Judge's charge to the jury. As has been stated above, we are satisfied that there has been misdirection and we are, therefore, bound to set aside the verdict of the jury and to direct the acquittal of the Appellants, which we do. The bail bonds will be cancelled.

J. N. R. *Appeal allowed; Convictions set aside.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 145 OF 1922.

MOOKERJEE, J.
RANKIN, J.
1923,
Heard, 10 and 11, May.
Judgment, 19, July.

RAMPRATAP CHAMRIA, Plaintiff, Appellant,
v.
DURGAPRASAD CHAMRIA and ors, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 12, 14, 15—Award, validity of—Pending suit, reference made to arbitration to settle all matters in dispute between parties to suit—Award going beyond matters in dispute in suit and adjudging rights of a stranger to suit, if valid—Civil Procedure Code (Act V of 1908), Sch. II, and Indian Arbitration Act (IX of 1899), jurisdictions created under, in respect of awards

During the pendency of a suit, all the parties to the suit except an infant Defendant, as also another, not a party to the suit, entered into an agreement whereby they appointed certain persons as arbitrators for the purpose of settling disputes among themselves. The Court, on an application made by the Plaintiff in the said suit, passed a consent order directing that all matters in difference in the suit between the parties should be referred to the final decision of the persons appointed arbitrators as aforesaid. The arbitrators made an award which dealt with matters not included within the scope of the suit and was in excess of their authority in respect of matters included within its scope. The award was filed under the Indian Arbitration Act and the Civil Procedure Code, Sch. II:

Held *per* CURIAM.—*That the award was invalid and could not be enforced either under the Civil Procedure Code, Sch. II, or the Indian Arbitration Act, and at any rate, it was not a case in which the Court should exercise its discretionary powers under para. 12 or para. 14 of the Civil Procedure Code.*

Held *per* MOOKERJEE, J.—*An examination of the provisions of the second schedule of the Code of Civil Procedure and of the Indian Arbitration Act leaves no room for controversy that the legislature has made clear and distinct provisions to regulate the procedure in respect of each of four types of arbitration which have special characteristic features. The jurisdiction thus created in respect of each type of arbitration must be exercised through the machinery provided and in conformity with the procedure prescribed. The legislature never contemplated a confusion of these jurisdictions. No provision can be traced for simultaneous arbitration, by private agreement and on reference by Court, in respect of subject-matters within and beyond the scope of a suit and amongst persons, some parties and some strangers to a litigation.*

Held *per* RANKIN, J.—*It is quite impossible that one and the same arbitration should be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court: between the parties to the suit and between them and other persons: under the Code provided by the Indian Arbitration Act and under the Code provided by the second schedule: under the superintendence and control of the Judge who has seizin of the suit and of the Judge disposing of business under the Indian Arbitration Act: partly upon an order of reference and partly under an agreement. When under para. 12 of the second schedule the Court proceeds to correct an award in a case where a severable matter not referred has been dealt with it does so by cancelling that part of the award and the part so cancelled is set aside for all purposes. Neither para. 12*

RAMPRATAP CHAMRIA v. DURGAPRASAD CHAMRIA.

nor para. 14 is directed to such a confusion of jurisdiction as the present case discloses.

No Court acting under the Civil Procedure Code has in India a general authority to act on the consent of parties and thus to make an Order of Reference in a form which might apply to any dispute whatever independently of any relation to the jurisdiction of the Court.

This was an appeal preferred on the 22nd November 1922 against an order of Mr. Justice Greaves, dated the 24th July 1922.

The plaint in the suit was as follows :—

1. One Nandaram Chamria died leaving two sons Gorakhram Chamria and Hardatrai Chamria. The said Nandaram Chamria died in involved circumstances in his native village at Fatehpur.

2. The said Gorakhram Chamria died in 1914 leaving a son Rampratap Chamria and the Defendant Mussamat Surji, the widow of his predeceased son Amlokchand Chamria who died in the year 1911.

3. The said Hardatrai Chamria adopted a son the Defendant Durgaprasad Chamria. Later on three sons were born to him one of whom died an infant.

4. The said Hardatrai Chamria died leaving a widow Mussamat Annardeyi Sethani and two sons the Defendants Radhakissen Chamria and Motilal Chamria.

5. The said Hardatrai Chamria during his life-time by his own unaided exertions started a business in Calcutta and elsewhere under the name of Hardatrai Chamria of which he was the sole proprietor.

6. The said Rampratap Chamria joined the said business as an assistant and later on was admitted by the said Hardatrai Chamria as a partner. In the beginning the said Rampratap Chamria was given a two annas share which was subsequently increased to five annas.

7. Subsequent thereto Amlokchand Chamria during his life-time was also admitted as a partner in certain portion of the said business and was given a two annas share.

8. Thereafter the said Hardatrai Chamria and Rampratap Chamria carried on the said business in partnership between themselves. The said Hardatrai Chamria had an eleven annas share in the said firm and the said Rampratap Chamria had the remaining five annas.

9. By an indenture dated the 1st October 1916 the said Hardatrai Chamria and Rampratap Chamria agreed to carry on the said business in Calcutta and elsewhere on certain terms therein mentioned. A copy of the said indenture is annexed hereto and marked "A." Portion of the assets of the said business is in Calcutta as will appear from the schedule to the annexure "A."

10. On Mussamat Surji expressing a desire to take the Defendant Motilal Chamria in adoption as a son unto her husband the said Hardatrai Chamria with the consent of Rampratap Chamria agreed that two annas share out of his eleven annas share should be set apart for the benefit of the proposed adopted son Motilal Chamria.

11. On the 16th November 1916 the members of the firm of Hardatrai Chamria & Co., Rampratap Chamria, Mussamat Surji, Durgaprasad Chamria, Radhakissen Chamria and Motilal Chamria entered into an agreement in writing whereby they agreed to carry on the said business in Calcutta and elsewhere. A copy of the said agreement is hereto annexed and marked "B." Part of immove-

RAMPRATAP CHAMRIA *v.* DURGAPRASAD CHAMRIA.

able property forming the assets of the said partnership is situate in Calcutta.

12. Since then the said business has been carried on, on the basis of the said agreement by all the parties.

13. On the same day, namely, the 16th November 1916, an agreement by way of family settlement was come to by and between Hardatrai Chamria, Durgaprasad Chamria, Radhakissen Chamria, Motilal Chamria and Mussamat Annardeyi Sethani by which the rights and interests of the parties hereto were declared and regulated. A copy of the said agreement is hereunto annexed and marked "C" to which as well as to the annexures "A" and "B" the Plaintiff craves reference as part of this his plaint.

14. The said Mussamat Surji did not adopt the Defendant Motilal Chamria. She, however, alleges that she had adopted Durgaprasad's son Keshabdeo. The Plaintiff denies the factum and the validity of the said alleged adoption but has been advised to make the said Keshabdeo a Defendant in this suit.

15. The said Durgaprasad Chamria has drawn out of the firm a sum of about rupees twenty-one lacs without the knowledge or consent of any of the parties.

16. The said Durgaprasad Chamria has taken forcible possession and removed the books of account of the said firm and is refusing inspection thereof.

17. The said Durgaprasad Chamria is making unauthorised entries therein to suit his own purpose.

18. The said Durgaprasad Chamria has been guilty of gross misconduct in the affairs of the said partnership and wards the partners.

*Sc*By reason of the wrongful acts of *and* Durgaprasad Chamria the parties *which* ll confidence in him and such a state of feeling has arisen between the partners as to render it impossible that the partnership can continue with advantage.

20. The Plaintiff's cause of action arose in Calcutta on 10th January 1921; and inasmuch as some portion of the business and its assets are situate outside the jurisdiction of this Honourable Court, the Plaintiff for greater safety asks for leave under cl. 12 of the Charter to institute this suit.

The award was in these terms :—

Whereas by a Nagree agreement, dated the 11th May 1922, the parties to the suit hereinafter mentioned as also Sethani Annardeyi referred all disputes between themselves to our arbitration and whereas by an order of the Calcutta High Court made on the 23rd May 1922 in suit No. 120 of 1922 (wherein Rai Bahadur Rampratap Chamria is the Plaintiff and Durgaprasad Chamria and others are the Defendants) all matters in dispute between the parties were referred to our arbitration provided that the arbitration is to be in terms of the said agreement, dated 11th of May 1922 and that the attorney for the guardian *ad litem* of the infant Defendant be allowed to represent her and whereas we have been attended by all the parties (including the said Sethani Annardeyi) as also Mr. S. K. Ghosh, the attorney for the said guardian *ad litem* and whereas we have fully considered all the materials placed before us and evidence adduced by the parties and have arrived at the decisions hereinafter mentioned on the basic points of dispute and whereas we desire to make an award embodying the decisions we have arrived at to enable the parties to adjust accounts and effect divisions of properties on the basis of our said decisions and if necessary separate awards may be made by us in regard to adjustments of accounts and divisions of properties and other matters incidental to our decisions

hereinafter stated. Now we hereby award as follows, that is to say,

1. That each party will bear his or her own costs of this suit.

2. That the two agreements dated the 16th November 1916 (true copies whereof are hereunto annexed) are valid and binding on the parties including the clause for reference to the arbitration of Rai Bahadur Sew Prosad Jhunjhunwalla.

3. That Rai Bahadur Rampratap Chamria and Amlokchand Chamria were not joint but separate in estate and they are each entitled to the five annas and two annas shares respectively as entered in the books of the firm of Hardatrai Chamria and that the Rai Bahadur Rampratap Chamria and Amlokchand Chamria's branches are respectively entitled thereto up to the 31st December 1916 and that with effect from the 1st January 1917 the shares of the parties are as stated in the memorandum of the terms of arrangement between the members of the firm of Hardatrai Chamria & Co., dated the 16th November 1916

4. That the adoption of the Defendant Keshabdeo Chamria by the Defendant Mussamat Surji as son unto her deceased husband Amlokchand Chamria is valid and as stated in the deed of adoption Mussamat Surji will be entitled to spend two lacs of rupees in charity.

5. If there be any ancestral or self-acquired property of Gorakhram in Fatehpur half of that property shall go to Keshabdeo Chamria and the remaining half to Rai Rampratap Chamria Bahadur. The Haveli built by Rampratap Chamria at Fatehpur belongs to him absolutely and he will pay Rs. 5,000 to Mussamat Surji as the price of her husband's share in the land.

6. All joint stock companies' shares now with Amlokchand's widow Mussamat Surji but in the name of Rampratap Chamria and G. P. Notes of the face value of Rs. 5,000 and 5 shares in the Eastern Bank, Ltd., which are in the possession and name of Rampratap Chamria will be Mussamat Surji's own absolute property.

7. Keshabdeo, adopted son of Amlokchand's widow, being a minor, his estate will be placed under the control and management of Durgaprasad Chamria. Rai Rampratap Chamria Bahadur and Babu Badridas Goenka and if Babu Badridas Goenka be unwilling to act as such then his nominee shall act in his place.

8. That Rampratap Chamria Bahadur shall out of his own estate pay rupees nine lacs (either in cash or in immoveable properties in Calcutta or Howrah the price whereof shall be fixed by us) to Mussamat Surji who will have a life interest therein and that on her death the said sum of rupees nine lacs or the said properties with the unspent balance, if any, of all income or interest derived therefrom, shall be the property of Keshabdeo Chamria and his heirs. Mussamat Surji will have the right of spending the income or interest with the sanction of Rai Bahadur Rampratap Chamria only so long as he is alive.

9. That with reference to the firm of Rai Hardatrai Chamria Bahadur & Co., we award as follows :—

(a) That the present partnership shall be dissolved with effect from the 30th June 1922 up to which date all accounts shall be adjusted and all affairs shall be settled.

(b) That all books of account, papers, deeds, documents, etc., concerning the firm as also all Government papers and other securities belonging to the firm shall be kept in a room securely locked up and

Rai Rampratap Chamria Bahadur, Babu Durgaprasad and Babu Radhakissen shall each have a key of the said room with him.

(c) That with effect from the 1st July 1922 the business of the firm of Rai Hardatrai Chamria Bahadur & Co. shall be conducted on the following terms :—

(i) All the partners shall deposit with the firm all cash money which they may have withdrawn from the old firm.

(ii) All the partners and the members of their families who having realised house rents have not deposited the same with the firm shall do so forthwith and the same shall thereupon be entered in the books of the firm.

(iii) The arrangements of the old firm regarding the custody of the firm's books, papers, securities, deeds, etc., shall remain in force in the new firm also.

(iv) All the partners who have attained majority shall have the power to sign the firm.

(v) The shares of the partners in the new firm shall be as follows :—

Rampratap Muttroomul	... three and a half annas
Hardatrai Durgaprasad	... three and a half annas.
Hardatrai Radhakissen	... three and a half annas
Hardatrai Motilal	three and a half annas.
Amlokchand Keshabdeo	... two annas.

When Keshabdeo attains majority, the share of all the above partners shall be equal.

(vi) On the death of any partner leaving a minor heir, the share of the minor shall be only two annas until he attains majority and thereafter his share will be equal to those of the other partners.

(vii) Each partner shall contribute his share of capital of the firm proportionately to the extent of his share and in case the contribution of any one falls short, he shall not withdraw any money from the firm to invest in any property in any other way.

(viii) In case any of the partners does not agree to the above conditions, he shall inform the firm in writing whereupon his capital shall be returned to him and his connection with the firm shall cease and his share will be equally taken up by the remaining partners.

10. All immoveable property of the estate of Hardatrai Chamria will be divided in four equal shares with the price of each share fixed by Durgaprasad and disposal of among the four partners, *viz.*, Sethani Annardeyi, Durgaprasad Chamria, Radhakissen Chamria and Motilal Chamria, by way of lottery.

11. The price of all immoveable property purchased by the firm of Hardatrai Chamria & Co. jointly with Rampratap will be fixed by Rampratap and the sons of Hardatrai will have the option of buying those or any of those properties at the prices so fixed. In case they do not purchase, the properties will go to Rampratap's estate and he will pay the price of the shares of the other partners.

12. The money belonging to the mother of Durgaprasad (who was Hardatrai Chamria's wife before his marriage with Sethani Annardeyi) which was credited on her death to the account of Annardeyi Sethani by Hardatrai shall be transferred to Durgaprasad's account with interest.

13. Premises No. 23, Cullen Place, Howrah, purchased by Durgaprasad for Rs. 8,61,000 for Annardeyi Sethani shall be conveyed and transferred to Annardeyi Sethani with interest and 16 feet of land out of this property shall be conveyed and made over at cost price to the proprietor of No. 22, Cullen Place, Howrah.

14. Rai Hardatrai Chamria Bahadur set apart money for charity and Annardeyi Sethani has also set apart rupees two lacs for charity. This amount she will get from Radhakissen and Motilal. The

RAMPRATAP CHAMRIA *v.* DURGAPRASAD CHAMRIA.

amounts set apart both by Hardatrai and his widow for charity shall be withdrawn from Hardatrai's estate and made over to three trustees. Three trustees shall be chosen from the male descendants of Nandaram Chamria and they shall spend the sums in charity as desired by the donors. Rai Rampratap Chamria Bahadur has given away premises No. 18, Harrison Road for charitable purposes including (*a*) Sanskrit Vidyalay, Fatehpur, for which Rs. 1,500 to Rs. 2,000 per month will be spent.

(*b*) The grant of twenty scholarships of Rs. 15 each per mensem to Brahmin students at the Benares Hindu University studying Darshan or Pali or Ayurveda or Sanskrit.

(*c*) The erection of Govind Debji's temple in his garden at Fatehpur for the maintenance of which Rs. 500 per mensem will be spent.

(*d*) Rajput Boarding, Orphanage, or other measures for the spread of education: We approve of this gift and recommend to Rai Bahadur Rampratap Chamria to convey the property to trustees to carry out his noble intention.

15. The accounts of the partnership will be made up by Haribuksh Prahladrai and Soorajmull.

16. The premises No. 22, Cullen Place, Howrah, are allotted to Keshabdeo Chamria out of whose estate Rs. 70,000 will be paid to Rai Bahadur Rampratap Chamria, being the value of his half share therein.

Mr. N. N. Sircar, Counsel appeared for the Appellant Rampratap Chamria.

Sir Binod Mitter and *Mr. S. M. Bose*, Counsel appeared for the Respondents Radhakissen and Motilal.

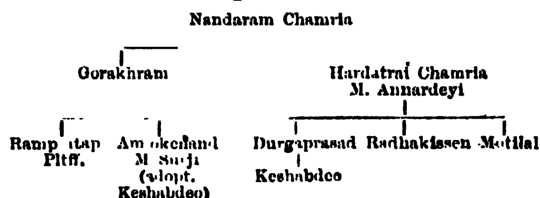
Mr. B. L. Mitter and *Mr. S. N. Banerjee*, Counsel appeared for the Respondent Durgaprasad Chamria.

Mr. H. D. Bose, *Mr. L. P. E. Pugh* and *Mr. D. N. Basu*, Counsel appeared for the Respondent Mussamat Surji.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This appeal is directed against an order made by Mr. Justice Greaves for cancellation of an award made by arbitrators.

The subject-matter of the litigation is alleged to be the estate left by one Hardatrai Chamria whose name appears in the following genealogical table:—



On the 12th January 1922, Rampratap instituted a suit against his cousins Durgaprasad, Radhakissen and Motilal, as also against his sister-in-law Surji and his nephew Keshabdeo. The allegations in the plaint may be briefly summarised. Nandaram left two sons Gorakhram and Hardatrai. The former died in 1914 leaving the Plaintiff as his surviving son, and Surji, his daughter-in-law, the widow of Amlokchand who had predeceased him in 1911. Hardatrai, the brother of Gorakhram, took Durgaprasad in adoption, and thereafter two sons were born to him, namely, Radhakissen and Motilal. Though Hardatrai started a business by his own exertions, Rampratap and Amlokchand were taken as partners therein: their shares varied from time to time, and after the death of Amlokchand, Hardatrai had 11 annas share and Rampratap 5 annas share. An indenture was executed on the 1st October 1916, between Hardatrai and Rampratap in respect of the business; but as Surji expressed a desire to take Motilal in adoption, Hardatrai, with the consent

of Rampratap. set apart 2 annas out of his 11 annas share for the benefit of Motilal. On the 16 November 1916, two documents appear to have been executed, one an agreement for management of the firm of Hardatrai Chamria & Co., the other an agreement by way of family settlement to regulate the rights of the parties. It is stated that Surji adopted not Motilal but Keshabdeo. In these circumstances, the suit was instituted on the 12th January 1922 by Rampratap against the other members of the family. On the 11th May 1922 a document was executed by Annardeyi (the widow of Hardatrai), Rampratap, Durgaprasad, Radhakissen, Motilal and Keshabdeo (through Surji). Arbitrators were appointed for the settlement of all matters in dispute amongst the parties; it was agreed that in respect of the suit the necessary parties should apply to the Court in accordance with the directions of the arbitrators whose decisions would be binding on them. On the 23rd May 1922, an order was made on the petition of the parties to the suit, and the matters in difference in the litigation between the parties thereto were referred to the arbitrators named in the agreement in terms thereof: the Court certified that the order made was for the benefit of the infant Keshabdeo. The arbitrators held their sittings on the 24th, 26th and 27th May 1922 and made their award on the last-named day. The award was sent to the Registrar on the 31st May; but it was not till the 4th July that the award was filed both in the suit and under the Indian Arbitration Act. Mr. Justice Greaves has analysed the provisions of the award which need not be set out except in bare outline for our present purpose. But it must be stated at the outset that the award deals with matters outside the suit and concerns one person at least who was not a party to the suit. The award recites that the arbitrators had arrived at decisions on the basic points of dispute and desired to make an award so as to enable the parties to adjust accounts and effect divisions of their properties.

Cl. 1 provides that each party will bear his or her costs of the suit. Cl. 2 provides that the two agreements of the 16th November 1916 are valid. Cl. 3 provides that Rampratap and Amlokchand were not joint but separate in estate and entitled to 5 annas and 2 annas respectively as entered in the books of Hardatrai Chamria, and that Rampratap and Amlokchand's branch was respectively entitled thereto up to the 31st December 1916 and that with effect from the 1st January 1917 the shares were as stated in the memorandum of the terms of arrangement between the members of the firm of Hardatrai Chamria & Co., dated the 16th November 1916. Cl. 4 provides that the adoption of Keshabdeo by Mussamat Surji was valid and that she, as stated in the deed of adoption, would be entitled to spend Rs.2,00,000 in charity. Cl. 5 deals with land at Fatehpur and does not concern the partnership with which the suit deals. Cl. 6 deals with shares in joint stock companies and does not concern the partnership. Cl. 7 directs that Keshabdeo's estate will be placed under the control and management of Durgaprasad, Rampratap and Badridas Goenka and applies to his interest in the partnership and to his other property outside the suit. Cl. 8 does not concern the rest, but contains a provision for Surji during her life which is ultimately to belong to Keshabdeo. Cl. 9 specifically deals with the firm of Rai Hardatrai Chamria Bahadur & Co. and concerns the partnership and the suit. The clause provides for the dissolution of the partnership with effect from the 30th June

1922 which is said to be beyond the powers of the arbitrators, as the dissolution must date from the institution of the suit, namely, the 12th January 1922: the clause also provides that as from the 1st July the firm is to be conducted on certain lines, the partners depositing with the firm all cash withdrawn by them from the old firm, and their shares are defined. This is said to be beyond the powers of the arbitrators as constituting a new partnership for the partners. Cl. 10 does not concern the partnership. Cl. 11 calls for no comment. Cls. 12, 13 and 14 do not concern the partnership. Cl. 15 provides for the accounts of the partnership being made up by three persons therein named. Cl. 16 refers to matters outside the partnership and therefore outside the suit.

It is thus abundantly clear that the award not only deals with matters outside the suit but is also in excess of the authority of the arbitrators in respect of matters included within the scope of the suit, such as, fixing the date of dissolution and making a new partnership between the parties. In these circumstances, Mr. Justice Greaves has set aside the award in so far as it purports to deal with the matters covered by the suit. We have been pressed to hold that this order cannot be supported.

The statutory law of arbitration in this country is embodied in the Indian Arbitration Act, 1899, and in the second schedule to the Code of Civil Procedure, 1908, which reproduces with modifications the contents of previous Codes. The provisions of the Code of Civil Procedure were analysed by Lord Macnaghten in *Ghulam Jelani* v. *Md. Hassan* (1). The schedule is divided into three sections, (*a*) arbitration in suits, (*b*) reference on agreement to refer, and (*c*) arbitration without the intervention of a Court; as Lord Macnaghten puts it, the Code deals with arbitrations under three heads:—

1. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court.

2. Where parties without having recourse to litigation agree to refer their differences to arbitration, and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court.

3. Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award.

Full directions are to be found in the Code as to the course of procedure in cases falling under head No. 1, and large powers are given to the Court with the view of making the award in such cases complete, operative and final. The Court makes an Order of Reference on the agreement (which must be the agreement of all parties to the suit), being brought before and fixes a time for the delivery of the award with power to enlarge the time, if necessary. When the award is submitted to the Court, the Court may in certain specified cases correct or modify it, subject to a right of appeal. In certain specified cases, it may remit the matter to the arbitrators or to the umpire, as the case may be. No award is to be set aside except in one of three cases specified and defined.

In cases falling under heads 2 and 3, the provisions relating to cases under head 1 are to be observed, so far as applicable.

(1) L. R. 29 I. A. 51; s. c. I. L. R. 29 Cal. 167; 6 C. W. N. 226 (1901).

RAMPRATAP CHAMRIA v. DURGAPRASAD CHAMRIA.

But there is this difference, which does not seem to have been always kept in view in judicial decisions. In cases falling under head 1, the agreement to refer and the application to the Court founded upon it. must have the concurrence of all parties concerned, and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads 2 and 3, proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award, as the case may be—under the cognisance of the Court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code.

The Indian Arbitration Act, on the other hand, relates exclusively to arbitration by agreement without the intervention of a Court of Justice, and, subject to the provisions of sec. 23, applies only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town. We need not analyse here the detailed provisions of the statute, defining the duties and functions of the arbitrator, as also the powers of the Court to remove the arbitrator, to stay proceedings, to remit or set aside the award and to enforce the award as a decree. The High Court is further empowered to frame rules to regulate all proceedings in Court in accordance with the provision of the statute.

An examination of the provisions of the second schedule of the Code of Civil Procedure and of the Indian Arbitration Act thus leaves no room for controversy that the legislature has made clear and distinct provisions to regulate the procedure in respect of each of the four types of arbitration which have special characteristic features. The jurisdiction thus created in respect of each type of arbitration must be exercised through the machinery provided and in conformity with the procedure prescribed. The legislature never contemplated a confusion of these jurisdictions. No provision can be traced for simultaneous arbitration, by private agreement and on reference by Court, in respect of subject-matters within and beyond the scope of a suit and amongst persons, some parties and some strangers to a litigation. What has happened in the case before us is, in essence, an arbitration in a manner neither known to nor contemplated by the law, and the Court must consequently decline to affix the stamp of its authority on the product of the labour of the arbitrators. From this standpoint, the award must be treated as invalid, and we are not called upon to consider the applicability of the principle indicated in *Darlington Wagon Co.* v. *Harding Steam Boat Co.* (2) and *Muhammad Newaz Khan* v. *Alam Khan* (3) explained in *Bhajahari* v. *Beharylal* (4), which recognise latent vitality in an arbitration award made with jurisdiction, even though it has not been enforced by a regular suit or by summary procedure. If we test the award from the point of view of the provisions of the Civil Procedure Code, the arbitrators have plainly dealt with matters not covered by the submission and beyond the scope of the suit. The effect of a reference by the suit may be accurately described in the words of Lord Brougham in *Baillie* v. *Edinburgh Oil Gas Light Co.* (5): "The judicial re-

(2) [1891] 1 Q. B. 245.
(3) L. R. 18 I. A. 73: s. c. I. L. R. 18 Cal. 414 (1891).
(4) I. L. R. 33 Cal. 881 (1906).
(5) [1835] 3 Cl. & F. 639 (659).

RAMPRATAP CHAMRIA *v.* DURGAPRASAD CHAMRIA.

ference is an act of the Court and does not take the cause out of the Court : the Court still retains control over it, but the mode of enquiry and the manner of trial alone is changed by the reference, and the forum of the arbitrator is, in this restricted sense and subject to the control of the Court, substituted for enquiry by the Court itself." The arbitrators on such a reference are consequently limited to questions in dispute between the parties in the cause referred, and they are not competent to mix up, in their investigation and determination, other controversies wherein strangers to the suit are interested. When an award has resulted from proceedings so carried on in a manner not contemplated by the law, the Court cannot be called upon to invoke the aid of the doctrine of separability which was recognised by the House of Lords in *Johnston* v. *Cheape* (6) and *Caledonian Ry. Co.* v. *Lockhart* (7) and by the Judicial Committee in *Boota* v. *Municipal Committee of Lahore* (8) and *Amir Begum* v. *Badar-ud-din* (9). Nor can any useful analogy be drawn from the principle recognised by the Judicial Committee in *Hemanta Kumari* v. *Midnapur Zemindary Co.* (10), namely, that a compromise may be recorded by the Court, even though the compromise includes matters not in controversy in the suit and the decree is limited to the subject of the litigation. In my opinion what has happened in the case before us has so radically affected the proceedings and vitiated its legality that the Court will not exercise the discretion vested in it either to modify the award under cl. 12 or remit the award under cl. 14 of the second schedule of the Code; *Hari Singh Nehal Chand* v. *Kankinarah Co.* (11). This is not a case where the arbitrators have failed to act with regularity from lack of care or knowledge : the proceedings have been deliberately organised and carried on by the parties in a manner not contemplated by law and they have thus contrived to defeat the object they had at heart, namely, to settle their differences in a tribunal of their choice. In this view, the appeal cannot succeed and must be dismissed with costs.

RANKIN, J.—The order under appeal is dated 24th July 1922 and was made upon notice or motion given on the 5th July 1922 on behalf of the minor Defendant Keshabdeo by his guardian *ad litem* Mussamat Surji.

The order is one made under para. 15 of the second schedule to the Code setting aside an award made in the suit and dated 27th May 1922. The award is not set aside upon any ground of misconduct of the arbitrators : though certain charges of irregularity were made, no decision upon them has been given. The main ground of decision is that the award is invalid as an award in a suit for dissolution of partnership in that it purports to direct the party to enter into a new partnership with effect from 1st July 1922. Another ground is taken in addition—*viz.*, that the award purports to declare a dissolution of partnership as at 30th June 1922, the suit having been brought on 12th January 1922.

In my opinion the award is invalid for the reason that the arbitration proceedings have been from first to last contrary to and unauthorised by the provisions of sec. 89 and the second schedule of the Code.

To set forth in detail the history of the

(6) [1817] 5 Dow 247.
(7) [1860] 3 Macq. 808.
(8) L. R. 29 I. A. 168; s. c. I. L. R. 29 Cal. 854; 7 C. W. N. 82 (1902).
(9) I. L. R. 36 All. 336; s. c. 18 C. W. N. 755; 19 C. L. J. 494 (P. C.) (1914).
(10) L. R. 46 I. A. 240; s. c. I. L. R. 47 Cal. 485; 24 C. W. N. 177 (1919).
(11) 34 C. L. J. 89 (1920).

RAMPRATAP CHAMRIA v. DURGAPRASAD CHAMRIA.

firm, the relationship of the parties and the terms of the various family arrangements is not necessary. But it is necessary to examine the scope and frame of the suit, to ascertain the parties interested, to consider what matters have been referred to arbitration and what matters have been dealt with.

The suit is brought for dissolution and winding up of a partnership business carried on under the name and style of "Hardatrai Chamria Co."

Hardatrai Chamria—the man who made the business—had three sons and a grandson. His widow Mussamat Annardeyi survived him. He had two nephews—sons of a brother; one is called Rampratap, the other died in 1911 leaving a widow Mussamat Surji. At one time it was proposed that Mussamat Surji should adopt the youngest son of Hardatrai but in the end she adopted or purported to adopt Hardatrai's grandson instead. The position therefore is:—

Gorakhram	Hardatrai = Musst. Annardeyi
Rampratap	Durgaprasad
Amlokchand = Musst. Surji	? Keshabdeo
? Keshabdeo	Radhakissen
	Motilal.

The nephew Rampratap is the Plaintiff. He impleads three sons of Hardatrai, Mussamat Surji, his brother's widow and Keshabdeo, the minor Defendant. Hardatrai's widow Mussamat Annardeyi is not a party to the suit.

The plaint alleges that the business at first belonged to Hardatrai alone: that the Plaintiff was at first made a partner with a share of two annas afterwards increased to five: that the Plaintiff's brother Amlokchand, deceased, had at one time a two annas share: that from Amlokchand's death (1911), Hardatrai and the Plaintiff had been the partners: and that on 1st October 1916 these two entered into a partnership agreement for 20 years. The plaint then recites two agreements dated 16th November 1916 which mean in effect (1) that the Plaintiff's partnership with Hardatrai was to come to an end with the year 1916, (2) that Hardatrai's interest therein together with all his other property should be divided into four equal shares—one for his wife and one for each of his three sons, (3) that a sum of about 4 lacs, certain landed properties, jewellery and life policies were to be treated as his wife's absolute *stridhan*, and everything else as belonging to his estate whether it stood in her name or not, (4) that after 1916 a new firm should carry on business in the old firm's name: in this Hardatrai would not be a partner: but (*a*) the Plaintiff, (*b*) Mussamat Surji, (*c*) Hardatrai's three sons were to have certain shares according as Motilal should or should not be adopted by Mussamat Surji.

The narrative of the plaint continues to the effect that since 1916 the business had been carried on under this new arrangement: that instead of Motilal, Mussamat Surji had purported to adopt Keshabdeo; and that the Plaintiff challenges this adoption. Finally, the plaint charges that Durgaprasad had been guilty of misconduct in the firm's affairs and that the Plaintiff is entitled by reason thereof to have a decree for dissolution made by the Court with ancillary relief.

Taking the plaint as it stands and without stopping to criticise it as a pleading, I would observe first that at least three successive partnerships are referred to, that all three are treated as contractual partnerships, and that the relief claimed appears to have direct reference to the last—the firm which came into existence under the scanty document of 16th November 1916 which is annexure B to the plaint. It seems quite probable that to take the accounts of this last partnership

would involve accounts to determine the net shares in the previous partnerships. This depends, however, upon facts not disclosed. But in no view of the suit is it a suit to ascertain what belonged to Hardatrai as distinct from the property of his widow, or a suit to ascertain his general estate as at 16th November 1916 and to distribute it under the terms of the instrument of that date (annexure C to the plaint): nor is it otherwise a suit to administer the estate of Hardatrai, deceased. Still less is it a suit for partition of joint property of a family of which Hardatrai was head and in which the Plaintiff *ex concessis* had no interest.

The limits of the suit, however, set no bounds to the disputes among the family, and on 11th May 1922 an agreement for arbitration was entered into by all the parties to the suit and also by Annardeyi who was no party to the suit. That this was intended to embrace matters in difference outside the suit is not denied. It was to decide the issues of the suit and all other matters in dispute—many of which related to the general estate of Hardatrai and the rights and interests of Annardeyi.

What was done was this:—The parties to the suit presented a petition referring to their agreement of the 11th May 1922 in general language as an agreement "to refer all matters in dispute between them." On the 23rd May 1922 the Court thinking it to be for the benefit of the infant pronounced an order of reference purporting to act under para. 3 of the second schedule to the Code. This order was not drawn up until the middle of June, by which time the arbitrators had acted on it and their proceedings were under challenge: accordingly the exact wording of the order was disputed. Meanwhile the arbitration had been held on 24th, 26th and 27th May and the award made on the 27th. It appears that all the parties to the agreement of the 11th May were heard and no party seems to have limited himself or herself to the matters in issue in the suit. On the second day, however, Rampratap sought a finding from the arbitrators that he and his brother Amlokchand had been separate in estate. This was disputed on behalf of Keshabdeo whose guardian Mussamat Surji had adopted him as a son to Amlokchand. Accordingly the attorney who represented the infant took objection to the arbitrators going into this matter or into anything outside the scope of the suit. This objection conflicted sadly with his previous submissions, it came late and it was contrary to the intention of the agreement of 11th May. The arbitrators held that the agreement entitled them to settle all disputes and their award reflects their opinion.

The award has been analysed by the learned Judge and I will mention only certain features. It purports to decide only "basic points of dispute" to enable the parties to adjust accounts and effect divisions of properties and it looks forward to "separate awards" to be made by the arbitrators, if necessary for working out their decisions. It decides that the Plaintiff and Amlokchand, his brother, were not joint but separate. It decides hypothetically as to how the property, if any, left by Gorakhram should be divided (Gorakhram never had any interest in any of the firms according to the plaint). It directs that the estate of Keshabdeo shall be placed under the control and management of certain relations during his minority. It distributes the immoveable property of Hardatrai. It directs that Annardeyi is to get a certain house in Howrah costing over eight lacs. The actual question of partnership is dealt with by declaring a disso-

RAMPRATAP CHAMRIA *v.* DURGAPRASAD CHAMRIA.

lution as at the end of the succeeding month, directing a new partnership in certain shares with an option to any partner to decline and to get back his capital, and appointing certain people to make up the partnership accounts.

This award was filed in the suit under the second schedule and it was also filed in this Court as an award under the Indian Arbitration Act. In the former character it has been set aside by the learned Judge, whose order in effect supersedes the arbitration and involves the continuance of the suit. In my opinion the award is void for all purposes.

The law of this country recognises four types of procedure in respect of arbitrations. The Indian Arbitration Act applies only to matters that are not before a Court of law. Secs. 20 and 21 of the second schedule provide a procedure for enforcing in a Court of law an award which has been made in an arbitration held without the intervention of a Court. Secs. 17 to 19 provide machinery for enforcing an agreement to refer. Secs. 1-16 deal with arbitration in suits.

The basis of an arbitration under the Arbitration Act is a written submission by the parties. The Act contains a statement of the provisions that will *primâ facie* be implied in such a submission. It contains a Code by which arbitrations are to be controlled or interfered with. It provides machinery by which awards may be set aside, remitted or enforced in execution.

Under the first part of the second schedule the actual reference is the order of the Court. The jurisdiction of the Court exists only over parties to the suit and over them only with reference to matters involved in the suit. When an Order of Reference is made the Court exercises a certain strictly limited measure of control and has certain other duties in reference thereto. When an award is made the award has no force whatever of itself. The Court may in certain circumstances modify or correct it. It may supplement the award by an order as to costs of the arbitration. If the award deals with any matter not referred, the Court is required to modify or correct it if the matter is severable. If the matter is not severable the Court may remit the award. In any case if the award stands it is effective not as an award but as leading up to a decree passed by the Court.

In my judgment, it is quite impossible that one and the same arbitration should be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court: between the parties to the suit and between them and other persons: under the Code provided by the Indian Arbitration Act and under the Code provided by the second schedule: under the superintendence and control of the Judge who has seizin of the suit and of the Judge disposing of business under the Indian Arbitration Act: partly upon an order of reference and partly under an agreement. When under para. 12 of the second schedule the Court proceeds to correct an award in a case where a severable matter not referred has been dealt with it does so by cancelling that part of the award and the part so cancelled is set aside for all purposes. Neither para. 12 nor para. 14 is directed to such a confusion of jurisdiction as the present case discloses.

Primâ facie the introduction of extraneous matters and parties should be viewed as legal misconduct on the part of arbitrators acting under an Order of Reference made in a suit. If, however, there is anything in the Order of Reference which authorises this it is an order not

RAMPRATAP CHAMRIA *v.* DURGAPRASAD CHAMRIA.

warranted by the Code. The Court before which a suit is brought is required to decide the suit (if it be not withdrawn): *primâ facie* it is itself required to decide the suit and has no jurisdiction to refuse: but on certain rigid terms the decree of the Court may be founded upon the decisions of an arbitrator: on those terms the Court may part with its jurisdiction to decide, retaining always a jurisdiction to control—not an abstract right of supervision but a particular jurisdiction limited and defined by the rules of the second schedule, a particular period of limitation being applicable and particular provisions as to appeal. In principle the arbitration is a proceeding in the suit—a mere method of investigation leading up to the decree or else ending in nothing.

On behalf of the Appellant the case of *Darlington Wagon Co.* v. *Harding* (2) was cited to us. So far as sec. 57 of the Judicature Act, 1873 or sec. 14 of the Arbitration Act of 1889 is concerned the decision shows that a reference of "all matters in difference" is a much larger order than any which a judge has authority to make and that if it purported to be made under these statutes it could be an excess of jurisdiction. In that case the order was held valid as having been made under the general authority of a Judge to act on the consent of the parties and appoint an arbitrator. In the present case the order referred only the matters in difference in the suit. One of the parties was an infant, whose guardian through his adoptive mother had been appointed only upon an investigation of her fitness to represent his interests in the suit. The order was undoubtedly intended as one under the second schedule. Moreover I am by no means prepared to hold that any Court acting under the Civil Procedure Code has in India a general authority to act on the consent of parties and thus to make an Order of Reference in a form which might apply to any dispute whatever independently of any relation to the jurisdiction of the Court.

I fear I have had rather small success in appreciating the grievance of the Appellant. It seems to be that the award should have been remitted under para. 14 of the second schedule in order that out of the same arbitration two awards might be produced—one in the suit and one under the Indian Arbitration Act. The law in the present case goes much deeper than anything contemplated by para. 14, but in any case to remit is a matter of discretion and to do so in this case would as an exercise of discretion be very remarkable indeed. The proceedings have been out of all relation to the second schedule save doubtless for the word "invalid" in para. 15.

It appears that on 8th June 1922 before the award had been filed, a motion to set it aside was prematurely launched and to this Mussamat Annardeyi was made a party. On the 5th July 1922 she appeared by Counsel and objected that she was not a party to the suit. That motion having been dismissed, the present proceedings were commenced on the same day. It was none the less contended upon this appeal that the learned Judge could not in the presence of all parties to the suit deal with this award made and filed in the suit under his Order of Reference of 23rd May 1922. As an argument to point the invalidity of the arbitration proceedings considered under the second schedule this may deserve attention but I see no reason in it otherwise.

I think the appeal should be dismissed with costs.

Mr. N. C. Bose, Solicitor for the Appellant.

(2) [1891] 1 Q. B. 245.

RAMPRATAP CHAMRIA v. DURGAPRASAD CHAMRIA.

Messrs. B. N. Basu & Co., Solicitors for the Respondent Durgaprasad.

Messrs. Dutt & Sen Solicitors for the Respondents Radhakissen and Motilal.

Mr. S. K. Ghosh, Solicitor for the Respondent Mussamat Surji.

P. K. C.

[CIVIL REVISIONAL JURISDICTION.]

RULE No 272 OF 1922.

RICHARDSON, J.
B B. GHOSE, J.
1922,
28, August.

THE ASSAM BENGAL RAILWAY CO, LTD., Defendants, Petitioners,
v.
RADHICA MOHAN NATH, Plaintiff, Opposite Party.

Indian Railways Act (IX of 1890), secs. 77 and 140, notice to Traffic Manager, if sufficient—Notice necessity of, in case of non-delivery of goods—Offer by Traffic Manager to settle claim on receipt of notice, if validates the notice.

A parcel of medicine was entrusted to a Steamer Company for carriage to a station on the Assam Bengal Railway. The parcel was, however, not delivered at the destination by the Railway Company and the consignor after giving timely notice to the Traffic Manager of the Railway Company, sued for recovery of compensation for non-delivery:

Held—*That the notice required by sec. 77 of the Railways Act, should be given to the Agent of the Company in India. Service of notice on the Traffic Manager is not sufficient compliance with the Act, unless it is shown that the notice had in fact reached the Agent within 6 months from the date of the delivery of the goods.*

WOODS *v.* MEHER ALI (1) *and* RADHA SHAM *v.* SECRETARY OF STATE (6) *distinguished.*

E. I. RY. CO. *v.* MADHO LAL (2), RADHA KISHUN *v.* E. I. RY. CO. (3), E. I. RY. CO. *v.* RAM AUTAR (4) *and* KALA CHAND *v.* SECRETARY OF STATE (5) *referred to.*

An offer made by the Traffic Manager on receipt of notice cannot in itself show that the Traffic Manager had authority to receive the notice on behalf of the Agent.

The distinction between "loss" and "non-delivery" in Arts. 30 and 31 of the Limitation Act does not justify the conclusion that the word "loss" in sec. 77 of the Railways Act excludes "non-delivery" of the goods.

GHELABAI PARSI *v.* E. I. RY. CO. (8), CURRAN *v.* M. G. W. RY. CO. (9) *and* SMITH *v.* GREAT WESTERN RY. CO. (10) *referred to.*

Per RICHARDSON, J. *Where detention is not pleaded or put in issue, a claim* simpliciter *for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of sec. 77.*

Per B. B. GHOSE, J.—*The word "loss" in sec. 77 is wide enough to include all cases where the goods are not forthcoming and therefore includes a case of non-delivery and therefore notice is necessary.*

E. I. R. Co *v.* KALI CHARAN (7) *commented on.*

(1) 13 C. W. N. 24 (1908).
(2) 17 C. W. N. 1134 (1913).
(3) 19 C. W. N 62 (1913).
(4) 20 C. W. N 696 (1915).
(5) 21 C. W. N. 751 (1917).
(6) 20 C. W. N. 790 (1916).
(7) [1922] Pat. 145.
(8) I. L R. 45 Bom. 1201 (1921).
(9) 2 Irish Rep. 183 (1896).
(10) [1922] 1 A C. 178.

THE ASSAM BENGAL RAILWAY CO., LTD. v. RADHICA MOHAN NATH.

This was a Rule granted against a decree made by the Judge of the Court of Small Causes in the matter of a Small Cause Court suit, allowing compensation to the Plaintiff, Opposite Party.

The facts were briefly as follows:—One Radhica Mohan Nath entrusted a parcel of medicines to a Steamer Company for carriage to a station on the Assam Bengal Railway. The Railway Company having failed to deliver the parcel to the consignee, a Small Cause Court suit was brought at Munshigunj against the Assam Bengal Railway Company by the consignor for compensation for non-delivery of the goods after timely notice to the Traffic Manager and decree was accordingly passed. The present Rule was obtained by the Railway Company against the said consignor to show cause why the decree should not be set aside.

Babu Upendra Kumar Roy for the Petitioners.

Babu Jitendra Kumar Sen Gupta for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

RICHARDSON, J.—The Opposite Party obtained a decree in the Small Cause Court at Munshigunj against the Petitioner, the Assam Bengal Railway Company, for compensation for non-delivery of a parcel of medicines. The goods were entrusted by the Opposite Party as consignor to a Steamer Company for carriage to a station on the Assam Bengal Railway. It was thus the Steamer Company which delivered the goods to the Railway Company. This Rule, obtained by the Railway Company, calls upon the Opposite Party to show cause why the decree should not be set aside on several grounds of which the following are material:—

"1. For that the Court below has erred in law in holding that notice to the Traffic Manager was notice to the Agent of the Defendant Company within the meaning of secs. 77 and 140 of the Indian Railways Act, IX of 1890, and the said Court ought to have held that the Plaintiff's suit was fit to be dismissed for want of notice.

"2. For that in the absence of any finding that the Traffic Manager had any authority to accept notice on behalf of the Agent or that the Agent in this particular case had any knowledge directly or indirectly of the Plaintiff's claim within the statutory period of six months the Court below is wrong in decreeing the suit.

"3. For that the Court below has misconceived the legal effect of the Traffic Manager's communication made without prejudice to the rights of the Company and this has materially affected the decision of the case on the merits."

As to these pleas the question is whether the learned Subordinate Judge correctly applied the law to the facts found by him. What he says in his judgment is this:—

"Upon the evidence I find that the Plaintiff gave notice of his claim to the Traffic Manager who offered to pay Rs. 18 to him in satisfaction of the claim. Under the rules, the Traffic Manager settles all claims and the Agent refers some claims to him for settlement. Under the circumstances I hold that notice to the Traffic Manager is notice to the Agent as held in *Woods* v. *Meher Ali* (1) and the notice was given within 6 months' time as laid down in the law."

It has frequently been held in this Court under sec. 140 of the Act, that in the case of a Railway Company the head-quarters of which are in England, the notice required by sec. 77 should be given to the

(1) 13 C. W. N. 24 (1908).

THE ASSAM BENGAL RAILWAY CO., LTD. v. RADHICA MOHAN NATH.

Agent of the Company in India. The case of *Woods* v. *Meher Ali* (1) on which the learned Judge relies has been distinguished more than once in language appropriate to the present case. See *The East Indian Railway Company* v. *Babu Madho Lal* (2), *Radha Kishun Lal* v. *The East Indian Railway Company* (3) and *The East Indian Railway Company* v. *Ram Autar* (4). Here also there is no evidence that claims of this kind are usually referred by the Agent to the Traffic Manager and there is no finding, as there was in the case of *Woods* v. *Meher Ali* (1), that the notice had in fact reached the Agent. In *Babu Madho Lal's* case (2), it was pointed out that the learned Judges who decided *Woods* v. *Meher Ali* (1) did not lay down as matter of law that service on the Traffic Manager was a sufficient compliance with the Act and that the decision was based on the particular facts of the case. Reference may also be made to *Kala Chand Shaha* v. *Secretary of State* (5). In my opinion the view of the learned Judge that notice to the Traffic Manager was notice to the Agent is erroneous in law.

The case of *Radha Sham Basak* v. *The Secretary of State* (6) cited for the Opposite Party is distinguishable. The question which arose there is not the question which we have to determine.

As to the offer made by the Traffic Manager to the Opposite Party, the learned Judge does not refer to the fact that the offer was made without prejudice. In any case the offer in itself cannot show that the Traffic Manager had authority to receive the notice on behalf of the Agent.

So far the Petitioner is entitled to succeed but for the Opposite Party an attempt was made to support the decision of the learned Judge on the ground that in the present case no notice under sec. 77 was necessary.

It was contended in the first place that the case was not within sec. 77 by reason of the fact that the goods were handed to the Railway Company for carriage not by the Opposite Party but by the Steamer Company. It is not easy, however, to see how the claim made by the Opposite Party against the Railway Company can be maintained at all unless it be on the footing that in handing the goods to the Railway Company, the Steamer Company acted as his agent. It was said that the Steamer Company referred the Opposite Party to the Railway Company. If that be so, the explanation no doubt is that the Steamer Company took up this position, that as regards the Railway Company the Steamer Company was merely an Agent acting on behalf of the Opposite Party as principal.

In the second place, it was argued that in the present case there was no "loss" of any goods within the meaning of sec. 77 of the Act and that for that reason there was no necessity to give any notice of the claim to the Railway Company. It does not appear to have been contended in any previous case in this Court that no notice is required of a claim for compensation in respect of the non-delivery or short delivery of goods entrusted to a Railway Administration for carriage. But that is not of itself a sufficient answer.

Sec. 77 of the Act so far as it is material provides :—"A person shall not be entitled . . . . to compensation for the loss, destruction or deterioration of animals or

(1) 13 C. W. N. 24 (1908).
(2) 17 C. W. N. 1134 (1913).
(3) 18 C. W. N. 62 (1913).
(4) 20 C. W. N. 696 (1915).
(5) 21 C. W. N. 751 (1917).
(6) 20 C. W. N. 790 (1916).

goods delivered to be so carried," that is carried by railway, "unless his claim to the . . . compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage by railway."

I will assume that the word "loss" in this section means loss by the Railway Administration. The argument is that goods not delivered or short-delivered are not "lost" and reliance was placed on the judgment of Jwala Prasad, J., in *The East Indian Railway Company* v. *Kali Charan Ram Prosad* (7). The learned Judge referred to the distinction which appears in Arts. 30 and 31 of the schedule of the Limitation Act between claims against a carrier on the one hand for compensation for losing or injuring goods and on the other for compensation for non-delivery of or delay in delivering goods. In the first case limitation runs from the time when the loss or injury occurs and in the second case from the time when the goods ought to be delivered. In my opinion, with respect, these two articles of the Limitation Act throw little, if any, light on the construction of sec. 77 of the Railways Act. There may be reasons for the presence of both articles in the Limitation Act but they may still be overlapping. Where there is an agreement by a carrier to deliver goods at a fixed time or within a reasonable time, a claim for goods lost may be drawn as a claim for their non-delivery.

The reasoning of the learned Judge then proceeds on the assumption, mistaken as I venture to think, that a claim for non-delivery necessarily imports that the Railway Company are consciously and deliberately withholding goods in their possession, which they might deliver if they chose to do so.

As it seems to me, a claim for non-delivery, without more, merely asserts that the goods were not delivered at the agreed time or within a reasonable time. Such a claim asserts nothing as to the cause of the non-delivery.

In *Ghelabai Parsi* v. *East Indian Railway Company* (8) there was no question as to the construction of sec. 77 of the Railways Act. The question was as to the right of the Railway Company to exemption from liability under a risk-note in Form B. The decision is based on the judgment of Palles, C. B., in the Irish case of *Curran* v. *M. G. W. Railway Company* (9) which also turned on a special contract between the consignor and the Railway Company. *Curran's* case (9) has recently been the subject of comment in the House of Lords in *Smith* v. *Great Western Railway Company* (10). But for the present purpose it is unnecessary to examine these cases. The question discussed was a question of the burden of proof turning on the state of the evidence at the conclusion of the trial upon an issue raised between the parties which it was necessary to decide one way or the other.

In the present case there is no finding that the goods were detained by the Railway Company. It is true also that there is no finding that the goods had, as the Company alleged, been stolen from the godown. As the case seems to have been framed and placed before the Court, it was not necessary to deal with these matters. Damages were awarded merely for the non-delivery of the goods.

(7) [1922] Pat. 145.

(8) I. L. R. 45 Bom. 1201 (1921).
(9) 2 Irish Rep. 183 (1896).
(10) [1922] 1 A. C. 178.

I have indicated that in my view, a claim for compensation for non-delivery includes the case of the loss of the goods just as much as the case of the detention of the goods. If that be so, it seems to follow that the statutory notice is a condition precedent to a verdict being taken on that alternative footing, because on that footing the goods may have been lost.

If it be conceded, though I do not decide, that where goods are wrongfully detained by a Railway Company, no notice is necessary under sec. 77, a plea by the Company of want of notice must at least be met on that ground and the Court must be asked to find that the goods were being detained and were not lost when they ought to have been delivered.

Where detention is not pleaded or put in issue a claim simpliciter for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of sec. 77.

The result is that in my opinion the Rule should be made absolute and the suit against the Company dismissed with costs of the Court below and of this Rule (hearing-fee four gold mohurs).

B. B. GHOSE, J.—I agree. The current of decisions in this Court is that notice under sec. 77 of the Railways Act should be served on the Agent. In the case of *Woods* v. *Meher Ali* (1), the learned Judges expressly say that they did not desire to differ from those decisions. It was apparently found as a fact in that case that the Agent was aware of the notice, and it was held under the circumstances of the case that the Agent had the required notice. If that is so, the decision was in accordance with *The Secretary of State* v. *Dipchand* (11), where it was held that the plea of want of notice would be sufficiently met if it were shewn that the notice served on the Traffic Superintendent reached the Manager within six months of the delivery of the goods. There is no such allegation or finding in this case. The notice served on the Traffic Manager was not therefore sufficient in law.

I do not think that there is much substance in the argument advanced by the learned Vakil for the Opposite Party in support of the decision of the lower Court that no notice under sec. 77 of the Railways Act was necessary in the present case as the goods were not delivered by the Plaintiff to the Railway Company for being carried by the Railway. If this contention is accepted I think it would cut the ground on which the claim against the Railway Company rests, and the Railway Company would not at all be liable for the value of the goods. The learned Vakil urged that the Steamer Company was really liable to the Plaintiff and the Railway Company is only liable because they took upon themselves the liability of the Steamer Company to pay damages for the breach of their contract. The Plaintiff, however, did not bring his suit on that basis and if he had done so there might have been various grounds for defence on behalf of the Railway Company. The liability of the Railway Company must therefore depend on the fact that there was delivery of the goods to the Railway Company, either by the Steamer Company acting as agents of the Plaintiff, or by the Plaintiff to the Steamer Company who received delivery of the goods as Agents of the Railway Company. The Plaintiff therefore cannot get rid of the obligation to give notice of his claim on this ground.

(1) 13 C. W. N. 24 (1908).

(11) I. L. R. 24 Cal. 306 (1896).

THE ASSAM BENGAL RAILWAY CO., LTD.

It is next urged by the learned Vakil for the Opposite Party th[illegible]t no notice under sec. 77 was necessary as the Plaintiff sued for non-delivery of the goods and not for loss. For this distinction reliance is placed on the case of *East Indian Railway Company* v. *Kali Charan* (7). I find some difficulty in understanding the facts of the case as reported. It is stated at page 147 of the report : "The Court below has found th[illegible]t the goods in question were lost not on account of a running train robbery, nor on account of theft but on account of the wilful negl[illegible]ct on the part of Defendant's servants." Thus there was finding that the goods were lost, and in such a case it cannot be questioned that notice is necessary. But there is another passage at p. 148 which runs thus :—"The lower Court has disbelieved the plea set up by the Defendant of the loss of the goods in the manner alleged by the Company and has expressly held that it was a case of non-delivery o[illegible] goo[illegible] the I[illegible]intiff." The learned Judge, how[illegible] held that although no notice was n[illegible]ces[illegible] a[illegible] the Plaintiff had actually given notice which according to him was good notice under sec. 77 of the Act. He cited a number of cases in support of his opinion that the notice served was sufficient. It may, however, be pointed out, in passing, that the cases of the Calcutta High Court cited do not seem to support his proposition. The observations, therefore, in the judgment that notice under sec. 77 was not necessary in the case of non-delivery of goods, are mere *obiter*. In conclusion the learned Judge declined to exercise his discretionary power of revision in favour of the Company as in his opinion justice had been done

Reference has been made to Arts. 30 and 31 of the Limitation Act in support of the contention that there is a distinction [illegible] present case there was a definite bet[illegible]s to the rate of interest. tinction [illegible]decree in the earlier suit of fixing the [illegible] recognition of the of limitation for su[illegible]ortgage as reason- cumstances. Art. 30 ap[illegible]tion in this for compensation against [illegible] the losing or injuring goods, and difficu[illegible] actually experienced in applying the appropriate article to suits for damages for non-delivery before the amendment of the Limitation Act, I shall refer to later on. It can therefore be hardly argued by reference to those articles that the word "loss" in sec. 77 of the Railways Act excludes "non-delivery" of the goods. The words "non-delivery of" in Art. 31 of the Limitation Act was first introduced by way of amendment in the Limitation Act of 1877, by sec. 3 of Act X of 1899. By sec. 2 of the same Act addition of a new sec. 10 to the Carriers Act of 1865 was made. Sec. 9 of the Carriers Act provides that : "In any suit brought against a common carrier for the loss, damage or non-delivery of goods it shall not be necessary for the Plaintiff to prove.' . . . Under the new sec. 10 notice was required to be given as is provided in sec. 77 of the Railways Act. The word "non-delivery" does not appear in sec. 10, but it seems to me that it was not intended to exclude the necessity of giving notice in the case of non-delivery, although a different article was found necessary for the purpose of limitation of suits. The case might have been different if the suit was for damages for wrongful detention of the Plaintiff's goods. But in such a case as that, the Plaintiff must prove that the goods are with the Railway Company which have been wrongfully detained by them, otherwise his suit must fail. The word "loss" used in sec. 77 is in my opinion wide enough to include all cases where the goods are not forthcoming and therefore

(7) [1922] Pat. 145.

THE ASSAM BENGAL RAILWAY CO., LTD. v. RADHICA MOHAN NATH.

includes a case of non-delivery. It may also be observed that under sec. 72 of the Railways Act, subject to the other provisions of the Act, the liability of the Railway Company is that of a bailee under secs. 152 and 161 of the Indian Contract Act. Sec. 161 of the Contract Act runs as follows: "If by the fault of the bailee the goods are not returned, delivered or tendered at the proper time he is responsible to the bailor for any loss or destruction or any deterioration of the goods from that time." It seems to me that if any person asks for damages for any loss on account of goods not being delivered against a Railway Company, he is under the provisions of sec. 72 bound to give notice under sec. 77.

In order to see whether the contention of the Opposite Party can find any support in the case of *Curran* v. *Midland G. W. Ry. Co.* (9) and the case of *Ghelabai* v. *E. I. Ry. Co.* (8) which followed the Irish case, we have examined those cases as also the case of *Smith* v. *G. W. Ry. Co.* (10) in which *Curran's* case (9) was distinguished and commented on. *Curran's* case (9) turned upon the question of burden of proof with reference to the special contract entered into between the parties and cannot therefore be of any assistance in deciding the question whether the word "loss" in sec. 77 of the Railways Act excludes the case of "non-delivery."

I am therefore of opinion that it was incumbent on the Plaintiff, who sues the Railway Company for damages for non-delivery of goods to give notice as provided in sec. 77 of the Railways Act. I desire, however, to make it clear that I do not intend to express any opinion as to the meaning of the word "loss" where it is contained in a risk-note or any other document, which should be construed with reference to the context. I agree with the order proposed by my learned brother.

J. N. R. *Rule made absolute.*

(8) I. L. R. 45 Bom. 1201 (1921).
(9) 2 Irish Rep. 183 (1896).
(10) [1922] 1 A. C. 178.

CIVIL APPELLATE JURISDICTION.
APPEAL FROM APPELLATE DECREE
No. 2288 OF 1920.

MOOKERJEE, J.
WALMSLEY, J.
1923,
16, January.

SITA SUNDARI BARMANI and anr., Defendants, Appellants,
v.
BARADA PROSAD ROY CHOWDHURY and ors., Respondents.

Probate and Administration Act (V of 1881), sec. 90—Lease executed by administratrix, without permission of the Court, effect of—Void or voidable—Equities, when lease sought to be set aside—Refunding of benefits received—Defendant, setting up equitable defence, bound to do equity

Sec. 90 of the Probate and Administration Act makes it obligatory upon the administratrix to obtain the sanction of the Court if a lease for more than five years is granted, but non-compliance with this provision does not invalidate the transaction, which becomes merely voidable and not void. If the party prejudicially affected thereby seeks relief, the Court will assist him only on equitable terms of reimbursement. No person can be allowed to avoid a transaction in such a manner as to enable him to recover property which would otherwise be lost to him and at the same time keep the money or other advantages which he has obtained thereunder.

A party seeking to avail himself of an equitable defence is as much bound to do equity as a Plaintiff.

Where in a previous suit all the disputes between the parties were settled by a consent decree and by the execution of

SITA SUNDARI BARMANI *v.* BARADA PROSAD ROY CHOWDHURY.

a kabuliyat *by the administratrix on terms beneficial to the estate, but no permission was obtained from the District Judge; and the said* kabuliyat *was not repudiated and no offer was ever made to restore the land to the landlord:*

Held, *in a suit for rent by the landlord upon the terms of the* kabuliyat, *that the Defendant was bound by that* kabuliyat, *and sec. 90 of the Probate and Administration Act could not be invoked by him even on the assumption that the said section governed a case where a new* kabuliyat *was executed, as in the present case, in respect of an existing tenancy.*

THE EASTERN MORTGAGE AND AGENCY CO., LTD. *v.* REBATI KUMAR ROY (1) *referred to.*

This was an appeal preferred on the 27th of August 1920 against a decree of Babu B. B. Mukerji, Additional Subordinate Judge of Khulna, dated the 15th of June 1920, affirming the decree of Babu Nagendra Nath Bhattacharjee, Munsif, 2nd Court at Khulna, dated the 6th of November 1918.

The facts material to this report sufficiently appear from the judgment.

Dr. Jadunath Kanjilal and *Babu Jnan Chandra Roy* for the Appellants.

Rai Surendra Chandra Sen Bahadur and *Babu Hemendra Chandra Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in a suit for arrears of rent. The claim is based on a *kabuliyat* which, the Defendants contend, was obtained by undue influence. This defence has been negatived. As regards one of the two Defendants, the additional defence has been urged that the *kabuliyat* does not bind him, as it was executed by his mother, when she was the administratrix of the estate of his father, without the permission of the District Judge under sec. 90 of the Probate and Administration Act. In our opinion that provision is of no assistance to the Appellants. Sec. 90, no doubt, makes it obligatory upon the administratrix to obtain the sanction of the Court if a lease for more than five years is granted, but non-compliance with this provision does not invalidate the transaction, which becomes merely voidable and not void. If the party prejudicially affected thereby seeks relief, the Court will assist him only on equitable terms of reimbursement. The principle applicable to cases of this character was explained in the case of *The Eastern Mortgage and Agency Co., Ltd.* v. *Rebati Kumar Roy* (1), which shows that an alienation by an executor or administrator without leave of the Court where such leave is necessary under sec. 90 of the Probate and Administration Act, is not void but voidable. This attracts the operation of the elementary rule that no person can be allowed to avoid a transaction in such a manner as to enable him to recover property which would otherwise be lost to him and at the same time keep the money or other advantages which he has obtained thereunder. The maxim that "he who seeks equity must do equity" is applicable to a Defendant as well as to a Plaintiff and a party who seeks to avail himself of an equitable defence must stand the test as well as one who appears as Plaintiff in such a case as the present. Here the Courts below have found that the transaction was beneficial to the estate. At that time, as a suit had already been instituted for the cancellation of a prior *kabuliyat* and the main questions in dispute between the parties

(1) 3 C. L. J. 200 (1906).

related to the extent of the lands comprised in the tenancy, the status of the tenant, the rate of rent payable and the fixity of the rent. These disputes were settled by a consent decree in the suit and by the execution of the *kabuliyat*. The Defendant has never repudiated the *kabuliyat*. He has not, even in the course of this suit, offered to restore the land to the landlord. He cannot now be permitted to turn round and contend that the *kabuliyat* is not operative as against him. It is plain that the justice of the case is against the Appellant, and sec. 90 cannot be successfully invoked by him even on the assumption that sec. 90 governs a case where a new *kabuliyat* is granted, as here, in respect of an existing tenancy.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

H. C. S. *Appeal dismissed with costs.*

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD ATKINSON.
LORD SUMNER.
LORD PARMOOR.
LORD CARSON.
MR. AMEER ALI.
1922,
Heard, 30 and 31, October.
Judgment, 11, December.

RAM BUJHAWAN PROSAD SINGH and anr., Appellants,
v.
NATHU RAM and ors., Respondents.

Hindu law—Mitakshara—Mortgage by manager—Plea in defence in mortgagee's suit denying legal necessity—Legal necessity for loan proved—Interest in excess of commercial rate—Onus on Plaintiff to prove necessity for high rate of interest—Plea that interest is penal, nature of.

In a suit to enforce a mortgage of coparcenary property by the manager of a joint Mitakshara Hindu family, it is open to the Defendant who has denied the necessity of the loan to say that the rate of interest was excessive and to that extent outside the authority of the manager. The Defendant in such a case does not lose his right to raise the additional plea that apart from the conditions which attach when a karta *mortgages joint family property, the stipulation for payment of interest and compound interest was in itself penal and unconscionable.*

The onus is on the Plaintiff to establish that there was necessity to pay a rate of interest in excess of the ordinary commercial terms.

NAZIR BEGAM *v.* RAO RAGHUNATH SINGH (1) *referred to.*

This was an appeal from a decree of the High Court, Patna, dated the 8th August 1919, which modified a decree of the 1st Subordinate Judge of Patna, dated the 30th August 1916.

The suit was brought by the Plaintiffs-Respondents to enforce a mortgage bond executed by one Harihar Charan Mahto who is now dead and was represented in the suit by Defendants Nos. 1 and 2. The other Defendants were joined as being prior mortgagees of the properties in suit.

The Plaintiffs' case was that Harihar Charan was the *karta* of a Hindu joint family and as such *karta*, he borrowed from the Plaintiffs, on the 16th July 1903, for the necessary expenses of the joint family a sum of Rs. 1,000 on the security of certain specific properties. The loan was to bear interest at 3 per cent. per mensem with quarterly rests and at the time of suit over Rs. 50,000 was alleged to be due. The claim, however, was confined to a sum of Rs. 32,000.

(1) L. R. 46 I. A. 145: s. c. I. L. R. 41 All. 571; 23 C. W. N. 700 (1919).

RAM BUJHAWAN PROSAD SINGH v. NATHU RAM.

The defence contended that the loan was not justified by the necessities of the joint family, that the property was "not at all liable for the payment of the amount claimed," and that the rate of interest was "invalid and by way of penalty."

The Subordinate Judge found in favour of the Plaintiffs but reduced the rate of interest to 1 per cent. per mensem on the ground that the stipulated rate was penal.

The High Court on appeal (Das and Coutts, JJ.) agreed with the trial Court that there was legal necessity for the loan, but they were of opinion that the pleadings did not raise the question of necessity with reference to the rate of interest, and further that the principal Defendant had admitted his liability in respect of both principal and interest and compound interest in a compromise entered into by him in 1911 and such admission was presumptive proof of a justifying family necessity to raise the loan on such an onerous terms.

Messrs. Dunne, K. C. and *Dubé* for the Appellants.—The onus is on the person relying on the mortgage to show that there was a necessity to borrow at the high rate of interest stipulated and he has failed to discharge this onus. The legality of the rate of interest may be challenged in a pleading which denies necessity generally.

Nazir Begam v. *Rao Raghunath Singh* (1).

The same principle was applied in *Manna Lal* v. *Karu Singh** where the *karta* was a Defendant.

(1) L. R. 46 I. A. 145: s. c. I. L. R. 41 All. 571; 23 C. W. N. 700 (1919).

* Judgment delivered by P. C. 29th July 1919. Apparently unreported.

In the present case there was a definite issue raised as to the rate of interest.

The consent decree in the earlier suit did not amount to a recognition of the rate of interest in this mortgage as reasonable, it merely left the position in this mortgage as it was before.

[*Per* CURIAM.—Was it not part of the compromise that this mortgage was not to be impeached?]

It was no part of the consideration for the compromise. The compromise did not endorse the terms of this mortgage, it was merely entered into without prejudice to the terms of the mortgage.

Further the *karta* could not bind the joint family by assenting to the rate of interest.

Mr. T. K. Roy for the Respondents.—The pleadings only raise the question whether or not there was legal necessity for the loan, they do not specifically raise the question whether or not the rate of interest is excessive, and that defence cannot therefore be taken.

Aindhu Gope v. *Khakhar Sahu* (4).

The issues do not specifically raise the point. In any event the compromise was entered into by the *karta* who at the time was sole owner and for valuable consideration he agreed that the terms of this mortgage should stand.

Therefore it is not open to the present Defendant to contest those terms.

Mr. Dunne, K. C. replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARMOOR.—This is an appeal from a decree of the High Court of Judicature at Patna which varied a decree of the Judge of the Subordinate Court. Hari Charan Mahto, the father of the first of the Defendants (Appellants), was

(4) 3 P. L. T. 367 (1912).

RAM BUJHAWAN PROSAD SINGH *v.* NATHU RAM.

head and *karta* of a Hindu joint family, governed by Mitakshara law. He borrowed a sum of Rs. 1,000, secured with interest at 36 per cent. per annum with quarterly rests, by hypothecation of certain immoveable properties of the joint family, and executed a deed of mortgage on the 16th July 1903, the rights in which are now vested in the Plaintiffs (Respondents). Hari Charan Mahto died on the 18th January 1911, without redeeming the deed of mortgage. At the time of the institution of the present suit to enforce the mortgage bond, it was claimed that there was a sum due on the mortgage for principal and interest of more than 50,000, after making an allowance for payments which had been made during the life-time of the mortgagor. The actual claim in the suit was for Rs. 32,000, the Plaintiff stating that they had reduced the amount of their claim on the ground that the mortgaged property was not worth the whole sum due for principal and interest.

In their plaint the Plaintiffs (Respondents) pleaded that Hari Charan Mahto had borrowed the sum of Rs. 1,000, at the above rate of interest, in order to defray some necessary household expenses of the joint family, and that as security for the bond money, principal, with interest and compound interest, he had mortgaged, hypothecated and made liable his *milkiat* right in certain scheduled properties, which it is not necessary especially to designate. In answer to this claim the first of the Defendants (Appellants) pleaded, among other things :—

"That the necessities mentioned in the bond in suit are wrong and baseless. This Defendant's father never took a shell from the Plaintiffs for the requirements and the benefit of the family, nor was there any necessity for the same.

"That the mortgaged property is the ancestral property of the joint family, and is not at all liable for the payment of the amount claimed. Nor can the property be sold for the payment of the same.

"That the rate of interest and compound interest and the period for payment of compound interest are altogether invalid and are by way of penalty. Such an invalid contract and such severe terms, which are by way of unconscionable bargain, cannot be given effect to or put into operation. The account of compound interest and the manner it has been calculated are also wrong. The Plaintiffs are not, in any case, entitled to compound interest on the interest."

It has been necessary to set out these pleas at length, since the judgment of the High Court has largely turned on a point of pleading. In the written statements, filed on behalf of the other Defendants (Appellants) the same defences are raised, and in the issues filed before trial, in accordance with Indian practice, 3 and 5 are relevant to the questions argued on the appeal before their Lordships. The third issue raises the question whether the Defendants (Appellants) are bound to pay the debt. Were they benefited by the loan? Can the Defendant raise his objection? The fifth issue raises the question whether the stipulation in the bond for payment of compound interest is penal and unconscionable.

The Judge of the Subordinate Court found that the bond in suit was genuine and for consideration, and that the amount of Rs. 1,000 had been borrowed for family necessity to enable Hari Charan Mahto to defend himself against a criminal charge of rioting. On a cross appeal filed on behalf of the Defendants (Appellants) to the High Court, it was argued that a *karta* was not entitled to defend himself against a criminal charge, at the cost of a joint family, and that there was no proof that the joint family

RAM BUJHAWAN PROSAD SINGH v. NATHU RAM.

property had been hypothecated for any legal necessity of the joint family. The High Court, however, confirmed in this respect the judgment of the Subordinate Court, and the counsel for the Defendants (Appellants) did not ask their Lordships to review the concurrent findings of the two Courts, or to reverse this portion of the decree of the Subordinate Court.

The Judge of the Subordinate Court further found that the stipulation in the bond for payment of interest at 3 per cent. per month, and to pay compound interest with three monthly rests, was penal, and he allowed simple interest at 1 per cent. per month. This finding appears to have been based, not on the conditions which attach when a security is given which purports to hypothecate joint family property, but on the provisions of sec. 16 of the Indian Contract Act, 1872. It was set aside by the High Court, which held that sec. 16 of the Contract Act did not relieve the debtor by reducing the rate of interest, except when the Court had been satisfied that the lender was in a position to dominate the will of the borrower, and that the bargain was unconscionable within the meaning of the section. It is not necessary on the present appeal that their Lordships should express any opinion on the respective judgments of the Subordinate Court and of the High Court on this issue. The case of the Defendants (Appellants) was not argued before their Lordships on the terms of sec. 16 of the Contract Act, but on the nature of the obligations created where money has been borrowed by a *karta* on the security of the joint family property. If, however, it is permissible to accept the finding of the Judge of the Subordinate Court that simple interest at the rate of 1 per cent. per mensem is a fair commercial rate in the absence of special circumstances justifying a higher rate, and to calculate the interest on the loan of Rs. 1,000 at this rate, then, after allowing for payments made, a decree in favour of the Plaintiffs (Respondents) would, as ascertained on this basis, amount to the sum of Rs. 236-5-6, the decretal amount inserted in the decree of the Subordinate Court.

It will be convenient, in the first instance, to consider the nature of the right which a mortgagee of an ancestral joint family property is entitled to enforce against such property where he has proved that there was legal necessity for borrowing the principal sum, but it is not proved that there was necessity to borrow at the rate of interest contained in the mortgage deed. The question whether the Defendants (Appellants) are entitled to raise this question in the present instance will be considered at a later stage. This Board in the recent case of *Nazir Begam* v. *Rao Raghunath Singh* (1) determined the principles applicable in a case of this character, and it is not permissible for any Court to restrict or curtail the principles affirmed in that case. After referring to the earlier cases of *Rajah Hurronath Roy Bahadoor* v. *Rundhir Singh* (2) and *Nand Ram* v. *Bhupal Singh* (3) the judgment proceeds :—

"It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the

(1) L. R. 46 I. A. 145: s. c. I. L. R. 41 All. 571; 23 C. W. N. 700 (1919).
(2) L. R. 18 I. A. 1: s. c. I. L. R. 18 Cal. 311 (1890).
(3) I. L. R. 34 All. 126 (1911).

RAM BUJHAWAN PROSAD SINGH *v.* NATHU RAM.

mortgage that rate and those terms cannot stand.

"This principle being established, the High Court was justified in finding that a mortgage upon such terms as those contained in the document sued upon, the lands charged being of such value as to make the security ample, was an unnecessary extravagance. No evidence, it is true, was given on either side, but the thing spoke for itself. It remains therefore, that there was necessity and, in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority."

In this case the Defendants pleaded that the condition relating to interest was very hard, unconscionable and inequitable, but it is stated in the judgment that this allegation did not seem to have been intended as a substantive plea in itself, but rather as introducing a plea of undue influence which failed, and then the judgment proceeds :—

"However this may be, their Lordships do not think it safe to rest their decision upon a supposed discretion in the Court, or on inference by the Judges as to the sum which would be sufficient to compensate the mortgagee. In their view, as already stated, the question is one of the authority of a manager of a joint Hindu family, and it is because their Lordships agree with the High Court that this authority was exceeded to the extent already stated that they concur in the conclusion at which that Court arrived."

This decision was applied by the Board in the later case of *Manna Lal* v. *Karu Singh** in which judgment was delivered on the 29th July 1919.

Applying this principle to the present case, the consideration arises whether the authority of Hari Charan Mahto, being an authority to borrow on reasonable commercial terms, was exceeded in the promise to pay interest at the rate of 3 per cent. per month with three monthly rests. Assuming that this question is raised in the pleadings, a matter considered later, the onus of establishing that there was a necessity to pay a rate of interest in excess of the ordinary commercial terms is on the Plaintiff, and no proof of this necessity appears to have been given at the trial. The first Defendant (Appellant) does state in his evidence that there was no necessity to borrow money at such interest. There is some evidence that the property mortgaged provided ample security for a loan of Rs. 1,000, but, in their Lordships' opinion, if there was absence of evidence on either side, the case speaks for itself, and it has not been proved that it was within the scope of the authority of the *karta* to borrow on the terms fixed in the mortgage deed. Their Lordships have the assistance of the Judge of the Subordinate Court in determining the reduction which should be made in the rate of interest, and are of opinion that the rate of interest adopted by him may be safely followed. Indeed it was not argued before their Lordships that this rate should not be applied if it was held that the rate fixed in the mortgage deed cannot be allowed to stand.

The High Court of Patna decided in favour of the Plaintiffs (Respondents) that they were entitled to recover the amount of interest fixed in the mortgage bond, on the security of the joint family property, on two grounds :—

(1) That the question of excessive interest had not been sufficiently raised in the defence of the Defendants (Appellants).

(2) That, even assuming this question was sufficiently raised in the defence, the

* Unreported.

RAM BUJHAWAN PROSAD SINGH *v.* NATHU RAM.

Plaintiffs (Respondents) were entitled to succeed owing to an admission made in the terms of a compromise of the 10th February 1911, referred to in the decree of the 12th February 1911.

The defence that there was no legal necessity for the loan on the security of the joint family property was raised and determined in favour of the Plaintiffs (Respondents), but the High Court held that this defence did not sufficiently raise the further question, that the rate of interest was excessive and to this extent was outside the authority of the *karta*. The High Court based their decision partly on the terms in which the plea of the Defendants (Appellants), that there was no legal necessity for the loan at all, was raised and stated in the written statement of the Defendants (Appellants), and partly on the ground that the written statement contains a special plea as to interest, contained in para. 10 of the defence and in para. 5 of the written statement. It is not possible to say, after the decision of the Board in the case of *Nazir Begam* v. *Rao Raghunath Singh* (1) already referred to, that a plea of no legal necessity for a loan, and that the property is not at all liable for the payment of the amount claimed, does not open the door for a Defendant to say that the rate of interest is excessive, and place on the Plaintiff the onus of proving that the rate of interest is not excessive, having regard to all the circumstances which prevailed when the loan was made. The Defendant in such a case does not lose his right to raise this defence by adding the additional plea that, apart from the conditions which attach when a *karta* mortgages the joint property, the stipulation in the bond for payment of interest and compound interest, is in itself penal and unconscionable. In view, however, of the recent decision of this Board the matter is concluded and no longer open to question.

It becomes necessary, therefore, to consider the second question on which the judgment of the High Court was founded, namely, whether the Plaintiffs (Respondents) were entitled to succeed, owing to the admissions made in the terms of the compromise of the 10th February 1911. It is necessary to state shortly the relevant factors. On the 19th December 1903, Hari Charan Mahto executed a further mortgage bond in favour of the Plaintiffs (Respondents), who instituted a suit against him and his son, Defendant No. 1, to enforce this mortgage bond. Hari Charan Mahto died after the institution of this suit, and his son, Defendant No. 1 in the present suit, settled the matter. The arrangement was embodied in a consent decree of the 12th February 1911, and was in part carried out by the execution of a sale deed of the 10th February 1911, in which sale deed there is a passage: "Be it known that the bond, dated 16th July 1903, stands good as before, after payment of Rs. 1,000 as principal, besides interest and compound interest." The consent decree provides as follows: "Besides the amount claimed, Rs. 1,000, as principal and interest and compound interest due under the mortgage bond, dated the 16th July 1903, executed by Hari Charan Mahto, is due from me under the bond. Only Rs. 1,487 out of interest and compound interest entered on the back of the bond has been realised. The bond is allowed to stand good as before—*i.e.*, the principal interest and compound interest will remain due from me." The High Court of Patna held that this was a clear

(1) L. R. 46 I. A. 145: s. c. I. L. R. 41 All. 571; 23 C. W. N. 700 (1919).

admission of liability on the part of Defendant No. 1 in respect of both principal and interest and compound interest, and that though it was not in any sense a ratification of what was done by Hari Charan Mahto, it was presumptive proof of a justifying family necessity, and that hence, if it is necessary to come to a conclusion on the question whether there was any necessity to raise the loan on such onerous terms, it would be sufficient to say that the subsequent consent of Defendant No. 1 to the transaction was evidence of such necessity which had not been rebutted, and that so far as Defendant No. 2 is concerned the question did not arise as he was not in existence either at the date of the original transaction or at the date when the compromise was made.

On the construction of the words "the bond is allowed to stand good as before, *i.e.*, the principal interest and compound interest will remain due from me," their Lordships are of opinion that they constitute no more than a reservation of the rights, whatever they may be, under the mortgage bond of the 16th July 1903, and that they do not constitute an admission of a legal necessity either to the principal amount or of the rate of interest or compound interest. The mortgage bond which it was sought to enforce in the suit was executed subsequently to the mortgage bond on which the present action is founded, and it would be a reasonable precaution to insert words of reservation in order to ensure that there was no interference with the security of the prior bond. In the present suit the question of legal necessity for the principal of the loan was considered in both Courts, quite apart from the terms of the compromise, although if the terms of the compromise are proof as to the necessity of the rate of interest they would be proof to the same extent of the necessity of the principal of the loan. This is sufficient to determine the matter in favour of the Defendants (Appellants). Assuming, however, that the construction adopted by the High Court is correct, and accepting the view expressed in the judgment of the High Court that there was not in any sense a ratification of what was done by the father of Defendant No. 1, their Lordships are unable to accept the conclusion that the compromise terms would constitute such proof of a justifying family necessity as would be sufficient to discharge the Plaintiffs (Respondents) from the onus of proving that there were special circumstances which entitled Hari Charan Mahto to pledge the family joint property on excessive terms of interest or compound interest. The passage is, in any case, nothing more than an admission, for what it is worth, made by Defendant No. 1, and if it were necessary to draw a conclusion of fact their Lordships could not agree in the conclusion of the High Court.

Their Lordships will humbly advise His Majesty that the appeal succeeds on the question of interest or compound interest, that the decree of the High Court be set aside and the case be remitted with a direction that the rate of interest be reduced to simple interest at 1 per cent. per mensem and that the Plaintiffs (Respondents) pay the costs of this appeal and in the High Court.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellants.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

G. D. M.

PRIVY COUNCIL

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.
LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.
LORD SALVESEN.
1922,
Heard, 30, November and 1 and 4. December.
1923,
Judgment,
23, January.

KUMAR NARESH NARAYAN ROY, Appellant,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL and anr., Respondents.

Navigable river, shifting of—Rights of Government and riparian proprietors in churs and reformations in situ—Rennell's map, value of—Suit for recovery by co-sharer, decreed in absence of Plaintiff—Decree, if admissible in evidence and conclusive in Plaintiff's suit against same Defendant, after partition of property between co-sharer Plaintiff and Defendants in pursuance of decree

The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. If private property be submerged and subsequently again left bare by the water, it belongs to the original owner.

HARADAS ACHARJYA CHOWDHURI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (1) *followed.*

The value of Rennell's map adverted to.

In a previous suit by H, a co-sharer of the Plaintiff against the Defendant to which the Plaintiff was no party, H had recovered a decree for possession of H's share. Subsequently a partition of the property was made by deed between H, Defendant and Plaintiff to work out the decree but without expressly referring to it.

Held—*That the decree was not conclusive in Plaintiff's suit to recover his share from the Defendant and might, had it stood alone, be rejected as evidence, but followed by the partition became material.*

This was an appeal from a decree, dated the 14th March 1919, of the High Court of Bengal, which reversed a decree, dated the 19th June 1917, of the Subordinate Judge of Nadia.

The suit was brought by the Appellant for a declaration that certain chur lands in Parganah Laskarpur were a reformation *in situ* of the Appellant's zemindari and for a refund of revenue and cesses which had been paid twice over in respect of that land.

The Subordinate Judge before whom the case came for trial appointed a Commissioner to hold a local enquiry and to report "whether the disputed lands are reformations *in situ* of Taraf Jotashai included in Parganah Laskarpur," and in accordance with the Commissioner's finding he passed a decree in favour of the Appellant. In the course of his judgment he stated as follows :—

"The report (of the Commissioner) is in Plaintiff's favour, and by the elaborately considered judgment of the Privy Council in the case of Rani Hemanta Kumari it has been found that the lands in suit are the lands of Block Jotashai. The Plaintiff's title and that of Rani Hemanta Kumari stand on the same footing, and it does not, therefore, lie in the mouth of Government against whom that finding was made, to deny his (Plaintiff's) title. He has not only proved that the lands in suit is a reformation of Parganah Laskarpur, but that it is the self same land as Block Jotashai of Amin Mukanda Narayan's map. The D Register (Ex. 26) proves that the Plaintiff is the malik of Parganah Laskarpur to the extent of

(1) 26 C. L. J. 590 (P. C.) (1917).

4 annas 13 gundahs 1 kara and 1 krant share, and he has stated that he has been paying the same revenue unaltered as fixed at the time of the Permanent Settlement irrespective of the diluvion and this fact has not been denied by the Government. His predecessor successfully litigated up to the Privy Council in suit No. 9 of 1863, and his title was established in respect of these lands. It is held accordingly that the land in suit is a reformation *in situ* of the Plaintiff's estate as alleged in the plaint."

On appeal the High Court (Beachcroft and Greaves, JJ.) reversed the findings of the Subordinate Judge and dismissed the suit.

The Plaintiff appealed to His Majesty in Council.

The facts are fully set out in the judgment of the Judicial Committee.

Messrs. A. M. Dunne, K. C. and *W. Wallach* for the Appellant.—The Subordinate Judge referred the matter to a Commissioner to report whether the land was a reformation *in situ*. That reference was made under sec. 75 and Or. 26, rr. 9 and 10 of the Civil Procedure Code. The Subordinate Judge decided according to the Commissioner's report, and that decision should not have reversed except upon clear and undisputed evidence.

Surut Soondree Debea v. *Prosunno Coomar Tagore* (3).

The High Court have come to their conclusion on their own hypotheses which are not based on evidence. They were not justified in excluding the decision of the Privy Council in 1906.

That decision was relevant and material evidence in support of the Appellant's contention and in conjunction with the deed of partition of the 13th December 1909 to which the Secretary of State was a party, it acts as an estoppel against the Respondent. The Appellant has produced sufficient evidence to establish his contentions.

Reference was also made to *Secretary of State* v. *Maharaja of Burdwan* (4) and *Haradas Acharjya Chowdhuri* v. *Secretary of State* (1).

Messrs. L. DeGruyther, K. C. and *Kenworthy Brown* for the Respondents.—It was for the Appellant to establish his case affirmatively. This he has failed to do.

The statements in the revenue maps which have been accepted by the Commissioner are not admissible under sec. 36 of the Indian Evidence Act. The decision of the Board in 1906 was based upon different evidence and is irrelevant to the present issue. The High Court were right in excluding it and no question of estoppel arises. The Appellant has failed to show the exact locality in Taraf Jotashai in which the lands in dispute were situated at the time of the settlement and has failed to discharge the onus of proof that they are a reformation *in situ*.

Referred to *Jagadindra Nath Roy* v. *Secretary of State* (5).

Mr. Dunne, K. C. in reply.—In the former case it was held that the land in dispute belonged to the Appellant and partition was made by Government on the strength of that decision. The Respondents cannot now go back on that finding.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—This action was

(1) 26 C. L. J. 590 (P. C.) (1917).

(3) 13 M. I. A. 607, 614, 617 (1870).

(4) L. R. 48 I. A. 565: s. c. I. L. R. 49 Cal. 103; 26 C. W. N. 614 (1921)

(5) L. R. 30 I. A. 44, 53; s. c. I. L. R. 30 Cal. 291; 7 C. W. N. 193 (1902).

brought in the year 1912 by the Plaintiff, who is a zemindar for a declaration of his proprietary right to certain land in the District of Nadia, and for a declaration that he had been twice assessed for revenue in respect of it, and for a return of the overpaid revenue in past years. He succeeded in the Court of the Subordinate Judge, but that judgment was reversed on appeal, and now he has appealed to His Majesty in Council.

The case made by the Plaintiff was that the tract of land in question was within the collection or block or taraf of villages known after the name of its principal village as the Taraf Jotashai in the Parganah of Laskarpur; his case being that this parganah consists of seven mouzahs or villages described as Jotashai, Ramkristopur, Nowsera Ramkrishnapur, Kadirpur, Sadasibpur, Biharajpur (also known as Bahirmadi), and Mallikpur. He did not profess in his pleadings to say in which village the tract was situate, but generally averred that it was within this block or taraf, and that the whole had been settled with his ancestor at the Permanent Settlement in the year 1793. He said that the tract some time afterwards had become diluviated and now was re-formed *in situ*.

The written statement of the Secretary of State traverses the allegations that the lands were re-formed *in situ*, or that they were in the Block Jotashai, or had been settled with the Plaintiff's ancestor, and raised certain other defences which will be dealt with later.

Upon this contention being raised, a local investigation was ordered to ascertain whether the disputed lands are re-formations *in situ* of Taraf Jotashai in Parganah Laskarpur of the Rajshahi Collectorate, and the Commissioner was directed to make a map of the disputed land and to show therein the lines of Block Jotashai, as depicted in the maps of Mukanda Narayan Chowdhuri and Purna Chandra Chatterji. He was directed also to ascertain, with the help of Major Rennell's map of the Ganges prepared in 1780, the Revenue Survey map, the Diara Survey map and the Thak Survey map of Jotashai, whether the disputed land formed part and parcel of Parganah Laskarpur at the time of the decennial settlement; to plot those maps in his map; to plot the lines of the *khas* mahal map of chur Marichar Diar as prepared by Babu Bijoy Krishna Bose, Deputy Collector in 1883-84, to which, according to the defence, the disputed land appertained.

The Commissioner found that the land in question was in Block Jotashai and was a re-formation *in situ* of land formerly belonging to that block or taraf. He arrived at this finding after a very careful enquiry, making a personal visit to the site and taking much evidence. He also produced a map on which he had plotted the lines of the other maps according to the directions given him. His report having been filed, it was at one time intimated on behalf of the Secretary of State that objections would be raised to it, but no objections were raised and no application was made to have the report referred back to the Commissioner.

The case then came on for hearing upon this report, some oral evidence on behalf of the Plaintiff which did not carry the matter any further and a good deal of documentary evidence, including the proceedings and decrees in former litigation, the relevancy and probative force of which latter have undergone much discussion at their Lordships' bar.

The general nature and character of the Plaintiff's case was as follows:—The

River Ganges, called in this part of its course the Padma, has changed its channels frequently and considerably since the date of the decennial settlement in 1783, which was made permanent ten years later, in 1793.

In these circumstances the principles upon which a tribunal should act in a claim of this kind are to be found in a judgment delivered in 1917 in the unreported case of *Haradas Acharjya Chowdhuri* v. *The Secretary of State for India in Council* (1), where it was said by their Lordships :—

" The River Ganges rests so uneasily in its bed that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (See Regulation 11 of 1825.) If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. *Lopez* v. *Muddun Mohun Thakoor* (2)."

This being so, the Plaintiff's case was developed as follows :—

The Ganges in this part of its course divides two districts known as Rajashahi on the north and Nadia on the south. Laskarpur was a Parganah in Rajashahi; and therefore, to the north of the river: and anything in Laskarpur must be taken to have been north of the river at the time of the Permanent Settlement. The river, flowing in a general direction from west to east, but with many deviations and curves to the north and south, has now altered its course some miles to the northward, leaving a bed which can still be traced, where it probably flowed about 1850. In the course of its shift from south to north it diluviated and again set free large portions of the Parganah of Laskarpur. The tract in dispute, which was in the southern portion of the parganah, was, as the Plaintiff contended, in existence as dry land at the time of the Permanent Settlement, and was included in it. If so, it must have been diluviated shortly after, first re-appeared as an island, and now has become, as indeed land further north of it has also become, a permanent portion of the land on the southern side of the river.

The case for the Secretary of State was that the burden of proof of this averment lay upon the Plaintiff, and that he had not made it out, and that for all that could be now traced this land may well have been part of the bed of the river at the time of the Permanent Settlement, and therefore not part of Laskarpur and never settled for.

The land in dispute, which is roughly of a hatchet shape, and is coloured violet on the Commissioner's map, formed part of an irregular area of considerably larger size coloured yellow, and came to the Plaintiff for some estate or interest, the exact nature of which must be hereafter considered, by virtue of a deed of partition on the 13th December 1909, between the Secretary of State, the widow of a co-sharer, and the Court of Wards acting for the Plaintiff who was then an infant.

(1) 26 C. L. J. 590 P. C. (1917).
(2) 13 M. I. A. 467 (1870).

The oldest map known to be in existence is Major Rennell's survey, prepared in 1780, which the Commissioner or Amin was directed to plot upon the map which he prepared. With regard to this map, in the case already cited, *Haradas Acharjya Chowdhuri* v. *The Secretary of State for India in Council* (1), their Lordships made the following observations :—

"Rennell's map is undoubtedly, both owing to its difference in scale, to the different purpose of its preparation, and the difficulty of assigning fixed points from which the survey was made, a map which it is hard to incorporate into the survey of 1859. And, again, the variability of the river renders reliance upon it difficult As has been already said, their Lordships are not, however, prepared to dispossess the Appellants because of this difficulty. It may be that any assumption that can now be made cannot be exact, but some assumption is necessary."

The Commissioner, as directed, plotted Rennell's map upon the one which he prepared. There was one fixed point which could be relied upon. A factory called Harishankara on the south bank was in existence in Rennell's map, and has remained ever since. Taking this point, and reducing the scale as best he could, the Amin plotted the river with a curve sweeping over two-fifths of the south-eastern part of the land in dispute. leaving the rest dry land to the north. which would be so far according to the Plaintiff's contention, but putting the two-fifths in the bed of the river. In so doing, however, he put the site of two of the seven villages which constituted the Block Jotashai, Sadashibpur and Mallikpur under the bed of the river, and, inasmuch as they must have been at the time of the settlement to the northward of the river, it followed that at some portion of its course over the map, the river must have been more to the southward than it was shown by this plotting, and if the curve retained its outline but was shifted bodily to the southward all except, perhaps, a very small part of the land in dispute would have been dry land on the north bank. It would have been just possible to shift the river bodily to the southward for this purpose, and yet leave the factory standing. If for some reason the course of the river was a little narrower, it could have been done more easily. But there was apparently no physical reason why the curve should have retained the same outline, and if the north turn began a little more to the westward and nearer the factory the land in dispute would have been under the bed of the river.

The next map which the Commissioner had to deal with was what was called the Diara map, prepared about the year 1850, at which time the Mahalwar register of Laskarpur showed the Plaintiff's ancestor and predecessor-in-title as a proprietor of a great number of mouzahs still in existence, with a number of others noted as missing villages. Some of the seven villages to which the Plaintiff referred in his plaint appear in one column, some in the other, and some as to part in both.

The river bed, according to its course at that time, is still traceable, and flowed apparently through the middle of the land in dispute. About this time appeared a chur called Marichar Diar—Diar meaning land emerging from water—which is said on behalf of the Secretary of State to comprehend the land in dispute. At the time when the Commissioner made his survey the river was two miles to the north and the factory a mile to the south of the land in dispute. He reckoned the area of the tract marked yellow as 20,004 bighas. The tract coloured violet is

(1) 26 C. L. J. 580 P. C. (1917).

roughly about one-quarter of the tract coloured yellow.

There has been much previous litigation with regard to the tract coloured yellow and the lands adjacent to it. Their Lordships deem it unnecessary to refer to the earlier cases as they were summarised in a judgment delivered by this Board on the 21st March 1906,* in a case to which reference will now be made.

This was a suit brought by Rani Hemanta Kumari Debi in 1895 against the Secretary of State and Maharaja Jagadindra Nath Bahadur, the Rani claiming to be the proprietor of a zemindari right in a 2 annas 15 gundhas share of a permanently settled estate in Laskarpur, and alleging that the lands claimed by her within the area of Block Jotashai had been permanently settled by the Government with her predecessor-in-title. The lands in which she was claiming her right were the larger block marked yellow in the plan annexed to the present suit, of which the part coloured violet is that for which the present Appellant is suing. The Rani succeeded in the Court of first instance; that decision was reversed by the High Court, but restored by the judgment of this Board. The result was to decide that the lands in which she claimed a fractional share being comprised in Block Jotashai lying between the village Jotashai on the north and the southern boundary of the chur are a re-formation *in situ* of lands which before diluviation were comprised in Parganah Laskarpur.

This was a recovery by a co-sharer as against the Secretary of State of her right in the lands for which the Plaintiff is suing in the present suit. It is not in itself conclusive, because the Plaintiff was not a party to that suit. Objection, indeed, was made in that suit by the Secretary of State that the Rani could not sue without making other co-sharers parties; and the answer made by the Court was that it was unnecessary as the judgment would only decide her right, and would not be binding either in favour of or against other co-sharers. It was rejected by the High Court even as evidence; and this rejection might have been right, if it stood alone. But it was followed by a deed of partition, dated the 13th December 1909, between the Rani, an officer of the Court of Wards acting for the present Plaintiff, then an infant, and a representative of the Secretary of State, whereby the tract marked yellow was divided between the three parties according to their several shares or supposed shares. The Rani took a portion, the Secretary of State two other portions, and the Plaintiff the portion coloured violet. There is no reference in the deed to the Rani's successful suit, but it is clear that the partition was made in consequence of the decree in that suit and with the view to work it out, and in their Lordships' opinion this introduces the decree in the Rani's suit. Moreover, the deed describes the lands as being "in Block Jotashai," which is in itself an important admission.

Mr. Justice Beachcroft, in his judgment in the High Court, after commenting upon the error into which the Subordinate Judge had fallen in treating the judgment in the Rani's case as conclusive proceeded as follows: "The error would not be of much significance if we had in this case the evidence which was given in Rani Hemanta Kumari's case, for it would then be sufficient to adopt the reasoning used in that case. But we have not." And he proceeded to refer to certain additional materials mentioned in the judg-

* Reported in 10 C. W. N. 630 (1906).

ment in that case. It is satisfactory to their Lordships to think that were was that additional evidence; for in the present case the evidence, apart from the inference to be drawn from this decision, and from a statement to be hereafter referred to on the map of Ramkristopur, is not very conclusive.

Careful and detailed as is the report of the Commissioner, and careful and detailed as is the judgment of the Subordinate Judge, very little positive evidence to support the case of the Plaintiff can be extracted from the report or the judgment, if the Rani's case and the conclusion arrived at in it be excluded. The comment of the Judges in the High Court that the Commissioner's conclusion appears to depend upon the curve of the river in this part having retained the same outline is a forcible one, as is the argument submitted by counsel for the Respondents at their Lordships' bar to the effect that Plaintiff cannot show in which one of the seven villages, which formed the Taraf of Jotashai, the lands in question were situate at the time of the settlement, accompanied by his analysis of the facts which are known with regard to the boundaries of many of these villages, leaving only a residuum of uncertain area in which this tract could be put if it was dry land at the time of the settlement.

Their Lordships, however, cannot accept his contention that there is a distinction between the taraf and the block. Certainly there was no such distinction in the minds of those who gave judgment in the Rani's case. A perusal of that judgment would show that the words "taraf" and 'block" are used interchangeably.

At the same time, their Lordships feel that it is possible to be over-critical of the Commissioner's report, and that among the many physical features which he saw and upon which he reported, there may have been some which pointed to traces of old channels of the river which would have supported his conclusion in a manner not directly apparent upon the face of his report; and they are much impressed by the fact that he was not cross-examined or given any opportunity to meet criticisms upon it.

There is one passage in the report of the Commissioner to which their Lordships' attention was specially directed. He has dealt with the boundaries of four of the seven villages in the block, and pointed out that, in his view, the remaining three could not be traced, and he proceeds to say that it would be not impossible that the sites of these three missing villages had been encroached upon by the river at the time of the Revenue Survey— that is, about 1850-51, and consequently could not be then surveyed and mapped. His report then proceeds as follows :—

"There is no clear and positive evidence before me to show that the river site at the time of the Revenue Survey was previously the site of those three villages. But the fact that the site belonged to Parganah Laskarpur is amply proved by the statement contained in the Revenue Survey map of Ramkristopur."

For some unexplained reason this map does not form part of the record. It is, therefore, impossible to say with certainty that this statement was of such a kind as to be receivable in the present suit under sec. 36 of the Indian Evidence Act. But no objections having been taken to the report and the Commissioner not having been examined or cross-examined, their Lordships think that they ought to treat it as admissible evidence, and if so, it adds considerable weight to the material upon which the Commissioner formed his conclusion.

Upon the whole, their Lordships think that the Commissioner's report, coupled with the decree in the Rani's case, was sufficient to turn the scale in favour of the Plaintiff. Their Lordships are glad in dealing with a case in which the public interest is involved to be able to reach this conclusion. It would be unfortunate if, with regard to the same land, a decree could be made in favour of one co-sharer and another decree made against another co-sharer upon the same title.

There remain one or two points to be dealt with. In the partition deed which has been much relied upon, and which is indeed the only link by which it is possible to connect the Rani's judgment with the present case, and in which this land is described as being in Block Jotashai, it is stated when the Plaintiff's share comes to be set out in the schedule that it was "settled for periods." This, it is contended, is an admission that there was no permanent settlement, and an admission upon which the Secretary of State can rely as against the Plaintiff. The Plaintiff, it is true, repudiated this partition deed, which was effected on his behalf by the Court of Wards during his minority, but only a few days before he attained his majority, and contended that the partition proceedings were not binding upon him; but the Subordinate Judge held the contrary, and gave him a declaratory decree on the footing of the partition proceedings, and in the High Court his counsel accepted this position. But the words in the schedule "settled for periods" may be accepted as a correct description, but not as an admission that the settlement was *de jure*. This question leads their Lordships to consider the points raised in India and by the Respondents' case before their Lordships, but not so much insisted upon at the bar, that the Plaintiff was bound by a compromise entered into by his mother who was his predecessor-in-title, and a decree passed in pursuance of that compromise in 1881, or by a settlement which he took with the Government in 1910. The first of these contentions was not accepted by the Subordinate Judge or by the High Court. The Government were not parties to the compromise, or to the decree and as Mr. Justice Greaves in the High Court observed, there is on the record a letter from the Collector of Rajshahi expressly stating that the Government was not a party to that suit.

As regards the second, the Subordinate Judge held that the Plaintiff need not bring a suit for the purpose of having the settlement, which was said to have been forced upon him in 1910, set aside, as his purpose would be equally served by his obtaining a declaration that he was not liable to double assessment for the disputed land.

This objection does not seem to have been deemed by the High Court worthy of further notice. It reappears, however, in the case for the Respondents before the Board, but was not much insisted upon in argument, and being rather a point of procedure than of substance is therefore not one on which the Government would be desirous of relying, and their Lordships do not think it should prevail.

The defence of the Limitation Act was dealt with by the High Court, and their Lordships see no reason to differ from the view there taken.

The ground upon which the High Court differed from the Subordinate Judge was not that the evidence showed that this disputed tract had been under the bed of the river, but that the burden of proof lay upon the Plaintiff, and that he had

KUMAR NARESH NARAYAN ROY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

not proved with sufficient conclusiveness that it was dry land to the north of the river at the time of the Permanent Settlement, and the High Court put aside the judgment of this Board in the Rani's suit, as not being evidence.

The grounds upon which their Lordships differ from the High Court are that the decree in the Rani's suit, followed by the partition deed, must, in their Lordships' view, be regarded as material, and that the High Court have not attached sufficient weight to the conclusions of the Commissioner, derived from examination on the spot, and his reference to the map of Ramkristopur, unchallenged as his conclusions were by examination and cross-examination.

Upon the whole, their Lordships will humbly recommend His Majesty that the decree of the High Court be set aside, and the decree of the Subordinate Judge be restored, and that the Plaintiff do have his costs in the Court below and of this appeal, these costs to be paid by the Secretary of State.

Solicitors: *Messrs. W. W. Box, & Co.* for the Appellant.

Solicitors: *Solicitor, India Office* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 159 OF 1921.

MOOKERJEE, J. RANKIN, J. 1923, 15, November.	MANMATHA NATH MULLICK, Claimant No. 1, Appellant, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Opposite Party, Respondent.

The Calcutta Improvement (Appeals) Act (XVIII of 1911), sec. 3, appeal, if lies against decision determining the principle upon which prospects and possibilities of future development should be taken into account in determining compensation for compulsory acquirement Land Acquisition Act (I of 1894), sec. 24 (5), higher value, if allowable by reason of advantage accruing from action taken by the Trust in respect of a neighbouring parcel acquired previously—"Market value of land," meaning of—Other sales, admissibility in evidence, to prove value.

In certain land acquisition proceedings, the claimant contended that in the determination of the value of the land he is entitled to have a higher value put upon his land in consequence of the intention of the Improvement Trust to keep a previously acquired piece of land to the immediate west as an open space:

Held *per* MOOKERJEE, J.—*That an appeal to High Court lay as the judgment of the President of the Tribunal should plainly that the case involves a question of principle; the matter in dispute related to the determination of the exact principle upon which prospects and possibilities of future development should be taken into account in determining the compensation to be paid for property compulsorily acquired.*

That in the present case as the Improvement Trust authorities intended to keep the previously acquired plot as an open space in order that it might be annexed to the land now under consideration, and both amalgamated with an existing open square, the benefit which might accrue to the purchaser from the expression of intention of the Improvement Trust authorities, if carried into effect, would immediately result in the destruction of his rights as purchaser. Besides no evidence had been adduced to show that a purchaser could be had who would have paid anything like the price claimed.

The claimant was therefore not entitled to any enhanced value by reason of the intention of the Trust to keep the adjoining land as an open space.

Per RANKIN, J.—*The claimant claimed to add a value by reason of a certain declaration of intention on the part of the Trust. But that intention was not unconditional, and was one quite inconsistent with the claimant's premises ever having a chance to be used, occupied or enjoyed with the benefit of an open space to the west. In assessing the value of land acquired for the purpose of a scheme, sales of other similar lands between the date of the promulgation of the scheme and the date of the declaration are admissible in evidence. If there had been evidence that the minds of prospective purchasers were being influenced by the chance that the plot of land to the west would be left as an open space and that the later scheme for acquiring the land now under consideration would not be carried out, it would not have been right to exclude that evidence from consideration. But no evidence of this sort was present.*

This was an appeal preferred from the decision of the President of the Calcutta Improvement Tribunal.

The facts were briefly as follows :—In respect of certain land acquired in connection with the Central Avenue Scheme of the Calcutta Improvement Trust, an award was made at Rs. 5,500 a cottah. The claimant claimed at Rs. 8,000 per cottah inasmuch as towards the west of the land lay another parcel which was acquired previously and was declared to be intended to be kept as an open space. The claimant preferred an appeal to the Improvement Tribunal from the Collector's award. The Tribunal made an award at Rs. 6,000 a cottah but overruled the above contention of the claimant. The claimant thereupon preferred the present appeal to the High Court under sec. 3 of the Calcutta Improvement (Appeals) Act.

Babus Mohendra Nath Ray and *Bipin Chandra Mallik* for the Appellant.

Babu Surendra Nath Guha for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal against an award made under the Land Acquisition Act, 1894, in respect of land acquired in connection with what is known as the Central Avenue Scheme of the Calcutta Improvement Trust. The declaration under sec. 6 was published on the 20th May 1919. The claimant thereupon contended that the land should be valued at Rs. 8,000 a cottah. The Collector made an award at the rate of Rs. 5,500 a cottah. As the land had been acquired for the purposes of the Calcutta Improvement Trust, an appeal was preferred to the Tribunal. The result was that the Tribunal made an award at the rate of Rs. 6,000 a cottah. The claimant has appealed to this Court under sec. 3 of the Calcutta Improvement (Appeals) Act, 1911, and has valued the relief at Rs. 20,000. It is consequently clear that the claimant does not adhere to his original estimate of Rs. 8,000 a cottah; he now claims in substance a little over Rs. 1,000 a cottah in excess of the rate allowed by the Tribunal. Under sec. 3 the appeal can be maintained only on the grounds specified therein, namely, that—

(*i*) the decision is contrary to law or to some usage having the force of law;

(*ii*) the decision has failed to determine some material issue of law or usage having the force of law;

(*iii*) there has been a substantial error

of defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits.

The judgment of the President of the Tribunal shows plainly that the case does involve a question of principle; for, it is stated that the matter in dispute relates to the determination of the exact principle upon which prospects and possibilities of future development should be taken into account in determining the compensation to be paid for property compulsorily acquired. The circumstances which render the decision of this question necessary may be briefly stated.

Towards the west of the land now acquired under what is known as Scheme XIII lies another parcel which is marked green on the map previously prepared in connection with Scheme VII. The precise date when the declaration in respect of the other plot was published under sec. 6 cannot be ascertained from the record. But as that scheme was sanctioned by the Government on the 30th March 1916, it has been assumed that the declaration was published shortly afterwards. The contention of the claimant is that in the determination of the value of the land now under consideration he is entitled to have the land acquired in 1916 treated as an open space towards the west, with the consequence that the value of his land would thereby be considerably increased. The Tribunal has overruled this contention and has held that cl. (5) of sec. 24 of the Land Acquisition Act militates against the argument put forward on behalf of the claimant. That section provides that in determining the amount of compensation to be awarded for land acquired under the Land Acquisition Act, the Court shall not take into consideration any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired. The Tribunal has come to the conclusion that Scheme VII and Scheme XIII, though nominally distinct, are so essentially interrelated that they may be treated in substance as one scheme and that under sec. 24, cl. (5) the claimant is not entitled to have a higher value put upon his land by reason of the advantage which might have accrued owing to the action taken in respect of a neighbouring parcel acquired previously. In support of this view, reference is made in the judgment of the Tribunal to the decision of the Judicial Committee in the case of *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (1) and *Fraser* v. *City of Fraserville* (2). In my opinion, the question which has been discussed in the judgment of the President of the Tribunal does not really require examination in view of the circumstances of this case.

Sec. 24, cl. (5) provides that the Court shall not take into consideration any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired. The terms of this section cannot be made applicable to the precise events which have happened. The effect of the decisions of the Judicial Committee in the cases mentioned may be concisely summarised. The basis on which compensation for lands taken is to be assessed is the value of the lands to the owner as it existed at the date of the notice to treat and not their value, when taken, to the promoters. *Corrie* v. *MacDermott* (3), *Cedard Rapiss Manufacturing and Power Co.* v. *Lacoste* (4), *In re Lucas and Chesterfield Gas and Water Board* (5), *Fraser* v. *City of Fraserville* (2), *Pastoral*

(1) L. R. 28 I. A. 121 (1901).
(2) [1917] A. C. 187.
(3) [1914] A. C. 1056.
(4) [1914] A. C. 569.
(5) [1909] 1 K. B. 16.

Finance Association, Ltd. v. *The Minister* (6) and *South Eastern Rail Co.* v. *London, C. C.* (7). All advantages which the land possesses present or future, in the hands of the owner may be taken into consideration, *Cedard Rapiss Manufacturing and Power Co.* v. *Lacoste* (4), *In re Lucas and Chesterfield Gas and Water Board* (5) and *Fraser* v. *City of Fraserville* (2), and the owner is entitled to have the price assessed in reference to those advantages which will give the land the greatest value. The value of an owner's interest is not properly compensated by assessing the amount of pecuniary benefits obtained by past user in disregard of possible benefits in the future. *Trent-Stoughton* v. *Barbados Water Supply Co.* (8) but *cf. Eldon (Earl)* v. *North Eastern Rail Co.* (9). The probability of a more profitable future use is one such advantage which may be taken into consideration. Thus land which may probably be used for building purposes must not be valued on the same basis as purely agricultural land. *R.* v. *Brown* (10). But although prospective value is a necessary element in the assessment of compensation, such value must be entirely excluded where it would arise from the construction of the particular works authorised by the Act which gives compulsory powers. *In re Lucas and Chesterfield Gas and Water Board* (5), *Cedard Rapiss Manufacturing and Power Co.* v. *Lacoste* (4) and *Fraser* v. *City of Fraserville* (2). It is a recognised principle to exclude from the assessment of compensation any enhancement or diminution in value consequent on the construction of works authorised by the special Act under which the assessment is made. The phraseology used in the decisions mentioned, specially in *Fraser* v. *City of Fraserville* (2) is "enhancement or diminution in value," whereas the language used in cls. 4 and 5 of sec. 24 is "any damage which is likely to be caused to the land acquired in consequence of the use to which it will be put and any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired." Whether these two points of view are identical in all circumstances may be a matter for argument. This much is plain that in the case before us, what has to be ascertained is, as required by cl. (1), sub-sec. (1) of sec. 23, the market value of the land at the date of the publication relating thereto under sec. 6.

The meaning of the expression "market value of land" was considered in *Bombay Improvement Trust* v. *Jalbhoy* (11) and *Kailash Chandra Mitra* v. *Secretary of State for India in Council* (12). In the first case, the "market value of land" was stated to mean the price which would be obtainable in the market for a concrete parcel of land with its particular advantages and its particular drawbacks, both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal right. In the second case, the market value of land was described as the price that an owner willing, and not obliged, to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land; in other words, the

(2) [1917] A. C. 187.
(4) [1914] A. C. 569.
(5) [1909] 1 K. B. 16.
(6) [1914] A. C. 1083.
(7) [1915] 2 Ch. 252, 258.
(8) [1893] A. C. 502.
(9) (1899) 80 L. T. 723.
(10) L. R. 2 Q. B. 630 (1867).

(2) [1917] A. C. 187.
(11) I. L. R. 33 Bom. 483 (1909).
(12) 17 C. L. J. 84 (1910).

price which a piece of land fetches when it is offered for sale, the seller being not obliged to sell it and the buyer being under no necessity of buying it. This is identical with the view adopted in *Wernicks* v. *Secretary of State for India* (13) and *Sadhu Churn* v. *Secretary of State for India* (14). Consequently, what has to be ascertained in the present case is the market value of the land on the 28th May 1919 in view of the circumstances as they existed at that date.

Now, it may be conceded that on the materials on the record it is fairly clear that the Improvement Trust authorities intended, when the land to the west of the site now under consideration, was acquired in 1916 that it should be kept as an open space. It is this expression of opinion on the part of the Improvement Trust authorities which is emphasised on behalf of the claimant and his argument in substance is that any intending purchaser at the time when the declaration was published on the 28th May 1919 would have paid a higher price for his land in view of the fact that the land towards the west was intended to be kept as an open space. This, however, is not a fair statement of the true facts. The record leaves no room for doubt that the Improvement Trust authorities intended to keep the land towards the west as open space in order that it might be annexed to the land now under consideration and the two parcels might be amalgamated with the Marcus Square for the purposes of extension. Consequently, an intending purchaser would be expected to have regard not merely to the fact that the land towards the west would be kept open but also that the land now under consideration would be acquired by the Improvement Trust authorities. In such circumstances, it is impossible to believe that any purchaser, other than a speculator, would purchase the land now under consideration in order that he might possibly profit by the transaction; in other words, the benefit which might accrue to the purchaser from the expression of intention of the Improvement Trust authorities, if carried into effect, would immediately result in the destruction of his rights as purchaser. No evidence has been adduced to show that a purchaser could be had on the 28th May 1919 who would have paid anything like Rs 8,000 for the land now in dispute. It seems to me to be manifest that there is no substance in the contention of the Appellant. It has finally been suggested that the case should be remanded for further investigation, but we cannot possibly accede to this request. No attempt was made in the Court below to lay the foundation for any alternative case and the Petitioner is not now entitled to a remand.

The result is that the decree made by the Tribunal is affirmed and the appeal is dismissed with costs.

RANKIN, J.—I entirely agree. It seems to me that the principles of law discussed in the judgment of the learned President of the Tribunal cover more ground than it is necessary to discuss for the disposal of the present case. At the time of the declaration under Scheme XIII, namely, the 28th May 1919, the land occupied by the premises known as No. 38, Munshi Sadaruddin Lane had not been cleared and was not an open space but was covered with buildings as it had always been. Nevertheless if the claimant can show that there was an intention on the part of the Improvement Trust authorities to the effect that this plot of land would be acquired and would be rendered capable of use and enjoyment to the advantage of premises

(13) 13 C. W. N. 1046 (1909).
(14) 31 C. L. J. 68 (1919).

Nos. 5, 6 and 6/1, Mitra Lane, he is entitled as a matter of abstract law to prove that circumstance as an element in the valuation taken into account. The question is whether on the facts of this case he has shown that an intending purchaser just before the 28th May 1919 can be supposed to have been willing to give more for the claimant's premises by reason of such an intention on the part of the Improvement Trust. It is quite clear and it is so found by the learned President, that apart from user of the site of No. 38, Munshi Sadaruddin Lane in connection with a clearing scheme which would sweep away the claimant's premises there never was any intention on the part of the Improvement Trust to keep premises No. 38, Munshi Sadaruddin Lane as an ornamental garden or an open space. The intention of the Calcutta Improvement Trust in this matter was entirely conditional upon the pushing forward to completion of Scheme No. 13. The claimant says that he is entitled to add an element of value in respect of that intention. If in the circumstances it is not such an intention as can be supposed to affect the mind of a *bonâ fide* purchaser of house property in Mitra Lane, then it is of no service to the claimant. It has been contended that there is a principle to the effect that the value of the premises is to be taken independently altogether of the scheme, that is to say, on the footing that Scheme No. 13 had never been sanctioned. In its true meaning this principle has more than one fact. On the one hand, it means that you do not depreciate a man's property by saying that as it was going to be acquired for public purposes no one would readily have bought it or by treating the owner as a man obliged at any sacrifice to sell. On the other hand, it means that improvements to be made by the scheme itself are not a ground for giving to the owner an added value. Neither of these propositions touches or decides the question raised by the special facts of this case. The claimant claims to add a value by reason of a certain declaration on the part of the Calcutta Improvement Trust. That intention is not unconditional. When examined, it turns out to be one quite inconsistent with the claimant's premises ever having a chance to be used, occupied or enjoyed with the benefit of an open space to the west thereof. In these circumstances it seems to me that the President of the Tribunal has come to a correct conclusion. He has allowed for the general rise of value in this neighbourhood by the Central Avenue Scheme. He has allowed for the principle very correctly stated by him that in assessing the value of land acquired for the purpose of a scheme, sales of other similar lands between the date of the promulgation of the scheme and the date of the declaration are admissible in evidence. In this case no such evidence was put forward. If there had been evidence that the minds of prospective purchasers were being influenced by the chance that the plot of land to the west would be left as an open space and that Scheme No. 13 would not be carried out, I think, it would not have been right to exclude that evidence from consideration. No evidence of this sort was present and the surrounding circumstances make it improbable that such a case could have successfully established. For these reasons it seems to me that it is not necessary that this case should be sent back and that the decision of the Tribunal should be affirmed.

J. N. R. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No 1183 OF 1923.

RANKIN, J.
PAGE, J.
1923,
10, December.

BASANTI CHARAN SINHA Petitioner,
v.
RAJANI MOHON CHATTERJEE, Opposite Party.

Calcutta Rent Act (III of 1920, B. C), sec. 2 (f), sec. 5, sec. 15, cl. (d), proviso (i)—Premises let at low rent on 1st November 1918, owing to neglect of repairs—Rent, if "unduly low"—"Standard rent, whether actual rent or rent payable if premises were repaired—Rent not increased since 1st November 1913, if necessarily unduly low.

The rent of 1st November 1918 which in the absence of a finding within one or other of the sub-divisions in cl. (3) of sec. 15 is to be certified as the standard rent under that section is the rent at which the premises were let in fact on the 1st day of November 1918 and not the "fair rent which the house would have fetched at the time, if it was in a normal state of repairs."

The Controller of Rents or the President of the Improvement Tribunal in revision cannot treat the rent at which the premises were let on the 1st of November 1918 as "unduly low" within the meaning of cl. (d) to sub-sec. (3) of sec. 15 merely on the ground that the premises would have been let at a higher rent on that date if the repairs of the premises had not been previously neglected.

In order that it may be a question at large how much the standard rent should be, there must first be a finding within one or other of the sub-divisions of cl. (3), sec. 15.

The second part of the first proviso to cl. (3) of sec. 15 does not enact a presumption which binds the Controller to hold that the rent of 1st November 1918 is too low if the rent has not been increased since 1st November 1913. This part of the proviso does not come into play until there is a valid finding under sec. 15, sub-sec. 3, cl. (d), that the rent is unduly low and where there is such a finding, it operates to remove the restriction on the amount of rent imposed by the first part with the result that the amount is left entirely at large. The question what the standard rent should be is after that purely one of fact.

This was a Rule against an order of the President of the Tribunal, dated the 17th September 1923, affirming that of the Controller of Rents, Calcutta, dated the 15th January 1923.

The facts of the case were as follows :—

On the 2nd January 1920, the Petitioner tenant entered into an agreement with the landlords, Opposite Party, for a lease of premises No. 10, Creek Lane for a period of three years certain from 16th January 1920, with option in the Petitioner to renew his tenancy for a further period of three years.

In pursuance of this agreement the Petitioner entered into possession on the 16th January 1920, but no lease was executed. Thereafter on the passing of the Calcutta Rent Act of 1920, the Petitioner, on the 1st October 1920, applied to the Controller of Rents, Calcutta, for standardisation of the rent at Rs. 165 per month, being 10 per cent. above the rent of November 1918. On 25th April 1921, the Controller of Rents rejected the petition, holding that the lease in question was outside the operation of the Act, but on the petition of the tenant the said order was set aside by the High Court on the 20th February 1922 [vide *Basanti Charan Sinha* v. *Rajani Mohon Chatterjee* (1)].

Thereafter the petition was heard on the merits by the Rent Controller who in

(1) 26 C. W. N. 711 (1922).

BASANTI CHARAN SINHA *v.* RAJANI MOHON CHATTERJEE.

view of objections taken by the Opposite Party framed the following issues, *viz.* :—

(1) Whether the applicant rented the premises for the purpose of a factory.

(2) Whether in December 1919, the premises underwent such extensive repairs and structural additions and alterations that in January 1920, it might be called a "new premises."

(3) Whether the rent paid in respect of the premises in November 1918 was unduly low.

The Rent Controller decided the first two issues against the Opposite Party, and in the course of his judgment on issue No. 2 found that some of the repairs were perfunctorily done or left half-finished and further stated that during his inspection although made three years after the repairs he noticed signs of incompleteness of the said repairs. But upon the third issue he recorded his finding as follows :—

"There is no independent evidence to show that the rent paid in November 1918 was 'unduly low.' From the counterfoil rent receipt which has not been duly proved it appears that the rent paid in November 1918 was the same as that in November 1913. However, in my opinion the rent of Rs. 150 paid in November 1918 was unduly low. The fair rent of the premises in November 1918 would have been Rs. 200 plus occupier's share of taxes."

Against the decision of the Rent Controller which was passed on 15th January 1923, both parties applied for revision to the President, Improvement Tribunal, who upheld the order of the Rent Controller by his judgment, dated the 17th September 1923.

The Petitioner tenant thereupon obtained the present Rule from the High Court. On the day on which the Rule came on for hearing, the landlords filed a petition for revision and the two matters were with the consent of the Vakils for the parties heard together.

Babu Nagendra Nath Ghosh for the Tenant, Petitioner.

Babus Brajalal Chakrabartty and *Hiralal Chakrabartty* for the Landlord, Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—In this case, there is, first of all, a Rule obtained by the tenant claiming a revision of the decision of the learned President under the Calcutta Rent Act and, secondly, an application by the landlords for the issue of a Rule revising the same decision in certain respects. The learned Vakils concerned have very properly and conveniently agreed to put the whole matter before us upon the judgment of the learned President. So far as regards the landlords' application, that depends upon three points. It is said first of all, that the premises were let to the present tenant for the purposes of a factory and that, therefore, they are outside the definition of the word premises as given by sec. 2, cl. (*c*) of the Calcutta Rent Act, III, (B. C.), of 1920. In my opinion, the ned President has dealt with this matter quite correctly. He has enquired into the question whether the building here was let for residential purposes or for the purposes of a shop or an office, and he has come to the conclusion on ample evidence that the letting was not for the purposes of a factory. The state of mind of the tenant at the time as to what he intended to try to do in future is by no means conclusive on this point. The landlords appear to have been sending after all negotiations a draft lease which would have put the tenant under a firm obligation to use the premises only for residential purposes. That

BASANTI CHARAN SINHA v. RAJANI MOHON CHATTERJEE.

being so, the learned President's judgment is unexceptionable on this point.

It is then said that the learned President has failed to appreciate the true force of the evidence of the landlords' expert Mr. Shrosbee. That one way of putting the matter which he has criticised was only one of the aspects dealt with by the witness. It is not for us to say whether or not the evidence of that witness was fully and effectively appreciated by the learned President. We are not entitled to revise his decision even if on going through the evidence we should think that he has devoted an insufficient amount of attention or attributed an insufficient importance to one element of a question of fact.

Lastly, it is said that the learned President has misdirected himself in fixing the amount of the fair rent in this case. That contention is based upon the proviso to sec. 15 of the Rent Act. It seems to me that the position is fairly plain. In order that it may be a question at large how much the standard rent should be, there has, first of all, to be a finding within one or other of the subdivisions of cl. (3) of sec. 15. In the present case, there has to be a finding that the rent paid on the 1st of November 1918 was, in the opinion of the Controller, unduly low. If that finding is come to, then by the proviso the hands of the Controller are tied as to the amount to which he may raise the rent. He is forbidden to fix the rent at a higher amount than the highest rent actually paid for the premises since November 1913. But, by the second part of the proviso, if one or other of the things therein mentioned is found, that particular restriction on the question of amount is taken away and the result is that the amount is entirely at large. It is certainly suggested by the language of the second part of the proviso that where rent has not been increased since the first day of November 1913, as in the present case, the rent must be unduly low. That, however, is not an enactment but only a suggestion arising out of the provision dealing with the details of the subject and whether that suggestion is well-founded in any particular case is purely a question of fact. The legislature has not therein enacted a presumption which binds the hands of the Controller when considering whether the rent on the 1st November 1918 was or was not unduly low. In my judgment, if the finding of fact under cl. (*d*) of sub-sec. (3) of sec. 15 is good, there is no ground for complaint by the landlords under the terms of the proviso. That brings me to the question upon which the Rule was granted to the tenant.

The tenant complains that the learned President has found that the rent of 1918 was unduly low by misdirecting him in law. The finding was that before 1913 the premises were let out for more than they afterwards fetched. He says: "This fall in the rent was, in my opinion, due to a change for the worse in the condition of the building brought about by a neglect of necessary and timely repairs. The rent of November 1918 which under the Act is the basis of the standard rent of a house must, I think, be taken as the fair rent which the house would have fetched at that time, if it was in a normal state of repairs. If at that time, the house happened to be out of repairs, the fair rent of the house in its actual condition at that time would be low and the result of taking that rent as the basis for fixing its standard rent would be that, so long as the Act remains in force, the owner would be precluded from getting any higher rent in future even after putting the premises in a proper state of repairs; for sec. 5 of the

BASANTI CHARAN SINHA *v.* RAJANI MOHON CHATTERJEE.

Act provides that the standard rent of a house cannot be increased by reason merely of expenditure incurred by the landlord in making necessary repairs. I do not think that that could have been the intention of the legislature." In my opinion, this construction of the provisions of cl. (*d*) of sub-sec. (*3*) of sec. 15 is incorrect. The test throughout the Act is intended to be the actual rent, that is to say, the rent at which the premises were let in fact on the 1st day of November 1918. Under cl. (*d*), the Controller has to ask himself whether that rent at that date was unduly low and, in my opinion, the reference there is not to a hypothetical or notional state of normal repairs but to the actual condition of the premises as compared with the actual rent paid or agreed to be paid. It is perhaps open to some argument, but I will take it for the present purpose that the view of the learned President is right and that, in a case where in November 1918 the premises were let at a rent which was low by reason only of bad condition, the landlord having put the premises in repairs will be unable under the Rent Act to get an increase of rent. I say nothing to prejudice the question if it arises hereafter under cl. (*a*) of sub-sec. (*3*) or otherwise. It is not, however, plain to me that the legislature may not have contemplated with equanimity some of the troubles of a landlord whose property was in disrepair even although afterwards he has put it into repairs. In order that the rent of a house may be unduly low, all things must be considered. The premises may be out of repairs and still the rent may be unduly low. But in the present case, the learned President has held, as I understand, that the fall in the rent was entirely due to the change for the worse in the condition of the building. He has not found that notwithstanding the bad condition of the building, the rent of 1918 was unduly low, nor, in my judgment, did he mean to find anything of the sort. I think, therefore, we must exercise our power in revision and send this matter back to the learned President in order that the question whether the rent paid on the 1st day of November 1918 was or was not unduly low may be reconsidered and a proper finding come to upon that and the consequential points. It must be distinctly understood that no fresh evidence is to be taken and the remand is solely for a finding under cl. (*d*) of sub-sec. (*3*) of sec. 15 of the Calcutta Rent Act in the light of the observations made in the judgment and for the disposal of the case accordingly: the Rule of the tenant is made absolute on these terms and to this extent. The landlords must pay to the tenant his costs in the Rule and the application, the hearing-fee for the two together being assessed at two gold mohurs.

PAGE, J.—I agree.

N. G.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

VISCOUNT FINLAY. LORD DUNEDIN. LORD ATKINSON. SIR JOHN EDGE. MR. AMEER ALI. 1923, Heard, 5, 6, 8, 12, 13 & 15, March. Judgment, 10, July.	THE IMPERIAL BANK OF INDIA (substituted for the Bank of Bengal, Akyab), Appellants, *v.* U. RAI GYAW THU AND COMPANY, LIMITED, Respondents.

Transfer of Property Act (IV of 1882), secs. 8, 48, 58 (a), 59, 78, 79, 80—Mortgage by deposit of title-deeds to secure future advances but no maximum amount expressed—Mortgage, if legal and if affects property outside enumerated towns—Subsequent registered mortgage—Mortgagee not asking for title-

THE IMPERIAL BANK OF INDIA *v.* U. RAI GYAW THU AND COMPANY, LIMITED.

deeds—Subsequent advances by prior mortgagee—Priority, claim of, in respect of subsequent advances, if valid—Not asking for title-deeds, if abstention or negligence amounting to constructive notice—Notice, if material.

Where a mortgage has been made to secure future advances, the mortgagee does not as against a subsequent mortgagee secure priority in respect of subsequent advances unless a maximum amount is, as required by sec. 79 of the Transfer of Property Act, expressed in his mortgage. The exception to sec. 80 also cannot apply where no such maximum amount is expressed in the prior mortgage, and it is immaterial in such a case, in view of the language of sec. 80, whether the second mortgagee took his mortgage with or without notice, actual or constructive, of the prior mortgage.

There is no distinction in secs. 58 and 59 of the Transfer of Property Act between legal and equitable mortgages as in English law, where the legal mortgage will always prevail against the equitable unless the holder of the legal mortgage has done or omitted to do something which prevents him in equity from asserting his paramount rights.

Equitable mortgage effected by the deposit of title-deeds made in the towns specified in sec. 59 of the Act is a mortgage in the sense of the Act. Such a mortgage may involve lands outside the towns mentioned.

Where the earlier mortgage was by deposit of title-deeds and the later by a registered document, the fact that the second mortgagee did not ask for the title-deeds would not entitle the first mortgagee to claim priority in respect of subsequent advances made in terms of the earlier mortgage under sec. 78, for nothing done by the second mortgagee can be said to have caused the earlier mortgagee to make such further advances.

Semble :—*Where the earlier mortgage was made by deposit of title-deeds and sec. 79 of the Act applies by reason of a maximum amount being expressed as secured by the transaction, there is on the part of a person taking a second mortgage by a registered instrument, in a place where he knew that mortgages by deposit of title-deeds were legal and usual, without asking for the title-deeds and without ascertaining whether the title-deeds were already pledged, such an abstention from an enquiry which he ought to have made or such negligence as to infer notice in terms of sec. 3 of the Act. But in parts of India remote from the towns enumerated in sec. 59, it would be out of question to hold that there was a necessary duty in taking a mortgage to insist on the production of the title-deeds and registration is sufficient protection.*

These were two consolidated appeals (Nos. 148 and 149 of 1920) from seven judgments and decrees of the Chief Court of Lower Burma, dated the 6th May 1918, modifying and affirming decrees of the District Court of Akyab.

The question for determination in each of the appeals was whether certain advances made by the Bank of Bengal, Akyab, (now represented by the Appellant Bank), on the footing of equitable mortgages by deposit of title-deeds were entitled to priority over subsequent registered mortgages executed in favour of the Respondents.

The relevant facts in each appeal are set out in the judgment of their Lordships.

In appeal No. 148 of 1920 the registered mortgage was effected by the mortgagor at a time when his liability to the Bank was Rs. 24,500.

THE IMPERIAL BANK OF INDIA *v.* U. RAI GYAW THU AND COMPANY, LIMITED.

In appeal No. 149 of 1920 the mortgagor was temporarily free from liability to the Bank when he executed the registered mortgage.

On the 8th March 1917, the District Judge gave judgment in the suits comprised in appeal No. 148 of 1920; he held that the registration by the Respondents of their mortgage was not notice to the Appellant Bank, that it was not negligent on the part of the Bank to have omitted to search the register before making advances, and that there was no right in the Respondents to have the Bank's securities marshalled. In the event he made a declaration that the mortgage in favour of the Bank was entitled to priority over the Respondents' mortgage.

The Chief Court in appeal modified the judgment of the District Court and declared that the Bank was entitled to priority only to the extent of Rs. 15,000, being the minimum amount due to the Bank after 1st June 1914, the date of the Respondents' mortgage—together with interest thereon.

They held that the Bank was guilty of negligence for failing to search the registers prior to making advances, and they ordered each party to marshal its securities in favour of the other.

In appeal No. 149 of 1920 the District Judge held that the Respondents had priority in respect of their registered mortgage of 1st May 1914 over advances made by the Bank after that date and his decision was upheld by the Chief Court on appeal.

From these decisions the Bank appealed to His Majesty in Council.

Messrs. N. Micklem, K. C., L. DeGruyther, K. C. and *W. Dragher* for the Appellants.—The Bank's mortgages were prior in time and will therefore prevail against the subsequent mortgages, although the latter are registered.

Sec. 48, Transfer of Property Act, 1882.

Registration is not compulsory in Akyab.

See sec. 57 of Transfer of Property Act, 1882, as amended by sec. 4 of Act VI of 1904.

It is immaterial that the land is situate outside Akyab, the material question under the section is where did the contract and deposit take place.

Srinath Roy v. *Gadadhur Das* (2).

In each case the deeds were deposited with the Bank and the properties comprised therein purported to be unencumbered.

The Respondents were guilty of "gross negligence" in failing to get the title-deeds or have them accounted for.

Colyer v. *Finch* (3), *Northern Counties Fire Insurance Co.* v. *Whipp* (4), *Oliver* v. *Hinton* (5), *Walker* v. *Lincoln* (6) and *Hudston* v. *Viney* (7).

Sec. 79 of the Transfer of Property Act contemplates that mortgages will be made to secure future advances and provides that the English rule shall apply except where a maximum is expressed. The Indian law in that event overrides the rule in *Hopkinson* v. *Rolt* (1).

The exception in sec. 80—("Except in the case provided for in sec. 79")—is as to the classes of securities mentioned in sec. 79 whether with a maximum expressed or not. Otherwise the security, which a Bank in England gets by deposit of deeds or for future advances generally, does not exist in India.

(1) 9 H. L. C. 514 (1861).
(2) I. L. R. 24 Cal. 348 (1897).
(3) 5 H. L. C. 905, 928 (1856).
(4) 26 Ch. Div. 482 (1884).
(5) [1899] 2 Ch. 264.
(6) [1907] 2 Ch. 104, 114.
(7) [1921] 1 Ch 98, 104.

THE IMPERIAL BANK OF INDIA *v.* U. RAI GYAW THU AND COMPANY, LIMITED.

An alternative construction of sec. 80 is that it applies to further mortgages not to advances on existing mortgages. The fact that sec. 80 deals wholly with "Tacking" in its true sense is an interpretation which is borne out by the marginal reference. See Coote on Mortgages (1912 Edn.), pp. 1248-1250.

In any event the Respondents are deprived by their own negligence of any priority which they might have had. *Madras Hindu Union Bank* v. *Venkatarangiah* (8), *Madras Building Co.* v. *Rowlandson* (9), *Shan Maun Mull* v. *Madras Building Co.* (10) and *Nanda Lal Roy* v. *Abdul Aziz* (11).

Mere registration does not constitute notice, *Tilakdhari Lal* v. *Khedan Lal* (12).

Registration need not be effected for four or even eight months after a mortgage so that an inspection of the register for the purpose of a fresh advance would be valueless. The Irish case of *In re Bourke* (13), which was approved of in *Fullerton* v. *Provincial Bank of Ireland* (14) shows the error of the contention that in the absence of fraud any registered mortgage takes priority over one that is unregistered.

Messrs. A. M. Dunne, K. C., Webster and *Pennell* for the Respondents.—The failure to register their mortgage is conclusive against the Bank, *Subramanian* v. *Lutchman* (15).

This point has not been taken earlier but it is a point of law and the Appellant is in no way prejudiced by having it raised now.

The Transfer of Property Act is a Code of English law and it is unnecessary to consider the English law outside that Code.

The English doctrine of legal and equitable estates is not known to the Indian law of mortgages and the whole question of priority is dealt with under sec. 48 of the Transfer of Property Act. That section does away with all the differences between legal and equitable interests except so far as it is modified by sec. 78, which says that a prior mortgagee may be postponed provided there is evidence of fraud, misrepresentation or gross neglect.

The rule is laid down by sec. 80 that a further advance shall not be given priority. The exception is provided by sec. 79. *viz.*, "where the maximum to be secured is expressed." In neither of the present cases was the maximum expressed; therefore the rule applies and the Respondents' charge should receive priority over the further advances made by the Bank

The mere fact of a marginal note making a reference to Tacking cannot alter the plain meaning of sec. 80.

Balraj Kunwar v. *Jagatpal Singh* (16) and *Punardeo Narain Singh* v. *Ram Sarup Roy* (17).

The Respondents were not guilty of "gross neglect" within the meaning of sec. 78.

They had registered, which was all that they were bound to do, the neglect if any lay in the failure by the Appellants to have the register searched.

Until 1882 "gross neglect" meant that there were facts from which an inference could be drawn that the mortgagee

(8) I. L. R. 12 Mad. 424 (1889).
(9) I. L. R. 13 Mad. 383 (1890).
(10) I. L. R. 15 Mad. 268 (1891).
(11) I. L. R. 43 Cal. 1052 (1916).
(12) L. R. 47 I. A 239; s. c I. L R. 48 Cal. 1; 25 C. W. N. 49 (1920).
(13) 9 L R. Ir 24 (1881).
(14) [1903] A. C. 309.
(15) L. R. 50 I. A. 77; s. c. 28 C. W. N. 1 (1922).
(16) L. R. 31 I. A. 132, 142 (1904).
(17) I. L. R. 25 Cal. 858 (1898).

was inducing the mortgagor to commit a fraud.

The meaning of gross neglect in the Transfer of Property Act was the meaning which had been assigned to the words in 1882, as interpreted by *Northern Counties Fire Insurance Co.* v. *Whipp* (4), *Hewitt* v. *Loosemore* (18) and *Ratcliffe* v. *Barnard* (19).

The interpretation given to the words in *Oliver* v. *Hinton* (5) was admittedly different and being later than 1882 could not have been the interpretation intended by the Act.

In India there is no rule that the person getting the legal mortgage should first get in the deeds; that is the difference between India and Ireland, "registered" countries, and England where registration is not compulsory. *Agra Bank* v. *Barry* (20) is directly in point. In the circumstances what might be gross neglect in England would not necessarily be gross neglect in India.

Rangaswami Naicker v. *Annamalai Mudali* (21) where the earlier Madras decisions relied on by the Appellants were considered.

The Transfer of Property Act should be construed according to the rules in existence at the time of passing of the Act.

Manindra Ch. Nandi v. *Troyluckho Nath Burat* (22).

They also referred to *Grierson* v. *National Provincial Bank* (23) and *Re*: *Hellett's Estate* (24).

Mr. N. Micklem, K. C. replied.

(4) 26 Ch. Div. 482 (1884).
(5) [1899] 2 Ch. 264.
(18) 9 Hare 449 (1851).
(19) L. R. 6 Ch. A. 652 (1871).
(20) L. R. 7 H. L. 135 (1874).
(21) I. L. R. 31 Mad. 4 (1907).
(22) 2 C. W. N. 750, 753 (1898).
(23) [1913] 2 Ch. 18.
(24) 13 Ch. Div. 310.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—These are two consolidated appeals. The facts in appeal No. 148 of 1920 are as follows:—

One Abdul Hakim, on the 28th December 1911, handed to the Bank of Bengal (now represented by the Appellants the Imperial Bank of India who took over their business) the following document:—

"AKYAB,
"28th December 1911.

"To The Agent, Bank of Bengal,
Akyab.

"DEAR SIR,

"I beg to hand you the title-deeds as at foot to be held as Collateral Security for the advances made by you or to be made by you to me hereafter.

"I further beg to submit you that all those title-deeds as at foot deposited with you are free from encumbrances.

"Yours faithfully,
"ABDUL HAKIM II."
(In Burmese).

"DETAILS OF PROPERTIES REFERRED TO ABOVE."

The schedule was not filled up. The Bank thereafter made advances on current account from time to time. On 1st June 1914, Abdul Hakim was indebted to the Bank to the extent of Rs. 21,500. His liabilities to the Bank subsequently rose and fell; the minimum amount due at any one time being Rs. 15,000 on the 8th July 1914. The liabilities rose by further advances.

On the 1st June 1914, Abdul Hakim, without the knowledge of the Bank, executed a deed of mortgage of seven parcels of land, of which the titles had been handed to the Bank, in favour of a firm who were the immediate predecessors-in-title of the Respondents. This mortgage was re-

gistered. The mortgage was to secure Rs. 10,000. The Respondents' manager did not ask for any title-deeds and believed the statement of Abdul Hakim that the properties were free from encumbrances.

The facts in appeal No. 149 of 1920 are as follows :—

One Maung Tha Baw deposited the title-deeds of certain agricultural lands with the Bank at Akyab, as security for advances made to him by the Bank from time to time. His indebtedness to the Bank fluctuated from month to month. On the 29th April 1914, he cleared his account with the Bank, but allowed his title-deeds to remain in possession of the Bank, and on the 23rd May 1914, took a fresh advance of Rs. 10,000. From that time onwards his indebtedness to the Bank continued up to the date of the suit. On the 21st May 1914, without notice to the Bank during the time when he was temporarily free from debt, Maung Tha Baw executed a mortgage of certain of the lands in favour of the Respondents in this appeal, and this mortgage was duly registered at the Sub-Registration Office at Myohaung where Tha Baw lives. The mortgage was for Rs. 30,000.

The point of contest in both cases is the question of priority of the Appellants, the Bank, and the respective Respondents in respect of their registered mortgages.

Before discussing the question or examining the judgments below, it is advisable to set out the sections of the Transfer of Property Act, 1882, on which the questions turn. By sec. 58 (a) it is declared that :—

" A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

The section goes on to set forth and distinguish in turn simple mortgages (b), mortgages by conditional sale (c), usufructuary mortgages (d) and English mortgages (e).

Sec. 59 provides that :—

" Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses "
and then continues—

" Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, by delivery to a creditor or his agent of documents of title to immoveable property with intent to create a security thereon."

It is to be observed that there is here no distinction between legal and equitable mortgages as in English law, where the legal mortgage will always prevail against the equitable unless the holder of the legal has done or omitted to do something which prevents him in equity from asserting his paramount rights.

The various classes of mortgages are merely described, and then as regards mortgage by way of deposit of title-deeds, that is spoken of as a known method. That that known method had consisted in applying the doctrine of English law that such deposit effected a mortgage good against the mortgagor, although no actual conveyance of the property had been made, may be taken as certain.

Priority is dealt with in general terms by sec. 48 :—

" Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such

rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

This is what is expressed in the old maxim *qui prior est tempore potior est jure.* But priority is specifically dealt with in secs. 78, 79 and 80, which are as follows :—

78. "Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee."

79. "If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property, shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum though made or allowed with notice of the subsequent mortgage."

80. "No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by sec. 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance."

Now upon the facts set forth the learned District Judge in appeal No. 148 of 1920 thought that two points and two points only arose : (1) Whether the registration of the Respondents' mortgage was *ipso facto* notice to the Bank, thus preventing the Bank from making further advances upon the doctrine of *Hopkinson* v. *Rolt* (1) : and (2) whether the fact that the Respondents in taking the mortgage did not ask for the title-deeds, brought into play the provisions of sec. 78. He decided the first question in the negative and the second in the affirmative. He then gave judgment in favour of the Bank. He did not consider or discuss the effect of the concluding words of sec. 80.

In appeal No. 149 of 1920 he held that the two questions were the same. The first he decided in the same way, but the second he decided otherwise. He held that as the mortgaged lands were in the District where the concluding provision of sec. 59 did not apply, the Bank were themselves negligent in not inspecting the register before making further advances and that this negligence on their part precluded them from putting forward negligence on the Respondents' part under sec. 78. He therefore preferred the Respondents. Again he did not discuss sec. 80.

The appeal in No. 149 of 1920 came on before the appeal in No. 148 of 1920. In that appeal sec. 80 was mentioned, but was dismissed with the remark that it did not in any way supersede sec. 79, and the question to be decided was declared to be whether in the circumstances the Court could impute gross negligence to the Respondents and whether such negligence was a proximate cause of the Bank making further advances. The learned Appeal Judge who delivered the judgment then proceeded to consider the English decisions as to the necessity of a legal mortgagee requiring possession of the title-deeds without perhaps quite adverting to the fact that the question in England is not so much one of priority in time as of

(1) 9 H. L. C. 514 (1861).

the possibility of an equitable mortgagee being allowed to prevail over a legal. Having come to the conclusion that in the English law there was no absolute necessity to require production of the deeds, he argued that the case became much stronger in the country where registration existed, and he, therefore, came to the conclusion that the omission in this case to ask for the title-deeds was not negligence and dismissed the appeal. In appeal No. 148 of 1920 he held that as he had decided in appeal No. 149 of 1920, it followed that there was no negligence and preferred the Respondents to all except the amount which represented the amount due to the Bank before the date of the mortgage so far as not paid off.

Before their Lordships the argument proceeded on somewhat different and broader lines. The Respondents based their case entirely on the concluding words of sec. 80. Applying these words they say the Bank is a mortgagee who has made an advance subsequent to an intermediate mortgage and therefore as this is not a case falling within sec. 79 they cannot obtain priority therefor. All the discussion as to what is and what is not notice becomes unnecessary. The law being as it stands, sec. 78 cannot have any application because nothing done by them caused the Bank to make the further advances.

The Appellants sought to rebut this argument in various ways. They first argued that the words of sec. 80 "in the case mentioned in sec. 79" meant mortgages to secure further advances or the balance of a running account. Their Lordships cannot accept this argument. They think that the words of sec. 79 mean that the mortgage there referred to must express a maximum. The words "to secure further advances, etc.," denominate the different classes of mortgages, but to bring them under sec. 79 they must have the common feature of a maximum expressed. As no maximum was expressed in either of the two cases here, the exception in sec. 80 cannot apply.

The Appellants then argued that when a mortgage was to secure further advances, any advance when made was not truly a subsequent advance. The words of the section, in their Lordships' opinion, are destructive of this argument. "Subsequent" from the context must mean subsequent to the intermediate mortgage, and if that is so, then in the sense of the section an advance when made after another mortgage granted becomes a subsequent advance.

It was then argued that the equitable mortgage effected by deposit of title-deeds was not a mortgage in the sense of the Act and that consequently the priority sections had no application. This seems untenable in view of the words of sec. 58 (*a*). Unless the deposit of title-deeds effects the transfer of an interest in a specific immoveable property for the purpose of securing the payment of money advanced or to be advanced, it is absolutely nothing at all. Further the concluding words of sec. 59 actually use the word mortgage to denote the security effected by delivery of documents of title.

The consideration, however, on which the Appellants laid most stress was that it was evident that the legislature wished to preserve the system of mortgaging by deposit of title-deeds in the enumerated towns. Such mortgages are only really useful for the exigencies of business, especially in the timber and rice trades, where balances fluctuate from day to day. It would be impossible at each subsequent advance that there should be a search of registers, because the registers searched

would be not only the registers in the town itself but all those where the security lands mentioned in the deposited title-deeds might be situated, and the exigencies of business require immediate advances without a delay which might be of many days. Therefore it was pressed on their Lordships that they should give such an interpretation to the Act as would not defeat one of its avowed objects.

Such considerations while founded on views as to business which are obviously of the greatest practical importance would, in their Lordships' opinion, be rather arguments for the invocation of the legislature than an incentive to the putting of a forced construction on sections of an Act which in themselves were, in their Lordships' judgment, capable of only one interpretation. It may, however, be not amiss to point out that, in their Lordships' view, the remedy is given in the Act itself, and that is by the insertion in the arrangements for such mortgages of a maximum as indicated by sec. 79. The insertion of such a maximum elides the result which otherwise would obtain in terms of the case of *Hopkinson* v. *Rolt* (1). It is true that the subsequent mortgage must be made with notice of the prior mortgage which includes the maximum. But a case like the present, where the lender took the subsequent mortgage without asking for the title-deeds, would be met by sec. 3 of the Act which provides :—

"A person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. . . . . . ."

Taking the case of appeal No. 148 of 1920 as the simpler, their Lordships would be prepared to hold, that for a mortgagee taking a mortgage in a place where he knew that mortgages by deposit of title-deeds were legal and usual and not to ascertain whether the title-deeds were already pledged was such abstention from an enquiry which he ought to have made or such negligence as to infer notice in terms of the section. In the present case such a finding is unavailing, because sec. 80, in saying "with or without notice" makes notice immaterial. But if there had been a maximum then the exception would have applied and the case would have fallen under sec. 79. Appeal No. 148 of 1920 has been taken as the simpler case because the dealings are all within the town, but in appeal No. 149 of 1920, in their Lordships' judgment, the result would have been the same. No doubt each case must be judged of according to circumstances. In parts of India remote from the enumerated towns, it would be out of the question to hold that there was a necessary duty in taking a mortgage to insist on the production of the title-deeds. Registration is sufficient protection. But here the transaction was in Akyab, and the Respondents knew that a deposit of title-deeds in Akyab might involve lands situate outside Akyab and not very far remote.

Upon this view of sec. 80, 78 does not admit of any application. The Bank who had no maximum expressed so as to get the benefit of sec. 79 took the risk of there being an intermediate mortgage. Their further advances could not in any sense be said to have been induced by any action of the Respondents.

For the reasons above given their Lordships think, though on different grounds from that given by the learned Judges below, that these appeals fail, and they will humbly advise His Majesty accordingly.

(1) 9 H. L. C. 514 (1861).

THE IMPERIAL BANK OF INDIA v. U. RAI GYAW THU AND COMPANY, LIMITED.

The Appellants will pay the costs of the appeals.

The Respondents' petition for special leave to cross-appeal will be formally dismissed and no costs in relation to it must be charged in the Respondents' bill.

Solicitors : *Messrs. Waterhouse & Co.* for the Appellants.

Solicitors : *Messrs Bramall & White* for the 1st Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 136 OF 1922.

MOOKERJEE, J.
RANKIN, J.
1923,
30, April.

S. K. GHANDY
v.
L. P. E. PUGH.

Courts, if should interfere with internal management of joint stock companies acting within their powers—Suit for redress of wrong done to the company or to recover moneys or damages alleged to be due to the company, how far can be brought by an individual share-holder of the company.

It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.

BURLAND *v.* EARLE (1) *and* FOSTER *v.* FOSTER (2) *relied on.*

In order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should primâ facie *be brought by the company itself. But an exception is made where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. But in such an action the Plaintiffs cannot have a larger right to relief than the company itself would have if it were Plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.*

FOSS *v.* HARBOTTLE (3), MOZLEY *v.* ALSTON (4), MENIER *v.* HOOPER'S TELEGRAPH WORKS (5) *and other cases referred to.*

This was an appeal against the decree of Mr. Justice Pearson, dated the 26th July 1922, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts are briefly as follows :—The Plaintiff-Appellant, a share-holder of the Hoogly Coal Company, Limited, on behalf of the other share-holders of the company brought this suit against the Defendant-Appellant, L. P. E. Pugh, the first director of the company, impleading the company as the 2nd Defendant, for fraud upon the minority in passing a resolution confirming a sub-lease of the company's coal fields in which the said director was personally interested. The said director being the holder of sharers to the extent of about three-fourths of the capital and controlling the majority of the votes, passed the resolution in question. Mr. Justice Pearson dismissed the suit and hence the present appeal.

(1) [1902] App. Cas. 83.
(2) [1916] 1 Ch. 532 at p. 547.
(3) 2 Hare 461 (1843).
(4) 1 Phill. 790 (1847).
(5) L. R. 9 Ch. 350.

S. K. GHANDY *v.* L. P. E. PUGH.

Mr. Asoka Roy, Counsel, appeared on behalf of Mr. Ghandy.

Mr. Surita and *Mr. B. N. Bose*, Counsel, appearded on behalf of Mr. Pugh.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a suit for damages. The Plaintiff is a shareholder in the Hoogly Coal Company, Limited, incorporated under the Indian Companies Act. The first Defendant, a shareholder of the company, was appointed its first director by the articles of association and has been a director thereof since its incorporation. The company has been joined as the second Defendant. The circumstances which have given rise to the claim for damages may be briefly narrated.

On the 23rd September 1914, the first Defendant obtained a lease for 999 years of coal land in Mouza Bon Bistupur held under proprietary right by one Sanjilal. The consideration was the payment of Rs. 30,000 as premium and royalties on the working. On the 23rd June 1915, the Defendant company was incorporated to take over the Bon Bistupur concern from the first Defendant on terms contained in a draft agreement. The capital was fixed at two and a half lacs of rupees covered by 50,000 shares of Rs. 5 each. This agreement between the first Defendant and the company was executed on the 2nd July 1915. On the 5th July 1915, 40,000 fully paid-up shares were awarded to the first Defendant as consideration. Messrs. W. A. Lee & Co. were at the same time appointed Managing Agents and they continued as such for about a year when their services were dispensed with. The evidence showed that till september 1917, the concern was looked after by the first Defendant who was also the sole director. During all this time, the premium of Rs. 30,000 had not been paid to the vendor nor had he executed the conveyance to the company. But in January 1916 the first Defendant had agreed to deposit shares to the extent of one lac to secure the company against the charge for premium, as, under the agreement, the company took the property free of encumbrances. On the 3rd September 1917, the first Defendant granted a sub-lease for 999 years to one Bagchi. This sub-lease included not only the Bon Bistupur concern but also two other collieries which were owned by the Defendant. The consideration for the transfer was an aggregate sum of Rs. 80,000 as premium. Royalties were also to be paid but at increased rates which were double the original rates. Possession was given to Bagchi under this sub-lease. The case for the Plaintiff is that this sub-lease, in so far as it relates to Bon Bistupur, is fraudulent and in breach of the duty of the first Defendant as director of the company. On the 17th September 1917, the first Defendant gave notice of a meeting of the share-holders of the Defendant company for the next day; but the meeting was not held, apparently because no one was present. After further notice, a meeting was held on the 26th November 1917 when a resolution was proposed to confirm the lease to Bagchi on payment of royalty. The first Defendant was in the chair and voted in favour of it, while others present voted aganst it; he then declared the resolution carried. A doubt, however, was raised as to the legality of the proceeding, and a further meeting was held on the 16th February 1918. The Plaintiff protested but a resolution was carried in these terms :—

"That the company confirms the lease granted by the first Defendant on the 3rd September 1917 so far as it relates to the lease of Bon Bistupur on royalty and ac-

S. K. GHANDY v. L. P. E. PUGH.

cepts the offer of the first Defendant to pay over the royalties as they accrue due to the company and to make no further claim on him."

The case for the Plaintiff is that this resolution was a fraud on the minority and was not binding on the company. On these allegations the Plaintiff instituted the present suit on behalf of himself and the other share-holders of the Defendant company. The reliefs claimed were framed in the following terms:—

"1. Judgment for Rs. 50,000 as damages for wrongful acts, to be paid to the Defendant Company. 2. Judgment that the first Defendant may be ordered to deliver up to the Defendant company certificates of the said shares held by him or his nominees in order that the same may be cancelled and that the first Defendant be ordered to pay to the Defendant company at the rate of Rs. 5 per share in respect of such shares, if any, as have been transferred to *bonâ fide* holders for value."

The Defendant contended that no relief could be claimed in the suit as framed. Mr. Justice Pearson has found that the share-holders have not lost by what took place or that any more profitable way of dealing with the property was open, considering the position of affairs at the time, when the sub-lease was granted by the first Defendant on the 3rd September 1917. He has consequently held that upon the suit as framed the Plaintiff was not entitled to the relief sought. In our opinion, the view taken by Mr. Justice Pearson is correct and his judgment must be upheld.

The principles of law applicable to a case of this character were enunciated by Lord Davey in *Burland* v. *Earle* (1) in a well-known passage which is quoted by Mr. Justice Peterson in *Foster* v. *Foster* (2):—

"It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *primâ facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle* (3) and *Mozley* v. *Alston* (4) and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule"—that is to say, that the company ought to bring the action—"where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the share-holders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the Plaintiffs cannot have a larger right to relief than the company itself would have if it were Plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the share-holders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A

(1) [1902] App. Cas. 83.

(2) [1916] 1 Ch. 532 at p. 547.

(3) 2 Hare 461 (1843).

(4) 1 Phill. 790 (1847).

S. K. Ghandy v. L. P. E. Pugh.

familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other share-holders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works* (5). It should be added that no mere informality which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the share-holders is clear. This may be illustrated by the judgment of Mellish, L. J., in *MacDougall* v. *Gardiner* (6)." This passage was approved in *Dominion Cotton Mills Co.* v. *Amyot* (7) and applied by Kekewich, J., in *Normandy* v. *Ind., Coope & Co.* (8). The same view was affirmed in *Cook* v. *Deeks* (9) where Lord Buckmaster, L. C., referred to *North West Transportation Co.* v. *Beatty* (10) and *Jacobus Marler Estates* v. *Marler* (11).

The question consequently arises, whether on the facts of this case, the Plaintiff has established that the suit as framed comes within the scope of this rule. The answer, in our opinion, must be in the negative. We have been pressed to hold that the grant of the lease to Bagchi for a premium of Rs. 80,000 on the 3rd September 1917 was fraudulent and was in breach of the obligation of the first Defendant as the director of the Hoogly Coal Company. The transaction, however, was not merely in respect of the Bon Bistupur property but also in respect of two other collieries which belonged to the first Defendant alone. The Plaintiff has not been able to establish that this premium of Rs. 80,000 was not fair consideration for the two collieries held by the Defendant. This distinguishes the present case from the decision in *Cockburn* v. *Newbridge Sanitary Steam Laundry Company* (12) which illustrates how the application of well-settled principles to concrete facts may be beset with difficulties. We see no reason to dissent from the view taken by Mr. Justice Pearson that the lease was neither an act of fraud nor a breach of duty.

The result is that the decree made by Mr. Justice Pearson is confirmed and this appeal dismissed with costs.

Messrs. Dutt & Son, Solicitors for the Appellant.

Messrs. Chaudhuri & Chaudhuri, Solicitors for the Respondent.

J. N. R. *Appeal dismissed.*

(5) L. R. 9 Ch. 350.
(6) L. R. 1 Ch. D. 13, 25 (1875).
(7) [1912] App. Cas. 546.
(8) [1908] 1 Ch. 84.
(9) [1916] App. Cas 554.
(10) L. R. 12 A. C. 589.
(11) 85 L. J. P. C. 167 (1913).
(12) [1915] 1 Ir. 237.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1963 OF 1921.

SUHRAWARDY, J.
PAGE, J.
1924,
25, January.

KEDAR NATH BISWAS, Defendant, Appellant,
v.
KAMINI SUNDARI DASYA, Respondent.

Bengal Tenancy Act (VIII of 1885), Sch III, Art. 3—Suit for possession by raiyat in case of dispossession by landlord claiming title by auction-purchase in execution of rent decree against third person, if governed by 2 years' rule of limitation—Dispossession by landlord—Limitation.

Where a raiyat was dispossessed of a part of his holding by his landlord who caused the dispossession claiming title by auction-purchase in execution of a rent decree against another person treating him as his sole tenant, and it was found that the said

KEDAR NATH BISWAS *v.* KAMINI SUNDARI DASYA.

decree and sale were fraudulent and that at the time when the Plaintiff was dispossessed in 1913 and up till the date when the suit for possession was instituted in 1919 the Plaintiff was all along the tenant of the Defendant:

Held—*That the suit was barred by the two years' rule of limitation under Sch. III, Art. 3 of the Bengal Tenancy Act.*

NABIN CHANDRA SAHA *v.* SHEIKH WAJID (1) *and* KAMALDHARI THAKUR *v.* RAMESWAR SINGH BAHADUR (2) *referred to.*

SUHRAWARDY, J.—*Art. 3, Sch. III of the Bengal Tenancy Act applies to a case where dispossession has been by a person who at the time of dispossession occupies the position of a landlord.*

This was an appeal preferred on the 29th of August 1921 against the decree of Rajendra Nath Rai, Esq., Additional District Judge of Zillah Jessore, dated the 20th of June 1921, reversing the decree of Babu Dhirendra Nath Bagchi, Officiating Munsif, Additional Court at Jhenidaha, dated the 29th of May 1920.

The facts material to the report are as follows :—

Plaintiff brought this suit on the 17th May 1919 for declaration of title and recovery of possession of 5 cottahs of land on the allegation that Defendants Nos. 1 and 2 who were her landlords in collusion with the other Defendants dispossessed her from the lands in suit in March 1919 by stacking straw and erecting a hut thereon. Plaintiff's case was that two brothers Sitanath and Dwarkanath jointly held a homestead of 10 cottahs under the Defendants Nos. 1 and 2 at an annual rental of Rs. 1-4-0. Sitanath having died his half-share devolved upon his widow, the Plaintiff, and she having purchased the other 8 as. share from Dwarkanath in Pous 1320, B. S., became entitled to the entire 10 cottahs and was in possession of the same on payment of the 16 as. rent to her landlords, Defendants Nos. 1 and 2. Dwarkanath's daughter, Defendant No. 4, and her sons Defendants Nos. 5 and 6 in collusion with the landlords Defendants Nos. 1 and 2 dispossessed the Plaintiff subsequently from Dwarkanath's half-share in the homestead as alleged and hence they brought this suit.

Defendant No. 2 alone contested the suit, and his defence, *inter alia*, was that the disputed land which was admittedly the eastern half of the homestead formed a separate non-transferable occupancy holding of Dwarkanath which he held at an annual rental of Re. 1, and that after Dwarkanath's death his daughter, Defendant No. 4, succeeded him, and that as Defendant No. 4 did not pay rent in respect of the eastern half of the homestead he and Defendant No. 1 sued her for rent and having obtained a decree purchased the land in execution sale. Defendants Nos. 1 and 2 obtained delivery of possession of the land through Court on the 8th December 1913 and were in possession of it since that time.

The Munsif dismissed the suit. He believed the Defendant's case and held that the disputed land was a separate holding held by Dwarkanath alone at a *jama* of Re. 1, and that Plaintiff had no title to or possession of the lands in suit. He further held that the suit was barred under Art. 3, Sch. III of the Bengal Tenancy Act. The following portion of his judgment will be found material :—

"I therefore hold that even if the Plaintiff had ever any right to or possession of the disputed land she was dispossessed therefrom by her landlords, the Defendants Nos. 1 and 2, for upwards of 2 years before

(1) 24 C. W. N. 382 : s. c. 31 C. L. J. 109 (1919).

(2) 17 C. W. N. 617 (1913)

KEDAR NATH BISWAS v. KAMINI SUNDARI DASYA.

the institution of the suit, and the present suit is therefore barred by the special law of limitation as provided in Sch. III of the Bengal Tenancy Act."

On appeal by the Plaintiff, the Additional District Judge of Jessore allowed the appeal and decreed the suit. He believed the Plaintiff's case and held that the disputed land appertained to the occupancy holding of Rs. 1-4 held jointly by Sitanath and Dwarkanath, that the rent decree against Defendant No. 4 and the sale thereunder were fraudulent and collusive, that the homestead was partitioned by the two brothers in two equal shares and Sitanath got the western half while Dwarkanath got the eastern half and this was the land in suit which was purchased by the Plaintiff from Dwarkanath. He further held that the suit was not barred, and disposed of the issue on the point of limitation as follows :—

"In view of the ruling of *Kamaldhari Thakur* v. *Rameswar Singh Bahadur* (2) the suit is not time barred."

Against this decision of the lower Appellate Court Defendant No. 2 preferred this second appeal.

Rai Surendra Chandra Sen Bahadur (with *Babu Hemendra Chandra Sen*) for the Appellant.—In this case having regard to the facts found the two years' rule of limitation (Sch. III, Art. 3 of the Bengal Tenancy Act) applies and the suit is barred by limitation. Defendant purchased the suit lands at a sale in execution of a rent decree against a third person treating him as the sole tenant, and then dispossessed the Plaintiff. That decree and sale have been found to be collusive. The said decree was not against the Plaintiff: the relationship of landlord and tenant between the Plaintiff and the Defendant existed at the time of the dispossession. There is no doubt a conflict of decisions on the question as to whether Art. 3, Sch. III of the Bengal Tenancy Act will apply where the dispossession is by the landlord by virtue of his title as auction-purchaser: see *Nabin Chandra Saha* v. *Sheikh Wajid* (1) and the cases referred to therein. I submit that that question does not arise here having regard to the findings in this case. Defendant went upon the suit land claiming it as his *khas* land. It is found that at the time of the dispossession and up to the date of the suit the Defendant was in fact the landlord of the Plaintiff.

Babu Shib Chandra Palit for the Respondent.—Having regard to the conflict of rulings the case should be referred to a Full Bench. The Defendant dispossessed the Plaintiff as auction-purchaser and as such the dispossession was not by the Defendant in his capacity as landlord.

The JUDGMENT OF THE COURT was as follows :-

SUHRAWARDY J.—In this appeal the point involved is whether on the findings of the Courts below the Plaintiff's suit is barred by two years' limitation under Art. 3 of Sch. III of the Bengal Tenancy Act. The facts are that Defendant No 2 who is the Appellant was the landlord in respect of a certain holding which was jointly held by two brothers Sitanath and Dwarkanath. Sitanath died leaving the Plaintiff as his widow on whom devolved his one-half share. The Plaintiff's case is that she purchased the other one-half of Dwarkanath and thus became entitled to the 16 annas share of the holding. The Defendant's case is that in respect of the eastern half of this holding Dwarkanath was the sole tenant and after his death the

(2) 17 C. W. N. 817 (1913).

(1) 24 C. W. N. 382: s. c. 31 C. L. J. 199 (1919).

KEDAR NATH BISWAS v. KAMINI SUNDARI DASYA.

Defendant No. 4 succeeded him as a tenant, but as Defendant No. 4 did not pay the rent in respect of the eastern half of the holding, the Defendants Nos. 1 and 2, being the landlords, brought a suit for rent, obtained a decree, purchased the land in execution of the same and obtained delivery of possession through Court on the 8th December 1913. The lower Appellate Court has found that the Defendant's decree against Defendant No. 4 and the sale in execution thereof were fraudulent and collusive. It was the case of the Plaintiff and it has been found by the Courts below that the Plaintiff was all along the tenant of the Defendants Nos. 1 and 2 in respect of the land in dispute and that the decree against Defendant No. 4 and the sale thereunder did not affect the Plaintiff's title. The Plaintiff alleged that she was dispossessed in 1325 by a certain act of the landlords. The first Court disbelieved the evidence on that point and found that she was dispossessed by her landlords (Defendants Nos. 1 and 2) more than two years before the institution of the suit and held that the suit was barred by limitation. The learned Munsif does not say on which date the dispossession took place, but reading the whole judgment it appears that he was of opinion that the Plaintiff was dispossessed from the disputed land in 1913 by virtue of the delivery of possession to the Defendants Nos. 1 and 2 in execution of the rent decree against Defendant No. 4. The lower Appellate Court has not found as to when the dispossession took place; but it disposes of the issue "Is the suit barred by limitation" in these words: "In view of the ruling of *Kamaldhari Thakur* v. *Rameswar Singh Bahadur* (2) the suit is not time-barred." I think what he means to say is that because the dispossession was by the Defendant in 1913 as purchaser in execution sale, it was not dispossession by him as landlord and so two years' bar of limitation did not apply to the facts of this case and therefore the Plaintiff's suit was not barred by limitation."

On this question as to whether the dispossession under Art. 3 of Sch. III of the Bengal Tenancy Act should be dispossession by a person as landlord and not in any other capacity though he happened to be a landlord has been the subject of consideration in a large number of cases and there has been a wide divergence of judicial opinion. All the cases on this point have been collected in the case of *Nabin Chandra Saha* v. *Sheikh Wajid* (1) and in the well-known edition of the Bengal Tenancy Act by Mr. Surendra Chandra Sen whose assistance we had in this case appearing as he did for the Appellant, at pp. 856 and 858. It is not necessary for us to refer to those cases, nor do we feel called upon in the particular facts of this case to refer the matter to a Full Bench as we have been invited to do by the learned Vakil for the Respondent. The facts of this case are of a peculiar nature. It has been found, and it is the case of the Plaintiff, that the relationship of landlord and tenant between the Defendant and the Plaintiff continued down to the date of the suit and I take it that it still continues. At the time when the sale in 1913 took place and delivery of possession was given to the Defendant through Court, he was on that date occupying the position of a landlord in respect of the Plaintiff. The collusive decree that was obtained against Defendant No. 4 did not put an end to that relationship and it is on the basis of that relationship that the

(2) 17 C. W. N. 817 (1913).

(1) 24 C. W N. 882: c. 31 C. L. J. 199 (1919).

KEDAR NATH BISWAS *v.* KAMINI SUNDARI DASYA.

Plaintiff now comes to Court and demands restitution of property of which she was dispossessed. I need not consider the question as to what would have been the effect if the rent decree were against the Plaintiff and the dispossession had taken place by the Defendant as purchaser in execution of that decree. I may only mention that the ratio of some of the decisions of the class of the case of *Kamaldhari Thakur* v. *Rameswar Singh Bahadur* (2) is that the landlord having ceased to be a landlord by purchasing the holding himself in execution of this decree, he subsequently obtained delivery of possession through Court and thereby dispossessed the tenant not as a landlord but as an auction-purchaser. But, here, as I have said, the dispossession was by the Defendant when he was holding the character of a landlord in relation to the Plaintiff. If we look at it from another point of view it appears that the Plaintiff was dispossessed on the 8th December 1913 from the holding as a tenant in respect of the holding. In my judgment Art. 3 applies to a case where dispossession has been by a person who at the time of dispossession, in whatever way the dispossession might take place, either through a civil wrong or by means of criminal force, occupies the position of a landlord or possesses the character of a landlord and had the capacity of the landlord; the dispossession must be taken to have been effected by the landlord. In this view of the finding of the lower Appellate Court I think that Art. 3 is applicable to the facts of this case and the Plaintiff's suit is barred by limitation.

The result is that this appeal is allowed, the decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs.

(2) 17 C. W. N. 817 (1913).

PAGE, J.—I am of the same opinion. The question in this appeal is whether or not the Plaintiff's suit is barred by limitation. The material article is Art. 3 of Sch. III of the Bengal Tenancy Act which provides that a suit by a Plaintiff as a raiyat, (which was the capacity in which the Plaintiff launched the proceedings in this suit), to recover possession of land must be brought within two years from the date when the Plaintiff was dispossessed of the land. It is well-settled that dispossession must be by a landlord. I desire to adopt the observation of Jenkins, C. J., in the case of *Rudranarayan Maiti* v. *Natober Jana* (3). Referring to Art. 3 his Lordship says: "This is an article, which after a lapse of a certain time, deprives the Plaintiff of his right to come to Court for the purpose of vindicating a claim which is his and therefore it must be clearly made out that any particular case falls within its terms. We recently had occasion to enter a protest against extending the terms of this article by use of figures of speech and metaphors. What we have to see in each case is whether in fact there has been such dispossession as the article requires. That dispossession, it is conceded, must be by the landlord." There are two findings of fact in this case to which I must refer. The first is that the Plaintiff was dispossessed of the premises more than two years before she launched the present suit; and the second finding is that at the time when she was dispossessed and up till the date when the suit was instituted she was in fact the tenant of the Defendants Nos. 1 and 2. In my opinion these two findings of fact are sufficient to enable us to dispose of this appeal. Upon these facts Art. 3 will bar the claim of the Plaintiff. But it

(3) I. L. R. 41 Cal 52: s. c. 18 C. W. N. 358 (1913).

KEDAR NATH BISWAS *v.* KAMINI SUNDARI DASYA.

is contended that Art. 3 does not apply because the Defendant No. 2 had obtained a decree for possession against some other person on the ground that such other person was his tenant, and that he obtained possession under that decree. The Court below has found, however, that that proceeding was a fraudulent and collusive proceeding between the parties to it. The Plaintiff was not impleaded in that suit and she was not bound by the decree passed in it. In my opinion, the fact that the Defendants in collusion with a third person obtained possession of these premises by fraud does not affect the position of the Plaintiff. The finding of fact that at the time of dispossession the Plaintiff was the tenant of the Defendants Nos. 1 and 2 brings into operation Art. 3 of Sch. III of the Bengal Tenancy Act, notwithstanding the fraudulent device to which the Defendant No. 2 resorted in order to obtain possession. The determination of the question depended upon this finding of fact and in my opinion this appeal should be allowed.

H. C. S. *Appeal allowed with costs.*

[CRIMINAL REVISIONAL JURISDICTION.]

REF. NOS. 1 AND 2 OF 1924.

PAGE, J.	SHEIKH BAHATAR,
MUKERJI, J.	Complainant,
1924,	*v.*
28, January.	NOBADALI, Accused.

Simultaneous trial and disposal of cross-cases, desirability of Police case, if can have precedence over complaint case—Criminal Procedure Code (Act V of 1898), sec. 438, revisional powers of District Magistrate over Subordinate Magistrates, extent of—Sec. 344, Court's powers of postponement or adjournment, extent of.

Two cross-cases were instituted, one upon a Police report and the other upon a complaint, the accused in the one being the complainants in the other. The Sub-Divisional Magistrate directed the trial of the Police case first and then of the complaint case. The District Magistrate in revision set aside that order and directed the trial of the two cases side by side:

Held—*That the policy of the law is that a case should go on, unless it be adjourned, so far as the trial Court is concerned, under the provisions of sec. 344, Cr. P. C., for reasons to be stated in the order. There is, therefore, no justification for the postponement of the trial of the complaint case. The accused in the complaint case, who may be interested in the Police case, cannot in any way be hampered to depose truthfully in the Police case and proving their own version of the case. On the other hand, there is no reason whatever why the complainant in the complaint case should not be allowed to proceed with his case in which he and his co-accused can give their deposition on oath and be in a much better position to substantiate the truth of their version, than as accused persons in the Police case. There is no foundation for the view that a Police case is to have precedence because it is a Police case. To meet the ends of justice, therefore, both the cases should be tried simultaneously and contemporaneously, but should be dealt with wholly separately from each other, each on its own merits and upon the facts and circumstances appearing therein, judgments in the two cases being pronounced, if possible, after both the trials are over.*

BECHU MOLLA *v.* SIA RAM SINGH (1) *and* JUDHISTHIR GOPE *v.* SHEIKH SAMIR (2) *distinguished.*

QUEEN-EMPRESS *v.* CHANDRA BHUIYA (3) *referred to.*

Held further—*That the District Magistrate had no jurisdiction to pass the order*

(1) I. L. R. 14 Cal. 358 (1886).
(2) 27 C. W. N. 700 (1922).
(3) I. L. R. 20 Cal. 537 (1893).

SHEIKH BAHATAR *v.* NOBADALI.

which he did. If he was of opinion that an order for trial of the two cases side by side was necessary in the interests of justice, his proper course was to make a reference to the High Court under the provisions of sec. 438, Cr. P. C.

These were References under sec. 438, Cr. P. C. made by the Sessions Judge of Birbhum (Mr. K. C. Nag), recommending that the order of the District Magistrate of Birbhum, dated the 15th November 1923, directing the trial of the two cases side by side may be set aside and the order of the Sub-Divisional Magistrate of Suri, dated the 9th of November, directing the trial of Case No. 1 first may be restored, for the reasons stated in the Reference.

The Reference was as follows :—

"The Petitioner Sheikh Bahatar lodged a first information at the Illambazar Police Station against Nobadali and others for offences under secs. 147, 225 and 379, I. P. C., on the 1st of October at about 1 A.M. and on the same date Nobadali also lodged a counter complaint to the Illambazar Police Station at 1-30 A.M., which was noted in the Station Diary. On the 11th the Police sent up charge sheet against Nobadali and others under secs. 147, 225 and 379. Meanwhile on the 3rd of October accused Nobadali lodged a petition of complaint against Sheikh Bahatar and others before the Sub-Divisional Officer, Suri; and processes were issued against Bahatar and others. On the 5th November the Sub-Divisional Officer passed an order in the Police case directing the Police to send up witnesses on the 24th November. On the same day that is on 5th November, the accused Nobadali filed a petition before the Sub-Divisional Officer of Suri praying that the petition case might also be proceeded with on the 24th November. Upon this petition the learned Sub-Divisional Officer after calling for the Station Diary passed an order on the 9th November that the Police case would be taken up first. Not being satisfied with the Sub-Divisional Officer's order accused Nobadali filed a petition on the 15th November before the learned District Magistrate of Birbhum praying that the Police case and the petition case started by him should be tried side by side by the same Magistrate and that the order of the Sub-Divisional Officer should be set aside. The learned District Magistrate on the same day without calling for the records of the case and without issuing any notice on Sheikh Bahatar passed an *ex parte* order directing the Sub-Divisional Officer to deal with the two cases 'side by side' and 'to pronounce judgment as soon as possible in one case after that given in the other."

* * * * *

The portion of the District Magistrate's order directing the Sub-Divisional Officer of Suri to deal with the two cases 'side by side' is, in my opinion erroneous in law and without jurisdiction.

There is no provision of law by which the District Magistrate can directly interfere with the Sub-Divisional Officer's order and as such the learned District Magistrate's order was in my opinion *ultra vires* and without jurisdiction. Simultaneous trials of two cross-cases have been held to constitute grave irregularity and it has been greatly deprecated in the case of *Bechu Mollah* v. *Sia Ram Singh* (1). Now as to the order of trial of these two cases, I think in view of the recent ruling [in *Judhisthir Gope* v. *Sheikh Samir* (2)] that the Sub-Divisional Officer was right in holding that the Police case should be proceeded with first as this case was started prior

(1) I. L. R. 14 Cal. 358 (1886).
(2) 27 C. W. N. 700 (1922).

SHEIKH BAHATAR *v.* NOBADALI.

in point of time to the case of Nobadali against Sheikh Bahatar and others. I, therefore, recommend that the District Magistrate's order directing the Sub-Divisional Officer to deal with the two cases side by side be set aside and that the Sub-Divisional Officer's order, dated 9th November 1923, be restored."

No one appeared on these References.

The JUDGMENT OF THE COURT was as follows :—

We think the learned District Magistrate had no jurisdiction to pass the order which he did on the 15th November 1923. If he was of opinion that such an order was necessary in the interest of justice his proper course was to make a reference to this Court under the provisions of sec. 438, Cr. P. C. We accordingly accept this part of the Reference made by the learned Sessions Judge and set aside the said order of the learned District Magistrate.

With reference to the other recommendation made by the learned Sessions Judge, *viz.*, that the order of the Sub-Divisional Magistrate, dated the 5th November 1923, be restored, we are not prepared to accept his recommendation. He has referred to two cases in his letter of Reference in support of the recommendation that he has made, *viz.*, (*i*) *Bechu Molla* v. *Sia Ram Singh* (1) and (*ii*) *Judhisthir Gope* v. *Sheikh Samir* (2). The decision in the latter case rested on its special features, *viz.*, that the two cases were being tried by two different Courts, and in one of the cases the prosecution case had been closed and charge framed whereas in the other practically very little had been done, and under those circumstances it was held that it was desirable to hold the trials in one Court and to finish the trial which had nearly come to an end. With regard to the former case the authority of the observations which, by the way, were not the foundations of the decision therein was very much weakened in consequence of a later decision of this Court in *Queen-Empress* v. *Chandra Bhuiya* (3).

We propose to consider the matter from the point of view of first principles and in doing so we shall for the sake of brevity call the case against Nobadali and others as the Police case and the case against Sheikh Bahatar and others as the complaint case, since they have been started, respectively, upon a Police report and a complaint. We start with the position that the Police case is to go on immediately : in fact no application has been made by any party to have it postponed and none has suggested that it should not be taken up at once. The question is whether the complaint case should not also be started at once. Now, the policy of the law is that it should go on, unless it be adjourned so far as the trial Court is concerned, under the provisions of sec. 344, Cr. P. C. Under the provisions of that section, "if from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any enquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor postpone or adjourn the same." In this case no reasons have been recorded by the learned Sub-Divisional Magistrate. His order simply runs thus :—"Seen. The Police case will be taken up first." It is for us, then, to enquire : Is there any reasonable cause, which may justify the order?

The accused in the complaint case who may be interested in the Police case can-

(1) I. L. R. 14 Cal. 358 (1886).
(2) 27 C. W. N. 700 (1922).
(3) I. L. R. 20 Cal. 537 (1893).

SHEIKH BAHATAR v. NOBADALI.

not very well say that they will in any way be prejudiced. They cannot say that they will not permit the complainant in the complaint case in which processes have issued against them on the footing that a *primâ facie* case had been made out to proceed with his case merely because the Police case is pending. There is nothing to prevent them from proving their own version in the Police case. They cannot in fairness be permitted to say that as they are accused in the complaint case, they will in any way be hampered to depose truthfully as they are expected to do in the Police case in which they expect to secure a conviction of their opponents. On the other hand, there is no reason whatever why the complainant in the complaint case should not be allowed to proceed with his case in which he and his co-accused can give their deposition on oath and are in a much better position to substantiate the truth of their version, than as accused persons in the Police case. Of course if they had asked for an adjournment of the complaint case on the ground that being accused persons in the Police case they will be handicapped in going into the witness-box and give their deposition on oath, other considerations would have arisen; but it is they who want a simultaneous trial, presumably because they will be benefited and not prejudiced by the adoption of that course. There is no foundation for the view that a Police case is to have precedence because it is a Police case: and so far as order of institution is concerned it appears to us that upon the facts appearing on the records to say that the Police case was instituted earlier in point of time is a mere fiction.

We accordingly pass the following order which seems to us to meet the ends of justice in this case. The two cases should be tried simultaneously and contemporaneously, but should be dealt with wholly separately from each other, each on its own merits and upon the facts and circumstances appearing therein; judgments in the two cases being pronounced, if possible, after both the trials are over.

The Reference is thus accepted in part.

J. N. R.

[CRIMINAL REVISIONAL JURISDICTION.]

CR. REV. (MIS.) No. 129 OF 1923.

GREAVES, J. PANTON, J. 1923, Heard, 7 and 10, December. Judgment, 20, December.	BHOLANATH DAS and others, Petitioners, *v.* EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs 61 and 167, procedure when investigation cannot be completed in twenty four hours—Sec. 190 (1) (b), Magistrate if can take cognizance of cognizable offence upon report of a Police Officer which is not a "Police report" under sec 173—Sec 344, Magistrate's powers of postponement and adjournment.

The law laid down by secs. 61, 167, 169 and 190 (1) (b) *of the Criminal Procedure Code is that at the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before a Magistrate allowed under secs. 61 and 167, an accused must either be released by the Police under sec. 169, security for his appearance if and when required being taken, or the Magistrate, empowered in that behalf, must either take cognizance if he has before him a Police report (which ordinarily would be a report in the form laid down in sec. 173) which he thinks made out a* primâ facie *case or he must release him.*

The provisions of sec. 190 extend to any offence and notwithstanding the use of the words "Police report" in sec. 173, sec. 190 (1) (b) *cannot be restricted merely to*

BHOLANATH DAS *v.* EMPEROR.

non-cognizable offences, and a Magistrate is empowered by sec. 190 (1) (b) to take cognizance both in cognizable and non-cognizable offences upon a report such as is mentioned in sec. 190 (1) (b).

After a Magistrate has taken cognizance of a case his powers of postponement and adjournment are regulated by sec. 344, Cr. P. C.

This was a Rule granted on the 8th October 1923 against an order refusing application for bail by the Police Magistrate of Sealdah on 2nd October 1923, which order was affirmed by the Sessions Judge of the 24-Perganas (Mr. G. N. Roy) on the 5th October 1923.

The facts are fully set out in the judgment.

Babus Manmatha Nath Mukerji, Satindra Nath Mukerjee, Narendra Nath Mitra and *Promotha Nath Mitra* for the Petitioners.

Mr. Camell for the Crown.

The JUDGMENT OF THE COURT was as follows :—

We have already directed that some of the Petitioners are to be released on bail but the questions of law raised by the learned Vakil of the Petitioner remain to be decided.

The facts are as follows :—One Promotha Nath Das was arrested in June of this year, he was brought before the Additional Magistrate of Alipore on the 7th June when he made a confession which was recorded. As a result of Promotha's confession the Petitioners were arrested on the 5th August and on the 20th August they were brought before the Police Magistrate of Sealdah and a letter from the investigating Police Officer was received, their application for bail was refused and the case was adjourned to the 4th September. On the 4th September the case was again adjourned until the 18th September when a Magistrate, who had been deputed to verify Promotha's confession, was examined and the case was adjourned to the 2nd October. One of the accused Nagendra was subsequently released on bail by this Court on the ground that there was at that time no Police report and that no cognizance of the case had been taken by the Police Magistrate. On the 2nd October the case was again adjourned until the 13th October, bail was asked for and refused. An application for bail made to the Sessions Judge of Alipore was rejected by him on the 3rd October. On the 5th October a report from Inspector M. M. Sinha was filed before the Police Magistrate who on the 6th October took cognizance purporting to act on the report under the provisions of sec. 190 (1) (*b*) of the Code of Criminal Procedure. The accused were remanded on the 13th October until November 3rd when the Inspector was examined and they were remanded until November 15th on which day they were again remanded until November 30th. This Rule was granted on the 8th October and when it came before us on the 7th and 10th December the accused were still in custody. Four points were urged before us. First, it is said that the detention of the Petitioners is illegal as the Magistrate has not taken cognizance. Secondly, it is said that if he has taken cognizance he was not justified in doing so upon the report which was before him as it is not a report under sec. 173 of Code of Criminal Procedure and it is said that the Magistrate could only take cognizance in respect of a cognizable offence upon a report in the form contemplated in sec. 173. Thirdly, it is said that if the Magistrate was justified in taking cognizance upon a report not in the form contemplated by

BHOLANATH DAS *v.* EMPEROR.

sec. 173, the report before him did not contain sufficient materials to enable him to take cognizance. Fourthly, it is said that if he has rightly taken cognizance under this report he is not justified in granting adjournments to enable the Police to complete their investigations and that since he has taken cognizance he must proceed with the case and only grant such adjournments as are necessary to obtain the atttendance of the witnesses and as may be necessitated by the exigencies of his own work.

Sec. 61 of the Code of Criminal Procedure provides that no Police Officer shall detain in custody a person arrested without warrant for longer than is reasonable under the circumstances of the case and that such period shall not exceed 24 hours in the absence of a special order of a Magistrate under sec. 167, exclusive of the time necessary to bring the accused before a Magistrate. The Rule was not directed to the point whether the provisions of sec. 61 were complied with and we are unable to say what actually occurred.

Sec. 167 empowers Magistrates when a person is arrested and detained in custody and it appears that the investigation cannot be completed within the 24 hours fixed by sec. 61 and when there are grounds for believing that the accusation or information is well founded to authorize his detention for a term not exceeding 15 days in all.

The Magistrate in the present case apparently considered that he took cognizance on the 20th August but as has been pointed out by Mr. Justice Mookerjee and Mr. Justice Chatterjee there was nothing before him upon which he could take cognizance of the case on that day. The 24 hours' detention and the additional time necessary to bring an accused before a Magistrate allowed by sec. 61 and the fifteen days' additional detention allowed by sec. 167 having expired, an accused must either be released by the Police under the provisions of sec. 169, security being taken for his appearance before a Magistrate, if and when required, or the accused must, under the provisions of sec. 170, be forwarded under custody to a Magistrate who is empowered to take cognizance of the offence upon a Police report. The law as laid down in the sections of the Criminal Procedure Code to which I have referred seems to me to be this that at the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before a Magistrate allowed under secs. 61 and 167, an accused must either be released by the Police under sec. 169, security for his appearance if and when required being taken, or the Magistrate, empowered in that behalf, must either take cognizance if he has before him a Police report (which ordinarily would be a report in the form laid down in sec. 173) which he thinks makes out a *primâ facie* case or he must release him.

In the present case the Magistrate has purported to take cognizance upon a report, which the Crown admits, is not a Police report as contemplated by sec. 173. The Crown say that he was justified in so doing by reason of the provisions of sec. 190 *(1)* *(b)* which provides that a Magistrate empowered in that behalf may take cognizance of any offence upon a report in writing made by any Police Officer. It is said on behalf of the Petitioners that having regard to the words in sec. 170 "empowered to take cognizance of the offence upon a Police report" the words of sec. 190 *(1)* *(b)* must refer not to a cognizable offence but to a non-cognizable offence and it is said that in the case of a cognizable offence, having regard to the

BHOLANATH DAS v. EMPEROR.

clear words of sec. 170 to which I have referred, a Magistrate can only take cognizance upon a Police report as contemplated by sec. 173 and upon no other report. There is, I think, considerable force in this argument but after all the provisions of sec. 190 extend to any offence and I think, notwithstanding the use of the words "Police report" in sec. 173, that sec. 190 (*1*) (*b*) cannot be restricted merely to non-cognizable offences and that a Magistrate is empowered by sec. 190 (*1*) (*b*) to take cognizance both of cognizable and non-cognizable offences upon a report such as is mentioned in sec. 190 (*1*) (*b*).

This disposes of points 1 and 2. As to point three we have read the report and we are not prepared to say that the Magistrate was not justified in taking cognizance thereon. As to the 4th point since the Magistrate has taken cognizance I think his powers of postponement and adjournment are regulated by sec. 344. To the extent indicated in our order of the 10th December we make the Rule absolute.

J. N. R.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER. LORD DUNEDIN. LORD CARSON. SIR JOHN EDGE. LORD SALVESEN. 1923, Heard, 27, April. Judgment, 26, June.	A. S. S. SUBBAIYA PANDARAM, Appellant, *v.* MUHAMAD MUSTAPHA MARACAYAR (since deceased) and ors., Respondents.

Limitation Act (IX of 1908), sec. 10, Arts. 134, 144—Trustee, decree against—Purchase of endowed property in execution—Purchaser's possession, if adverse and from when—Decree against purchaser declaring property trust property, if res judicata—Cases of permanent leases by trustees, how distinguishable.

The purchaser of endowed property in execution of a decree against the trustee for the time being acquires title to the purchased property by adverse possession for 12 years under either Art. 134 or. Art. 144 of Sch. I of the Limitation Act.

A decree obtained by the succeeding trustee subsequent to the purchase in a suit to which the purchaser was a party declaring the property to be trust property, so far from preventing the purchaser from asserting his adverse claim to the property, merely emphasised the fact that it was adverse.

In view of the provisions of sec. 10 of the Act, the purchaser was not prevented from relying on the bar of limitation by reason of the fact that the property was to his knowledge trust property after the date of the decree.

SRI SRI ISHWAR SHYAM CHAND JIU *v.* RAM KANAI GHOSE (1) *and* VIDYA VARUTHI THIRTHA *v.* BALUSAMI AYYAR (2) *are distinguishable in that in both the attempt on the part of the trustee was to dispose of trust property by a permanent mokurari lease which being good for the grantor's life the possession became adverse only when his successor assumed office.*

This was an appeal from a decree, dated the 31st August 1916 of the High Court at Madras affirming a decree of the Subordinate Court of Tanjore, dated the 19th November 1915.

The suit was brought by the Appellant as Dharmakarta to recover lands dedicated to charitable purposes in 1890 and 1894.

The dedications were made by the Ap-

(1) L. R. 38 I. A. 76: s. c. I. L. R. 38 Cal 526; 15 C. W. N. 417 (1911).

(2) L. R. 48 I. A. 302: s. c. I. L. R. 44 Mad. 831; 26 C. W. N. 537 (1921).

pellant's grand-father and on his death the Appellant's father, Arunachellam, became Dharmakarta. In 1898 the property was brought to sale under a decree against Arunachellam and was purchased by the Respondent Maracayar (since deceased) who obtained possession on the 11th August 1898.

In 1900 the Appellant obtained a declaration that the properties were subject to charitable trusts, and to this suit the Respondent Maracayar was a party.

The decree was affirmed by the High Court on appeal in 1904.

In 1897 the Appellant had filed a suit to obtain possession of the property but his suit was dismissed on the ground that he was incompetent to sue while his father was sole trustee.

The Appellant attained his majority in 1910 and in 1913 he obtained a decree for the removal of his father from the trusteeship and two days' later filed this suit for the recovery of the property.

The Subordinate Judge dismissed the suit as barred by limitation on the ground that the Respondents had been in possession for more than 12 years.

On appeal the High Court agreed with the finding of the District Judge and held that the suit was barred by limitation under either Art 142 or 144 of the Limitation Act.

Mr. Kenworthy Brown for the Appellant.—The decision in 1900, affirmed by the High Court in 1904 that the property was in fact trust property, operates as "*res judicata*" against the Respondents and prevents them from contending that the property is their own.

Nasarat-ullah v. *Mujib-ullah* (3).

The Respondents had notice of the trust and so became constructive trustees at any rate subsequent to that decision. Their possession therefore was not adverse and they cannot obtain a title by presumption. There was no limit of time for the institution of this suit.

Sec. 10, Indian Limitation Act, IX of 1908.

Ram Kanai Ghosh v. *Hari Narain Singh* (4) relied on by the High Court was reversed by the Privy Council in *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (1) though not on this particular point. That decision and the decision of the Privy Council in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (2) are conclusive that a fresh period of limitation commences on the appointment of a new trustee.

On the removal of Arunachellam from the trusteeship in 1913 any title which the purchaser had acquired then ceased.

Messrs. DeGruyther, K. C. and *B. Dubé* for the Respondents.—On obtaining the declaration that the property was subject to a trust it was open to the Plaintiff to get a reconveyance to the charity in execution. Such execution was not taken out within three years and the Plaintiff's remedy became barred. *Singaravelu Mudaliar* v. *Chokka Mudaliar* (5).

If sec. 10 of the Limitation Act applies the Respondents being execution creditors and therefore assignees for valuable consideration are excluded from the operation, *Chintamoni Mahapatra* v. *Sarup Se* (6).

If sec. 10 is not applicable then either Arts. 11, 134 or 144 applies and the suit is barred.

(1) L. R. 38 I. A. 76: s. c. I. L. R. 38 Cal. 526; 15 C. W. N. 417 (1911).

(2) L. R. 48 I. A. 302: s. c. I. L. R. 44 Mad. 831; 26 C. W. N. 537 (1921).

(3) I. L. R. 13 All. 309, 315 (1891).

(4) 2 C. L. J. 548 (1905).

(5) 43 M. L. J. 737 (1922).

(6) I. L. R. 15 Cal 708 (1888).

A. S. S. SUBBAIYA PANDARAM *v.* MUHAMAD MUSTAPHA MARACAYAR.

The fact that different trustees are in possession of the property is immaterial, *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (7).

Mr. Kenworthy Brown replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—The real question in this appeal is whether the suit is barred by the operation of the Statute of Limitation.

It was instituted by the Appellant to recover, as against a purchaser under an execution sale and those who claimed under him, certain property which had by two deeds dated the 21st February 1890 and the 13th December 1894 been devoted to charitable purposes. The first of these two documents declared that the heirs of the settlor in the order of primogeniture should be trustees and conduct the said charities. The settlor died in 1895, leaving him surviving his widow and Arunachellam, his only son. Arunachellam is the father of the present Appellant. He was trustee of the charity and having become involved in debt one of his creditors sued him and obtained a decree in execution of which the endowments of the charity were attached. The settlor's widow, on behalf of the Appellant who was then an infant, filed an objection to the attachment, but it was dismissed on the ground that during the life-time of the Appellant's father he had no *locus standi*. In the same year another suit was instituted by the minor acting through the same next friend seeking to establish the validity of both the deeds, and while this suit was pending, the property was brought to sale under the decree against Arunachellam on the 22nd March 1898. It was purchased by Maracayar who is since deceased, and whose legal personal representatives are the Respondents Nos. 4 to 8 of this appeal; the sale was confirmed on the 11th August 1898, and delivery of possession was made to the purchaser, the settlor's widow being removed from possession. From that day until the institution of these proceedings the purchaser and those claiming under him have been in uninterrupted possession of the property.

On the 31st December 1900, it was declared in the second suit of 1897 that the properties, including those seized under the execution sale, formed a trust estate for the purpose specified in the deed. On the 9th November 1911, the Appellant, who had come of age on the 6th August 1910, petitioned the District Court asking for leave to bring a suit to remove Arunachellam from the office of trustee, and such leave was granted; the suit for removal was accordingly instituted and on the 21st July 1913, a decree was obtained removing Arunachellam, and the Appellant succeeded as trustee. The present suit was then brought on the 23rd July 1913, to recover the property. Both the learned Judge, before whom the matter first came, and the learned Judges of the High Court have decided against the Appellant but on different grounds; the result of the decisions was, however, in their Lordships' opinion, correct.

There is no doubt that whatever period of limitation be assigned, the full period had run before these proceedings were instituted, unless it could be alleged that by virtue of the proceedings to which reference has been made, there was some interruption in the period.

Now the real argument in favour of the Appellant was that in the presence of the

(7) L. R. 27 I. A. 69, 76; s. c. I. L. R. 23 Mad. 271; 4 C. W. N. 329 (1899).

purchaser it was declared that the trust had been validly created and that the property was, in fact, trust property, and it is suggested that this effects *res judicata* as against the Respondents, and prevents them from now asserting that the property is their own. Their Lordships do not think that the decree had that effect. At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and therefore ought not to have been seized, did not disturb or affect the quality of his possession; it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late.

A further argument has been put forward to the effect that the Statute of Limitation begins to run afresh as each new trustee succeeds to the office, and in support of that view reliance is placed in the case of *Sri Sri Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (1) and in the case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (2) but these authorities do not assist the Appellant. In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent mokurari lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life and a grant made for a longer period is good, but good only to the extent of his own life interest. It follows, therefore, that possession during his life is not adverse, and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the statute would only run against him as from the time when he assumed the office. Such an argument has no relation to the case where, as here, property has been acquired under an execution sale and possession retained throughout. Their Lordships are, therefore, of opinion that this suit is barred either under sec. 134 or 144 of the First Schedule to the Limitation Act. The former fixes the period as 12 years where the suit is to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration; and the latter assigns the same period where the claim is for possession of immoveable property or any interest therein not thereby otherwise specially provided for.

This is not, in fact, a transfer by the trustee himself for a valuable consideration, though there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself; but disregarding that section, sec. 144 covers the exact case. Further, sec. 10 of the Limitation Act appears also to contemplate the exact position: it is in these terms:—

"10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

and it shows that, where it is sought to follow trust property, as in the present case, on the ground that the person in possession knew that it was trust estate, the claim is not barred, excepting in a case

(1) L. R. 38 I. A. 76: s. c. I. L. R. 38 Cal. 526; 15 C. W. N. 417 (1911).

(2) L. R. 48 I. A. 302: s. c. I. L. R. 44 Mad. 831; 26 C. W. N. 537 (1921).

of assigns for valuable consideration, and the exception shows that in that event the claim may be defeated by adverse possession. The purchaser in the present case is clearly within the terms of the exception, and consequently he is not prevented, by reason of the fact that the property was to his knowledge trust property after the date of the decree, from relying on the provisions of the statute which limit the time within which suits must be brought for recovery.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: *Messrs. Douglas Grant* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 180 OF 1921.

MOOKERJEE, J.
RANKIN, J.
1923,
Heard, 27, 28 and 29, June.
Judgment, 24, July.

BANK OF BENGAL, Appellant,
v.
WILLIAM ARRATOON LUCAS and ors., Respondents.

Mortgage deed or deed of transfer of mortgage, how to differentiate for purposes of stamp duty—Creditor's right to his surety's securities, how far available—Parties to a mortgage deed, how far bound by the recitals therein—Civil Procedure Code (Act V of 1908), Or. 41, r. 27 (1), cls. (a) and (b), taking of additional evidence by Appellate Court, grounds of.

L. executed in favour of V. an English mortgage in July 1910 in consideration of the latter securing an advance by means of drafts to be discounted by the Bank of Bengal. In June 1911, a supplemental mortgage was executed between the parties and it was arranged that the requisite money would be provided by the Bank by cash credit to L. A promissory note was given by L. to V., who endorsed it to the Bank and executed a deed of guarantee in favour of the Bank for the sum advanced to L., who executed a deed of further charge in favour of V. in order to enable him to execute the deed of guarantee. Subsequently the Bank having called upon L. and V. to furnish further security for overdrafts made, a fresh deed, not stamped and attested as a mortgage, was executed in February 1914, by which V. transferred to the Bank the full benefit of the securities created by the deeds of July 1910 and June 1911; and in consideration of such transfer, the Bank released V. from all liability under the drafts discounted by the Bank as also under the promissory note and the guarantee. In a suit by the Bank against L. his puisne mortgagees and V. for recovery of the money:

Held—*That in determining whether an instrument is liable to duty as a transfer of mortgage only or to the full duty of a mortgage, the Court will look at the substance of the transaction and not merely at the form of the instrument.*

CITY OF LONDON BREWERY CO. v. COMMISSIONERS OF INLAND REVENUE (9), DOE L. SNELL v. TOM (10) *and other cases referred to.*

That there is no authority for the unqualified proposition that the principal creditor is entitled to the benefit of every collateral security given by the principal debtor to the surety, or that all securities given by a principal to his surety are held in trust. This theory of trust is rested on the analogy derivable from the class of

(9) [1899] 1 Q. B. 121 (1898).
(10) 4 Q. B. 615; 62 R. R. 445 (1843).

BANK OF BENGAL *v.* WILLIAM ARRATOON LUCAS.

cases where the remedies of a creditor against the principal debtor are transferred to a surety who has paid the debt. The principle should be that a creditor can derive no benefit from securities given by the principal to the surety, unless he can show a direct interest in them by contract or under a trust or unless both principal and surety are bankrupt or there has been a refusal by the debtor to pay.

EXP. WARING (14), MAURE *v.* HARRISON (13), RE: WALKER (15), MOSES *v.* MURGATROID (16) *and several other cases referred to.*

That as between the parties to a deed, they are bound by the recitals in the deed.

Held further—*That an Appellate Court may take oral evidence where any point is required to be cleared up in the interests of justice.*

BINOY BHUSHAN RAY *v.* DHIRENDRANATH DEY (1), KESSOWJI ISSUR *v.* G. I. P. RY. CO. (2) *and* RAJA INDRAJIT PRATAP *v.* AMAR SINGH (3) *referred to.*

This was an appeal preferred on the 15th of September 1921 against the decree of Babu N. G. Chatterjee, Subordinate Judge, 6th Court, Zillah Dacca, dated the 29th July 1921.

The facts material to this report are as follows:—One Lucas, a jute merchant, executed an indenture of English mortgage on 8th July 1910 in favour of a firm named Vertannes and Bertram. The deed provided that Vertannes and Bertram would finance Lucas in his business. This mortgage was on 26th June 1911 followed by a supplemental indenture of mortgage which acknowledged the debt due on the security of 1910 and contained an arrangement whereby a previous broker and financier of Lucas was to be paid off by an advance by the Bank of Bengal by way of cash credit to Lucas. The advance was to be made on the security of a promissory note drawn by Lucas in favour of Vertannes and Bertram and endorsed by them, to the Bank of Bengal. Vertannes and Bertram executed a deed guaranteeing to the Bank payment of the balance for the time being owing to the Bank by Lucas. Lucas also executed a further deed of charge in favour of Vertannes and Bertram in order to enable them to execute the said deed of guarantee. In 1912 Bertram died and letters of administration were granted to the Administrator-General of Bengal in 1913. Subsequently the Bank having called upon Lucas and Vertannes and the representatives of Bertram to furnish further security in respect of overdrafts, on the 4th February 1914 an indenture purporting to be supplemental to the mortgage deeds of 1910 and 1911 was entered into by all parties—the Bank, Lucas, Vertannes and the Administrator-General. By this deed Vertannes and the Administrator-General transferred to the Bank the full benefit of the securities created by the deeds of July 1910 and June 1911 and in consideration of such transfer the Bank released Vertannes and the representatives of Bertram from all liability under the drafts discounted by the Bank, as also under the promissory note and the guarantee. This document was not stamped or attested as a mortgage but as a transfer of mortgage. The question in the present suit largely arose upon this instrument. As Lucas

(1) 38 C. L. J. 114 (1923).
(2) L. R. 34 I. A. 115; s. c. I. L. R. ... Bom. 88.; 11 C. W. N. 7.
(3) Since reported 28 C.
(13) 1 Eq. Ca. Abr 93 (1
(14) 19 Ves. 345; 13 R. R
(15) [1892] 1 Ch. 621.
(16) 1 Johnson N. Y. 119.

BANK OF BENGAL v. WILLIAM ARRATOON LUCAS.

had not satisfied the debt due to the Bank, the present suit was instituted by the Bank. Lucas was made the first Defendant. Puisne mortgagees from Lucas were also joined as Defendants, and Vertannes and the Administrator-General were made *pro formâ* Defendants. The lower Court dismissed the suit, and from that decree the present appeal was preferred to the High Court.

Messrs. G. B. McNair, Langford James and *Babu Ambikapada Chaudhuri* for the Appellant.

Babus Dwarkanath Chakrabarti, Rajendra Chandra Guha and *Bhagirath Chandra Das* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by the Plaintiff to enforce a charge upon immovable property for the realisation of a sum of Rs. 78,504-10-2 with interest *pendente lite* and costs. The transactions which have led up to this litigation are evidenced by four deeds, whose substance must be stated concisely for the elucidation of the points in controversy.

Lucas, the first Defendant, is a dealer in jute. On the 6th April 1908, he executed an equitable mortgage (which for the sake of brevity may be called A) by deposit of title deeds in favour of his broker, Thaddeus, who financed him in his business. On the 8th July 1910, Lucas executed in favour of Vertannes and Bertram, an English mortgage (which for the sake of brevity may be called B) of the properties covered by A. According to the recitals in this document, Lucas was indebted to Thaddeus under A to the extent of Rs. 63,560 approximately. The arrangement was that the mortgagees should be the sole brokers of the mortgagor during the continuance of the security, and that they should secure an advance of Rs. 50,000 by means of drafts to be drawn by one of them in favour of the other and to be discounted by the Bank of Bengal. On the 26th June 1911, a supplemental indenture of mortgage (which for the sake of brevity may be called C) was executed. According to recitals in this deed, there was due to Thaddeus, under A, a sum of Rs. 65,000 approximately, and to Vertannes and Bertram, under B, a sum of Rs. 10,755-15-0. The arrangement was that Thaddeus should be paid off, the requisite money to be provided by the Bank of Bengal by way of cash credit to Lucas. A promissory note was given by Lucas to Vertannes and Bertram and was endorsed by them to the Bank of Bengal. The Bank placed Rs. 65,000 in the hands of Lucas, and with this sum Thaddeus was fully paid off. Thaddeus at the same time executed a deed of release in favour of Lucas. Vertannes and Bertram simultaneously executed a deed of guarantee in favour of the Bank for the sum advanced to Lucas, and Lucas executed a deed of further charge in favour of Vertannes and Bertram in order to enable them to execute the deed of guarantee. Bertram died on the 27th of December 1912, and letters of administration in respect of his estate were taken out by the Administrator-General on the 17th January 1913. On the 4th February 1914, a fresh deed was executed which for the sake of brevity may be called D. This purports to be supplemental to B and C, and the parties to the document were Lucas, Vertannes, the Administrator-General and the Bank of Bengal. The document was neither stamped nor attested as a mortgage, but was treated as a transfer of mortgage. The recitals show that at the time there was due to the Bank a

BANK OF BENGAL v. WILLIAM ARRATOON LUCAS.

sum of Rs. 74,017-1-4, namely, Rs. 13,084-13-7 on account of drafts discounted in conformity with the arrangements embodied in B, and Rs. 60,932 on the cash credit opened on the basis of C. The Bank, it is recited, had called upon Lucas, Vertannes and the representatives of Bertram to furnish further security in respect of this sum. The arrangement was that Vertannes and the Administrator-General should transfer to the Bank the full benefit of the securities created by B and C and that in consideration of such transfer the Bank should release Vertannes and the representatives of Bertram from all liability under the drafts discounted by the Bank, as also under the promissory note and the guarantee. Lucas had not satisfied the debt due to the Bank; thereupon the present suit was instituted by the Bank on the 20th December 1917. Lucas was made the first Defendant. Puisne mortgagees from Lucas, the proprietors of a firm named Gourchandra Das, were joined as Defendants Nos. 2 to 16. Vertannes and the Administrator-General were placed on the record as *pro formâ* Defendants Nos. 17 and 18. In the plaint as originally framed, the claim was founded on D, the deed of the 4th February 1914. The plaint was however subsequently amended on the 6th January 1919, so as to enable the Bank to take advantage of B and C, the mortgages dated the 8th July 1910 and the 29th June 1911. The Defendants contested the claim on every conceivable ground as will appear from the eighteen issues raised:

I. Has the Plaintiff Bank of Bengal cause of action?

II. Is the suit maintainable in its present form?

III. Is the suit for sale based on the document of the 4th February 1914, maintainable and enforceable against the Defendant No. 17? Is the deed as pleaded by the Defendant No. 1 an English mortgage and is it sufficiently stamped and attested? If so, has this Court jurisdiction to entertain the suit on such a mortgage?

IV. Have the rights, titles and interests of the Defendants Nos. 17 and 18 been legally transferred to the Plaintiff Bank? If not, can Plaintiff proceed with the suit?

V. Was there any contract between the parties relating to the law charges? Are they correct and are they recoverable in the present suit?

VI. Was there any contract between the parties as to insurance charges? If not, is the same maintainable and recoverable in the present suit?

VII. Was the Plaintiff's agent authorised to make any payment for insurance charges and can any such payment be a charge on the mortgaged properties?

VIII. Was there any contract for payment of compound interest and is it recoverable? Is the account annexed to the plaint correct?

IX. Has the sum of Rs. 7,543-15-0 been paid to the Defendants Nos. 17 and 18 by the Defendant No. 1? If so, is anything due by the Defendant to the Plaintiff under the indenture of 1910?

X. Is the account contained in the document of 1914 correct and due by the Defendant? Can it be a charge on the mortgaged properties?

XI. Is the Indenture, dated 4th February 1914, properly drafted, endorsed, signed and stamped with the knowledge of the Defendant? Were the properties described in Schs. A and B mortgaged to the Plaintiff Bank?

XII. To what relief, if any, is the Plaintiff entitled?

BANK OF BENGAL *v.* WILLIAM ARRATOON LUCAS.

XIII. Did the Plaintiff Bank advance Rs. 65,000 on the security of the immoveable properties to the Defendant No. 1? If not, can the Bank enforce the claim under law?

XIV. Was the bond of 1911 legally attested and presented for registration and did any consideration under the same? Can the Plaintiff enforce any lien under the same?

XV. Has the Plaintiff acquired any right under the deed of 1914 with respect to the deed of 1911?

XVI. Can the Plaintiff enforce the lien in respect of the bond of 1908 in favour of Thaddeus? Is that lien still alive?

XVII. Is the claim of the Plaintiff on the basis of pronote barred by limitation?

XVIII. Should the suit fail for non-substitution of the legal representatives of the Defendant No. 12 in time?

The Subordinate Judge has dismissed the suit. On the present appeal, the decision of the Subordinate Judge has been assailed as erroneous, both on the facts and in law. I shall first consider the three substantial questions of fact which have emerged from the arguments addressed to us, namely, first, was the Bank of Bengal the real mortgagee under the deed of the 29th June 1911; secondly, was the mortgage of the 29th June 1911, duly executed and attested: and thirdly, was the indenture of the 4th February 1914, executed by Lucas under circumstances which entitle him to treat it as inoperative in so far as he is concerned. In my judgment, the conclusions of the Subordinate Judge upon each of these points are erroneous and cannot be supported.

As regards the first point, it was argued in the Court below that Vertannes and Bertram were set up by the Bank as ostensible mortgagees, because the authorities were anxious to circumvent the provisions of secs. 36 and 37 of the Presidency Banks Act. This theory found favour with the Subordinate Judge, though no solid foundation was laid for such a case in the evidence. The Subordinate Judge based his conclusion on this part of the case on mere suspicion, contrary to the elementary rule that the burden lies heavily upon those who claim against the tenor of a deed to establish by evidence that the real transaction was different from the apparent. The senior Government pleader very properly declined to support the view taken by the Subordinate Judge on this matter.

As regards the second point, the Subordinate Judge came to the conclusion that the mortgage of the 29th June 1911 had not been duly attested, and he relied principally upon the evidence of Lucas as to what had happened at the time of execution. After a careful study of the evidence of Lucas, I have not been able to adopt the conclusion that he may be unreservedly treated as a witness of truth; he is so vitally interested in the result of this litigation that it would not be safe to act upon his assertions without independent corroboration. With regard to the question of attestation, his story, taken by itself, is most improbable, and no reason was even suggested why a witness of the position of Stapledon, a member of a well-known firm of solicitors, should have attested a signature which had not been made in his presence. Stapledon was first examined on commission on the 12th August 1918, and the point was then not cleared up. The reason is obvious; at that stage, the claim was rested solely on the document of the 4th February 1914, and no one realised the vital importance of the question of

BANK OF BENGAL v. WILLIAM ARRATOON LUCAS.

attestation of the mortgage of the 29th June 1911 till the plaint had been amended on the 6th January 1919. An application was made to the Subordinate Judge at the close of the trial for leave to examine Stapledon. He refused the application, as, in his judgment, his view upon other points in the case rendered the question of attestation immaterial: but he did record the opinion that he would have been inclined to afford an opportunity to the Bank to examine Stapledon if the decision of the case had hinged on the point. After we had heard arguments in this appeal for a considerable time, we felt convinced that this point should be cleared up in the interests of justice. The original document purports, on the face of it, to have been attested by two witnesses, Stapledon and Evenett. Their signatures are so placed on the document that presumably they signed after the document had been executed in their presence; *Binoy Bhushan Ray* v. *Dhirendranath Dey* (1). The case was covered obviously by both cls. (*a*) and (*b*) of Or. 41, r. 27 (*1*) of the Code of Civil Procedure. Under cl. (*a*), the Appellate Court may allow additional evidence, if the trial Court has refused to admit evidence which should have been admitted. Under cl. (*b*), the Appellate Court may allow additional evidence, if it requires such evidence to enable it to pronounce judgment or for any other substantial cause. We decided accordingly to examine both Stapledon and Evenett; the course adopted is supported by the decisions of the Judicial Committee in *Kessowji Issur* v. *G. I. P. Ry. Co.* (2) and *Raja Indrajit Pratap* v. *Amar Singh* (3). Stapledon and Evenett were thereupon examined, and their testimony left no doubt that the mortgage deed of the 29th June 1911, had been duly attested by them after they had witnessed its execution. The Respondents were allowed full opportunity to bring forward additional evidence, if they so wished. They intimated that they had no desire to rebut this evidence. On the record as it now stands, I feel convinced that the mortgage of the 29th June 1911, was duly executed and attested. As regards the third point, the Subordinate Judge has held that Lucas is not bound by the deed of the 4th February 1914. His conclusion is based chiefly, if not entirely, upon the assertions of Lucas. The story of execution of the document by Lucas is by no means convincing and is not sufficient to support a case either of fraud or of undue influence. Lucas was a man of business and was in no sense a novice. If it be his case that he affixed his signature to the deed in the belief that it was something other than what it purports to be, his evidence does not bear out such a theory. The attempt, in such circumstances, to take advantage of the principle enunciated in the class of cases of which *Foster* v. *Mackinnon* (4) and *Carlisle and Cumberland Banking Co.* v. *Bragg* (5) may be taken as the types, is futile. Nor is foundation laid in the evidence for a case of undue influence under the provisions of the Indian Contract Act; there is no question of confidence reposed and betrayed, much less of domination of his will to obtain an unfair advantage over him, within the meaning of sec. 16 which was expounded by Lord Shaw in delivering the judgment of the Judicial Committee in

(1) 38 C. L. J. 114 (1923).
(2) L. R. 34 I. A. 115: s. c. I. L. R. 31 Bom. 381; 11 C. W. N. 721 (1907).
(3) Since reported 28 C. W. N. 277 (1923).
(4) L. R. 4 C. P. 704 (1869).
(5) [1911] 1 K. B. 489 (1910).

BANK OF BENGAL *v.* WILLIAM ARRATOON LUCAS.

Poosathurai v. *Kannappa Chettiar* (6). The outstanding fact cannot moreover be ignored that since the 4th February 1914, Lucas has made no attempt to obtain cancellation of the deed of that date, and delay and acquiescence must throw serious doubts upon the genuineness of his defence; *Allard* v. *Skinner* (7) and *Wright* v. *Vanderplank* (8). In my opinion, the endeavour of Lucas to wriggle out of the transaction of the 4th February 1914 is bound to end in failure.

I shall next consider the two substantial questions of law involved in the appeal, namely, first, is the Bank entitled to relief on the basis of either the indenture of the 4th February 1914, or the mortgages of the 8th July 1910 and the 29th June 1911; and secondly, whether Lucas is, in this suit, entitled to re-open the accounts as between himself and Vertannes and the representatives of Bertram.

As regards the first question, there has been some discussion at the Bar as to the exact nature of the indenture of the 4th February 1914, which was neither stamped nor attested as a mortgage, but was taken to be a transfer of a mortgage. It is well-settled that in determining whether an instrument is liable to duty as a transfer only or to the full duty of a mortgage, the Court will look at the substance of the transaction and not merely at the form of the instrument; *City of London Brewery Co.* v. *Commissioners of Inland Revenue* (9). Thus, where a deed was executed by a mortgagor, professing to be a transfer of a mortgage for £150 and a security for a further advance of £70, on which sum the stamp was calculated, upon objection taken that the deed in fact amounted to an original mortgage for £220, as the original mortgagee did not execute it, it was ruled that it could not fairly be said so to operate and that the stamp was sufficient; *Doe L. Snell* v. *Tom* (10). On the other hand, in *Berham* v. *Earl of Thanet* (11), where the mortgagee assigned a part of the mortgage debt and joined with the heir of the mortgagor in conveying part of the mortgage lands to a new mortgagee, with a new proviso and at a new rate of interest and with a bond and a covenant, the transaction was regarded as a new mortgage. But it may be taken as a general rule that the introduction of a new proviso for redemption in the assignment of a mortgage is not by itself sufficient to constitute a new mortgage. In the absence, however, of a statutory provision like that embodied in sec. 27 of the Conveyancing Act, 1881, which prescribes forms of statutory transfer of mortgage, there is no reason why a document should not be of a mixed character, namely, a transfer of a mortgage as also a new mortgage. In this view, the Bank would be entitled to take advantage of the deed of the 4th February 1914, which, as a deed of transfer of mortgage, does not require attestation; and if any question of stamp duty could arise on such a view, the defect could be remedied by payment of penalty. In the events which have happened, the Bank is, in my opinion, entitled to the securities held by Vertannes and Bertram. If the deed of the 4th February 1914, be deemed inoperative in law, contrary to the true intention of all parties, they must be relegated to the position they would have occupied if that deed

(6) L. R. 47 I. A. 1; s. c. I. L. R. 43 Mad. 546 (1919).

(7) 36 Ch. Div. 145 (1887).

(8) 8 DeG. M. & G. 133; 114 R. R. 60 (1856).

(9) [1899] 1 Q. B. 121 (1898).

(10) 4 Q. B. 615; 62 R. R. 445 (1843).

(11) 3 My. & K. 607.

BANK OF BENGAL v. WILLIAM ARRATOON LUCAS.

had never been executed: *Surjiram Marwari* v. *Barhamdeo Prasad* (12).

I do not feel called upon to review here the history of the development of the well-settled rule relating to a creditor's right to his surety's securities. It is sufficient to state that it was held in an early case, *Maure* v. *Harrison* (13), that if the principal gave any security to the surety for his indemnification, the creditor was entitled to the benefit thereof. "A bond creditor shall, in this Court, have the benefit of all counterbonds, all collateral security given by the principal to the surety; and if A owes B money, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt." But this pronouncement has stood by itself and was not accepted by Lord Eldon in *Exp. Waring* (14). The later decision in *Re: Walker* (15) shows that there is no authority for the unqualified proposition that the principal creditor is entitled to the benefit of every collateral security given by the principal debtor to the surety, or that, as was said in *Moses* v. *Murgatroid* (16), all securities given by a principal to his surety are held in trust. This theory of trust is rested on the analogy derivable from the class of cases where the remedies of a creditor against the principal debtor are transferred to a surety who has paid the debt (Story on Equity Jurisprudence, sec. 638). The application, however, of the principle of subrogation, as expounded in *Gurdeo Singh* v. *Chandrika Singh* (17), is by no means free from difficulty. In the case where the remedies of the creditor are transferred to the surety, who has paid the debt, the payment by the surety extinguishes the creditor's claim, and what he seeks is a substitution to the creditor's remedies against the principal debtor. Where this does not happen, there can be no question of substitution proper, for the receipt of the surety's securities by a creditor does not relieve the surety from liability in case the securities prove insufficient. The relief by substitution is extended on the assumption that the debt has been or is to be paid in full, so that further detention of the security is against equity. Another objection to substitution may be found in the fact that the security being for the indemnity of the surety, he has no right to it till he has been damnified by payment; the creditor's remedies against the principal debtor, on the other hand, ripen as soon as there has been a refusal to pay. By subrogating the surety to the creditor's remedies against his debtor, the burden is finally placed where it belongs, and therein lies the equity of the transaction. No such object is attained in doing the converse of this, where the only result is to place the creditor in a position of advantage which he cannot claim. The burden in the latter case is not always placed where it belongs; if the securities are sufficient in value, the burden will take care of itself, if they are insufficient, the loss will fall, in part at least, on the surety. The view adopted by Lord Eldon in *Exp. Waring* (14) must consequently be regarded as well-founded on principle, and a creditor can derive no benefit from securities given by the principal to the surety, unless he can show a direct interest in them by contract or under a trust or unless both principal and surety are bankrupt and the rule in the decision just mentioned applies. In this connection

(12) 1 C. L. J. 337 (1905).
(13) 1 Eq. Ca. Abr. 93 (1692).
(14) 19 Ves. 345; 13 R. R. 217 (1815).
(15) [1892] 1 Ch. 621.
(16) 1 Johnson N. Y. 119.
(17) I. L. R. 36 Cal. 193 (1907).

reference may be made to the decisions in *Exp. Rushforth* (18), *Wright* v. *Morley* (19), *Wilding* v. *Richards* (20), *Powles* v. *Hargreaves* (21), *Bechervaise* v. *Lewis* (22) and *Vaughan* v. *Halliday* (23). It is worthy of note that the rule in *Exp. Waring* (14) was not applied in the Scotch case, *Royal Bank of Scotland* v. *Commercial Bank of Scotland* (24). According to the Scotch rule, the surety has no right to the security, except to indemnify himself for payments actually made; nor have the bill-holders any direct claim, though both principal and surety are insolvents; but if the surety's estate pays a dividend for which it is reimbursed out of the security, a new general asset is created; thus, incidentally, in the winding up of the surety's estate, all the creditors derive a certain benefit from the indemnity fund; whatever may remain of the latter goes back to the principal's estate. I need not pursue the point further; for apart from these considerations, if the rights of the surety have in effect been assigned to the Bank, as in my judgment they have been, the Bank is entitled to enforce the remedies available to the surety.

As regards the second point, it is plain that Lucas is not entitled to re-open in the present litigation the accounts as between himself on the one hand, and Vertannes and the representatives of Bertram on the other. The latter were, no doubt, made parties as *pro formâ* Defendants, but the question now attempted to be raised was not put in issue as

(14) 19 Ves. 345; 13 R. R. 217 (1815).
(18) 10 Ves. 409; 8 R. R. 10 (1805).
(19) 11 Ves. 12 (21); 8 R. R. 69 (1805).
(20) 1 Collyer 655; 66 R. R. 234 (1845).
(21) 3 DeG. M. & G. 430; 98 R. R. 202 (1853).
(22) L. R. 7 C. P. 372 (1872).
(23) L. R. 9 Ch. App. 561 (1874).
(24) 7 App. Cas. 366 (1882).

against them. It must further be remembered that Lucas must be taken, as between himself and the Bank, to be bound by the recitals in the deed of the 4th February 1914.

The result follows that this appeal must be allowed and the decree of the Subordinate Judge set aside. The suit will be decreed with costs both here and in the Court below in respect of the sums mentioned in the deed of the 4th February 1914 (including charges and expenses), which constitute a first charge on the properties covered by the deeds of the 8th July 1910 and the 29th June 1911. The case will be remanded to the Subordinate Judge with the direction that he will take an account of what is due to the Bank and draw up a decree accordingly.

RANKIN, J.—The fundamental question in this case is a question of law and it can be stated and answered first.

The Defendant Lucas is a jute merchant and in 1908 a Mr. Thaddeus was his broker and financed him in his business upon security of an equitable mortgage by deposit of title deeds in terms of an instrument dated 6th April 1908.

On the 8th July 1910, Lucas executed an indenture of mortgage over the same property in favour of a firm Vertannes and Bertram. This recited the mortgage of 1908 and stated that there was due to Thaddeus thereon a sum of Rs. 63,560 or thereabouts. It contained provisions that thenceforward Vertannes and Bertram would finance Lucas in his business to the extent of Rs. 50,000 and that they should during the subsistence of the security be his sole brokers at a commission of 1 per cent. on all his sales of jute.

This mortgage was on 26th June 1911 followed by a supplemental indenture of mortgage which contained the acknowledgment by Lucas that Rs. 10,755-15-0

BANK OF BENGAL *v.* WILLIAM ARRATOON LUCAS.

was then due to Vertannes and Bertram on the security of 1910, and that to Thaddeus on his prior security the amount due was Rs. 65,000 or thereabouts. The deed contains an arrangement whereby Thaddeus was to be paid off. Rs. 65,000 was to be advanced by the Bank of Bengal by way of cash credit to Lucas. The advance was to be made on the security of a promissory note drawn by Lucas in favour of Vertannes and Bertram and endorsed by them to the Bank. Vertannes and Bertram were to execute a deed guaranteeing to the Bank payment of the balance for the time being owing to the Bank by Lucas.

Accordingly Lucas by this deed of 1911 covenanted with Vertannes and Bertram (1) that he would on demand pay them all monies which they might at any time and from time to time be called upon to pay to the Bank in respect of the promissory note with interest from the date of payment by them to the Bank (2) "and also shall and will indemnify and keep indemnified the mortgagees from and against all claim and demands in respect of the said promissory note or the monies payable thereunder" and so forth.

The deed then charges all the property already mortgaged and certain additional items of property as security for the payment to the mortgagees as well of all monies which the mortgagees may be called upon to pay to the Bank under the said promissory note . . . . and all interest for the same monies as for the monies secured by the principal indenture (of 1910).

At the end of 1912 Bertram died and letters of administration with the Will annexed were granted to the Administrator-General of Bengal early in 1913.

On the 4th February 1914, an indenture purporting to be supplemental to the mortgage deeds of 1910 and 1911 was entered into by all parties—the Bank, Lucas, Vertannes and the Administrator-General. This document was not stamped or attested as a mortgage but as a transfer of mortgage. The question in hand arises upon this instrument.

It recites that under the arrangements of 1910 there is now due to the Bank on drafts discounted the sum of Rs. 13,084-13-7; and that there is due to the Bank upon the cash credit opened in 1911 Rs. 60,932-3-9. It recites that the Bank has called upon the other three parties to give further security for the total sum due, Rs. 74,017-1-4 and interest accruing.

"And whereas it has accordingly been agreed that the said Vertannes and the Administrator-General should transfer the full benefit of the securities created by (the deeds of 1910 and 1911) to the Bank, to the intent that the Bank shall henceforth hold the same as security for the repayment to the Bank on demand of the said sum of Rs. 74,017-1-4 and interest thereon and that in consideration of such transfer the Bank should release the said Vertannes and the Administrator-General and the estate and effects of the said Bertram from all claims and demands whatsoever under the said drafts so discounted by the Bank as aforesaid and under the said promissory note for Rs. 65,000 and the said agreement whereby the said Vertannes and Bertram guaranteed the payment of the balance of the said cash credit account.

"Now this Indenture witnesseth that in pursuance of the said agreement and in consideration of the release by the Bank hereinafter contained they the said Vertannes and the Administrator-General thereby grant convey transfer and assign unto the Bank all those the mortgaged premises . . . . and all the estate right title and interest claim and demand

whatsoever of them the said Vertannes and Administrator-General into and upon the same to have and to hold the same unto the Bank according to the nature and tenure thereof subject to such right or equity of redemption as the same are now subject to by virtue of the principal indenture (1910) and the supplemental indenture (1911) on payment by the mortgagor of the said sum of Rs. 74,017-1-4 now payable under the principal indenture and supplemental indenture and all interest at the rate aforesaid."

To this instrument Lucas was a party and he entered into divers covenants with the Bank upon the basis of these provisions.

Now the contention which has succeeded in the Court below and has been maintained before us has reference to the amount due to the Bank upon the cash credit secured by the promissory note under the arrangement of 1911 for paying off Thaddeus. This is the amount stated in the deed of 1914 as Rs. 60,932-13-9 but the question of amount is not at the moment relevant. The Defendant Lucas contends that as Vertannes and Bertram were in fact paid on their guarantee to the Bank but were released from it by this very deed of 4th February 1914 the deed transferred nothing to the Bank and that for the amount due on the promissory note the Bank have no security whatsoever. Of course if the deed had been stamped and [illegible] as a mortgage, the Bank would have been secured, but as a transfer—so runs the argument—it has no effect whatever. Again if the parties had met in the Bank parlour and Vertannes had paid down the amount outstanding on the note and the Bank's officer had said—"At last, Lucas now owes you a debt and you have security for it. You can take back your money if you assign your debt and your security to me"—then a transfer would have been perfectly correct but without this pantomime nothing it seems can be effected by a transfer, not even with Lucas's consent.

I do not doubt that for stamp purposes and for the purposes of sec. 59 of the Transfer of Property Act the line between a mortgage and a transfer must be drawn somewhere. But why draw it here? The debt to the Bank upon the promissory note was one single debt owed by two persons. As between these two one had from the other a covenant "to indemnify and keep indemnified against all claim and demands." The Bank was demanding further security which means "our right is to have payment: pay: but if you want further credit satisfy us and we will withdraw our demand." The principal debtor had a duty to the surety to make the payment—not only to the Bank [*Bechervaise* v. *Lewis* (22)]. The Bank as principal creditor had no right in the surety's security [*In re: Walker* (15)] but I fail to see how it can be said that the equity of redemption was prejudiced or altered by an assignment of the surety's rights to the Bank. It was and it remained a right to redeem on payment of the sum due on the promissory note with interest at the rate carried by the note. After February 1914 the mortgagor was in the circumstances free of any danger of having to pay interest to the sureties upon any interest they might be obliged to pay to the Bank—that seems to be the only possible difference to him, but that does not make a different equity.

I proceed now to consider whether there is any other reason why the Plaintiff Bank should not have a preliminary decree in the ordinary form upon the mortgage of 1911.

(22) L. R. 7 C. P. 372 (1872).
(15) [1892] 1 Ch. 621.

BANK OF BENGAL v. WILLIAM ARRATOON LUCAS.

which repeats and comprises the mortgage of 1910. This is the only question, as Plaintiff's counsel has stated that no personal decree against Lucas would be of any value and no such decree is asked for.

The defences which remain are *first* that the mortgage of 1911 was attested by a solicitor Mr. Stapledon although he was not present when Lucas executed it. *Secondly*, that Lucas signed the deed of 1914 without reading it and that it does not bind him. *Thirdly*, that the amount due on the 1910 deed to Vertannes and Bertram was paid off and that certain drafts discounted in 1912 and 1913 have nothing to do with this deed, Vertannes having negotiated them for Lucas without any security.

In the Court below there was a further and very remarkable defence to the effect that Vertannes and Bertram were mere *benamidars* for the Bank in respect of the deed of 1911, *i.e.*, that they had no interest of their own in the matter whatsoever but were mere nominees of the Bank put up to give a sham guarantee in order that the Bank might have the advantage of lending Rs. 65,000 to Lucas on security of his immoveable property contrary to the terms of the Presidency Banks Act. The learned Judge has upheld this defence, as he has upheld all the other defences I have mentioned, but the learned and very experienced vakil who appeared for the Defendant Lucas in this Court has very properly declined to support this finding. It is, however, somewhat difficult to think that the learned Judge when he came to canvas the subsequent transactions of the parties was in a position to appreciate their meaning or to draw correct inferences of fact. In particular, and with all respect to the learned Judge, his estimate of the value of the evidence of Lucas seems to me to be demonstrably wrong. In his answers to Interrogatories on 26th May 1918 (*cf.* also his evidence on the 18th July 1921) Lucas asserts his entire ignorance as to any deed of guarantee by Vertannes and Bertram to the Bank. The plain fact is that for years he had obtained finance from his broker: that Vertannes and Bertram were to be his sole brokers and that his business was conducted accordingly.

Coming first to the allegation that Mr. Stapledon witnessed Mr. Lucas's signature to the deed of 1911 without having seen him sign this rests wholly on the word of Lucas. "Lucas's evidence," says the learned Judge, "stands *ex parte* and there is no reason why it should not be believed." Now Lucas may have no reason for trying to resist the claim of the Petitioner Bank: but otherwise there seems to be something to consider. The learned Judge states that at the close of the case a petition was filed asking for leave to examine Stapledon. "Had the decision of the case hinged on this point only I would have probably given the Plaintiff Bank another opportunity after mulcting it in costs. But in the view I take of the deed I do not think it necessary and so reject the application."

Unfortunately it is necessary to decide this question and on this appeal being gone into at some length we acceded after argument to an application that [illegible] both of Stapledon and E[illegible] be taken under Or. 41, r[illegible] the Code, and stated that we wou[illegible] record our reasons in the judgment. In my opinion there is on the face of the judgment of the Court below substantial cause within the meaning of the Rule as explained by the Judicial Committee in *Raja Indrajit Partap* v. *Amar Singh* (3). I think further that

(3) Since reported 28 C. W. N. 277 (1923).

BANK OF BENGAL v. WILLIAM ARRATOON LUCAS.

the facts to which I shall shortly refer constitute substantial cause by themselves. Moreover if this be regarded as an exercise of our power under the Rule *mero motu*, it seems to be exactly within the language of Lord Robertson a case "where, on examining the evidence as it stands some inherent lacuna or defect becomes apparent" [*Kessowji's* case (2)]. An opportunity was offered to the Respondents to say whether they would want to call other witnesses: they did not desire to do so. Stapledon's evidence had been taken on commission in May 1922 in the case. At the hearing of this appeal leave should be given to use it. Evenett was examined before us. The original document has been carefully examined. In it Stapledon's signature is above Evenett's. Both gentlemen say with perfect frankness that they make no claim to an independent recollection of the occasion apart from the document. Both say that witnessing a signature that he has not seen made is a thing which Mr. Stapledon did not do. Against that Mr. Lucas says that in 1911 he did not know that two attesting witnesses were required for a mortgage but that he can swear that in 1911 Stapledon did not see him sign. He is certainly very fortunate both as to the circumstance and as to his recollection of it.

Now the credibility of Lucas on this point depends not only on the circumstances directly bearing on this issue but also on his evidence and conduct as to other matters. Apart from the question of *benami* already dealt with, the Court is asked on the evidence of Lucas to accept several remarkable allegations. That although under the deed of 1910 Vertannes had security for all discounted bills and for "any advances which may be made by the firm for the purposes of the said business" yet in 1912 Vertannes made himself liable as acceptor on bills to a very large amount solely for the benefit of Lucas upon a verbal arrangement that they should not be covered by the security. That in 1914 Lucas at the instance of a Mr. Morrison (then an officer of the Bank but now in Tasmania or elsewhere) signed the deed of 4th February 1914 without knowing its contents. That into this deed —to be executed by four parties—false statements were put, *e.g.*, that Rs. 13,000 was owing under the deed of 1910, whereas nothing was owing. That inspite of repeated applications to the Bank Lucas never could get them to give any particulars of his account or to let him see his own Pass-Book. That his admission in writing—made twice over in July 1914 and January 1915—was made without any enquiry as to whether he did owe Rs. 76,000 or not. That in spite of his extraordinary treatment over the deed of 1914 he never got a copy of it: it being his practice not to take a copy of mortgage deeds.

Now the learned Judge has referred to a circumstance which showed to him that on an application to substitute the heirs of one of the puisne mortgagees Lucas had given evidence before the Subordinate Judge then in charge of this case and had been disbelieved as a witness to whose oral evidence no weight could be attached. Having read this previous judgment with some care I take leave to doubt whether the comments made upon it by the trial Judge are justified. The trial Judge was well entitled to form his own opinion upon Lucas's evidence and if his view had been that notwithstanding his interest, his statements and his conduct, Lucas was a transparently honest witness whose word in his own favour could safely be accepted

(2) L. R. 34 I. A. 115: s. c. I. L. R. 31 Bom. 381; 11 C. W. N. 721 (1907).

to the value of half a lac and more, the position of the learned Judge would have been tenable at least in form. So too if the presence of direct and cogent corroboration had turned the scale. This however seems to be very far from the possibilities in the present case.

Reverting to the evidence upon the attestation of the deed of 1911 I note first that the mortgages of 1910 and 1911 were pleaded at length in the plaint (20th December 1917). In the first written statement Lucas pleaded (para. 4) that the rights of Vertannes created by the documents of 1910 and 1911 had not been legally transferred to the Plaintiff: also (paras. 8 and 9) that the debt due on the deed of 1910 had been paid off. He in no way challenged the deed of 1911 as a mortgage though he challenged the deed of 1914. This was in March 1918. In August 1918 evidence was taken on commission. Mr. Faley called to give formal proof as against the non-appearing Defendants of the document of 1910 was cross-examined on behalf of Lucas and his answers in examination-in-chief were frequently objected to. Mr. Evenett called for the same reason to give formal proof of the execution of the deed of 1911 gave (under objection) on the 16th August 1918 evidence identifying Stapledon's signature, Lucas's signature and his own. "The document was executed by Lucas in my presence." In cross-examination on the 22nd August on behalf of Lucas the witness who in the course of practice for 20 years must have witnessed hundreds of documents was asked without being given the document to look at, who were present. His answer showed that by this time he had forgotten who the witnesses to this particular document were and in fact he said so frankly. Stapledon had given evidence only as to the deed of 1914 and had been cross-examined only on that. As the written statement at that time contained no denial of the entering into the indentures of 1910 and 1911 and as Lucas had admitted them in April in answer to Interrogatories, cross-examination on his behalf was of a fishing character. When the Plaintiff Bank desired to amend the plaint so as to claim upon the deed of 1914 as a transfer only the application was resisted on the ground that it would be unfair to the Defendants since the witnesses on commission were "none of them cross-examined about the bonds of 1910 and 1911 as the suit was not based on the said bonds." (Order Sheet No. 49, 21st Dec. 1918, part III, p. 23). This was accepted as a fact by the Judge in making his order as to costs, but he allowed the amendment substantially on the ground that the claim was an honest claim and "the major portion of the claim is admittedly due." The additional written statement of Lucas was filed on the 6th April 1920. It is mainly occupied with the question of *benami* but by para. 7 it pleads that the deed of 1911 was not legally attested and presented for registration. The puisne mortgagees now appear and challenge the deed of 1911 in particular by written statement filed on 17th April 1920. In July 1921 the case was tried, one witness only being called for the Plaintiffs to prove some facts about the bank account. Lucas was the only witness for the defence. He says that Evenett alone was present when he signed. That "six months or a year ago it struck me that Stapledon was not present. It never struck me to suggest to my pleader when cross-examining Stapledon that he was not present when I signed it." Again "I came to know of the law on the point after amendment of the plaint in this case, I did not know it before as the question never arose

BANK OF BENGAL *v*. WILLIAM ARRATOON LUCAS.

before. My pleaders then asked me about the attestation of all documents."

So far the facts were before the learned Judge when he said that Lucas's evidence stands *ex parte* and there is no reason why it should not be believed. In my judgment there is cogent reason. The first written statement did in fact appreciate that the deed of 1914 might be relied on as a transfer of rights under the deed of 1911. If neither was attested by two witnesses there could be no mortgage. Lucas plainly did know the statutory requirement for the purposes of his original written statement filed in March 1918 because the third paragraph states it explicitly as regards the deed of 1914. The origin of the whole matter is in the fact that Mr. Evenett on 22nd August 1918 after a long examination upon all sorts of documents on previous days was asked as to the witnesses present at the execution of this document without being given the document to look at. It is idle to say that the Defendant's case was not put to him because on the pleadings it was not relevant. He was cross-examined. The Defendant was fishing this very water to see what he could get. If materials could be obtained, the pleadings were plainly not going to prevent some case or other being made if it promised well. No concrete case was put to Evenett to the effect that the deed was executed when he was alone with Lucas, because Lucas was rushing off to Dacca and that no witness in the whole of Messrs. Morgan's office could be had to sign, though the power-of-attorney had been mentioned in examination-in-chief. Not a word of this concrete story is to be discovered in Lucas's own evidence. In my opinion the attestation of the deed of 1911 is amply proved, and both Mr. Stapledon and Mr. Evenett are entitled to be absolved from a grave charge made against them both.

The second line of defence upon the facts is that Lucas signed the deed of 1914 without reading it and that therefore it is a nullity. I do not understand the evidence of Lucas to suggest that he signed something without knowing even the general nature of it or the properties comprised in it. To his mind apparently he was signing a mortgage in favour of the Bank—presumably for his debt to the Bank. Plainly Vertannes had something to do with the matter. On 18th April 1915 Lucas gave a second mortgage for Rs. 17,868 reciting that the properties hypothecated to you are mortgaged with the Bank of Bengal. This defence was in the original written statement. "This Defendant was taken quite at unawares and signed the said document at Messrs. Morgan & Co.'s office without even having an opportunity of going through the deed before signing the same and that he did so in the belief and on the assurance of Defendant No. 17 (*i.e.*, Vertannes) that the facts were correctly stated." The evidence of Lucas, on which it rests, is that when the parties met at the solicitor's office he was shown an engrossed deed, that he complained to Morrison that he knew nothing of its contents, that Morrison asked him not to be nasty and disagreeable, that Vertannes said that everything was all right and that on the impression that he would be financed by the Bank on signing the deed, he signed it. That after this the Bank never did finance him; that he spoke to Morrison about it but made no application in writing about this to the Bank. That he came to know of the statements of amount contained in the deed only when this suit was brought in December 1917. That he never could get any particulars of his account from the

BANK OF BENGAL v. WILLIAM ARRATOON LUCAS.

Bank and after admitting to some Rs. 76,000 twice he refused to admit anything.

Now both Mr. Stapledon and Mr. Vertannes were called before the commissioner. The cross-examination was not such as to leave it open to Lucas to make the case which he now makes. Vertannes was not cross-examined at all upon the point: in this case there is not even a pretence of touching on the subject. Lucas says he was busy and could not remain to instruct his pleader. Evenett in the following month (17 March 1914) identified Lucas before the Registrar: nothing was put to him.

The learned Judge seems to think that the Plaintiff Bank have to prove that Lucas read the draft on the deed. If he was content to take the statement of Vertannes or of Morrison he may certainly prove that they deceived him. Or he may set up a case of domination of his will and of undue influence under the Contract Act. But what this case is or why it should be seriously entertained upon this evidence I wholly fail to see.

The third series of findings upon fact are to the effect that in February 1914 nothing was due from Lucas to Vertannes upon bills discounted under the deed of 1910. That deed did not prescribe who should be drawer, drawee and acceptor but at first the practice was apparently for Vertannes to draw on Bertram, Lucas not being a party. At the end of 1912 there were a series of drafts drawn by Lucas on Bertram in favour of Vertannes. All the drafts were discounted with the Bank and all were to finance Lucas. On all of them Vertannes and Lucas were liable. Lucas says that there was a special verbal arrangement whereby his liability to Vertannes was not to be covered by the deed of 1910 This is a very definite statement: "Vertannes was negotiating drafts for me without any security." Considering what was done in February 1914 and later this requires a great deal of explanation on the part of everybody. Vertannes is nowhere asked as to bargain of that character, as to whether he negotiated drafts without security, why he had improper statements of liability put into the deed of 1914, whether the Bank in taking over his security and releasing him knew that certain drafts were excluded from a security that purported to cover not only all drafts but all advances. He is merely cross-examined to admit the difference in the way the bills were drawn and that is all he does admit. Moreover Vertannes' dead partner Bertram was a party to these drafts. Why should the Administrator-General be allowed to assign contrary to the good faith of the matter?

Again an account was put to Vertannes which purports to be a rough statement and expressly mentions that it is incomplete. This is, it appears, in the handwriting of a clerk of Vertannes. In it by an undated credit put down at the end Lucas is credited "By draft Rs. 50,000." That is quite all right as far as it goes but one must look to see what happened to the draft—whose it was, whether it was met or renewed or dishonoured. This account is not an account of the bills under discount. The learned Judge has been persuaded that it shows that little or nothing was owing under the deed of 1910 and that the statements in the deed of 1914 are outrageously wrong. He has not thought it necessary before finding this to take an account of the transactions between Lucas and his financing brokers, though commission on all local sales is expressly provided for by the deed of 1910.

The Defendant's case as put by his learned vakil, to whose clearness I am per-

BANK OF BENGAL *v.* WILLIAM ARRATOON LUCAS.

sonally much indebted, is that the accounts of the Bank are doubtless all right but that if Vertannes and Bertram who were handling the money for Lucas retained some of it improperly then Lucas would be liable on the bills to the Bank but Vertannes and Bertram could not have claimed the full amount under their security. Now the evidence of Lucas shows that he knew that Vertannes and Bertram had taken Rs. 10,000 under some claim or other. This appears to be in July and August 1912 (cheques 389, 390 in their Bank account, Ex. 101). He says they undertook to pay and he renewed the drafts expecting them to repay to the Bank. He states that he discussed the matter with the Administrator-General whose letter of 11th May 1913 is in evidence. Not a word is put to Vertannes about promises to relieve Lucas as to Rs. 10,000 or as to why he drew the money.

In these circumstances the question is whether on the evidence Lucas is entitled as against the Bank which took its transfer with Lucas's assent to the deed of 1914 to have an account taken as between himself and Vertannes and Bertram ripping up the basis on which the transfer was taken by the Bank, and going into the whole of the general account between Lucas and his brokers. I fail to see how on these pleadings and in this suit to which Vertannes and Bertram's estate are only *pro formâ* parties he can do anything of the sort and I see no such evidence as would justify such a course, were it possible.

In my opinion there must be a preliminary decree declaring the Plaintiff Bank to be entitled to a first charge upon the property comprised in the deeds of 1910 and 1911 for the sums mentioned in the deed of 1914 together with interests, costs, charges and expenses. The case must go back to the Court below to have the necessary account taken. The appeal should be allowed—as against Lucas with costs here and below and with liberty to add these to the security.

J. N. R. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER

No. 335 OF 1922.

RANKIN, J. PAGE, J. 1923, 18, December.	SHAHEBZADA MAHAMMAD MUNWAR SULTAN, Petitioner, Appellant, *v.* SHAHEBZADI SHAMSUNNESSA BEGUM, Opposite Party, Respondent.

Indian Lunacy Act (IV of 1912), secs. 62 and 38 —Court's duty before ordering an inquisition.

An inquisition under sec. 62 or sec. 38 of the Indian Lunacy Act into the state of health, the state of mind, the state of property and general capacity of a person is a thing which affects the person so prejudicially that it ought not to be taken except it be first ordered upon a careful consideration of evidence.

MUHAMMAD YAQUB *v.* NAZIR AHMAD (1) *referred to.*

This was an appeal preferred on the 29th of August 1922 against an order of the District Judge of 24-Pargannas (J. F. Graham, Esq.), dated the 8th of July 1922, dismissing an application for an inquisition under the Indian Lunacy Act.

The facts of the case will appear from the judgment.

Babus Mahendra Nath Roy and *Harendra Kumar Sarbadhikary* for the Appellant.

Babu Mritunjoy Chattapadhaya for the Respondent.

(1) I. L. R. 42 All. 504 (1920).

MAHAMMAD MUNWAR SULTAN *v.* SHAMSUN NESSA BEGUM.

The JUDGMENT OF THE COURT was as follows:—

RANKIN, J.—I am of opinion that the course taken in the Court below affords not a little just grievance to the lady against whom the proceedings were taken but it affords none whatever to the present Appellant. The smallest attention to the words of the Indian Lunacy Act whether they be the words of sec. 62 or the words of sec. 38 shows this that the Legislature appreciates that to have an inquisition into the state of health, the state of mind, the state of property and general capacity of a person is a thing which affects that person so prejudicially that it ought not to be taken except it be first ordered upon a careful consideration of evidence. It was said in a case, which is, I think, the case to which some reference is made in the judgment of the Court below [*Muhammad Yaqub* v. *Nazir Ahmad* (1)]. "It is true that nothing is contained in the Act itself to direct or guide a Judge as to how he shall consider applications for an inquisition and probably no rules exist for dealing with the matter; but ordinary common sense would appear to dictate to a tribunal before whom such an application comes that care should be exercised in a painful matter of this kind, namely, an inquiry into a man's or woman's state of mind; specially in the case of people in comfortable circumstances who merely wish to lead a quiet life, care should be exercised that they are not suddenly flung without sufficient reason into an elaborate inquisition which after all is nothing more or less than a trial involving sometimes the history of a person's life back for many years, medical evidence, and all sorts of family witnesses." Now, in this case, an application was presented to the learned District Judge and was registered on the 31st of March 1922. In May of that year the lady against whom it was made who appears to be an old lady and a *purdanashin* lady filed a sworn statement in reply and certain documents having been filed, the first order made is Order No. 5 of the 15th of May. "Pleader for Petitioner appears and states that a very lengthy written statement has been filed by the Opposite Party and that until he has had time to consider the objections, it will not be possible for issues to be framed." Now, that shows that the pleader for the Petitioner had entirely omitted to notice that, before anything like an enquiry involving framing of issues should be undertaken, the learned Judge had a most important duty to perform as regards this lady. He had no business whatever to tumble into an inquisition. His business was carefully to consider whether there were any grounds for holding an inquisition. The order goes on: "It is desirable, however, that the hearing of this case should be expedited as much as possible. Issues will be settled on the 22nd of May." That seems to me to show that the learned Judge had entirely omitted to notice what the duty was that rested heavily on his shoulders. On the 22nd May, in pursuance of the attitude disclosed by the order of the 15th an issue was framed being no less than a complete issue as to whether the lady was of unsound mind and incapable of managing herself and her affairs. Accordingly the Judge said: "It will now be necessary to have a report of the mental capacity and condition of the alleged lunatic"; and then, after some little time, on the 31st, two eminent medical practitioners were appointed to make an examination. Thereupon, the lady filed an application and it is rather interesting to see the attitude of mind disclosed by this application. I propose to take

(1) I. L. R. 42 All. 504 (1920).

MAHAMMAD MUNWAR SULTAN *v.* SHAMSUNNESSA BEGUM.

the narrative as regards this from the judgment, of the learned Judge himself. "Therefore, on the 16th June last, an application was filed on behalf of Shamsunnessa Begum praying that the inquisition which had been ordered to be held by two medical officers"—this may be a mere quotation but it shows a considerable confusion of mind on the part of somebody—"might not be proceeded with on the ground that it would involve considerable expense and inconvenience and praying that instead thereof the Court would be pleased to fix a date for personal examination of the alleged lunatic in camera with a view to ascertaining whether she is, in fact, a lunatic and whether there is any need for holding an inquisition." A more proper application than that I find it difficult to conceive. I should have thought that the lady was entitled to apply to this Court in revision to have the proceedings in the Court below stopped. She applied, however, to the trial Court asking it to do its duty—to consider whether there was any need for holding an inquisition and, in support of that application, she called attention of the Court to the case of *Muhammad Yaqub* v. *Nazir Ahmad* (1) which rightly or wrongly advises the Judges before ordering an inquisition to take steps, if possible, to see the alleged lunatic in person. The learned Judge in the present case appreciated the force of the lady's application and accordingly an order was made directing that she should be examined in camera and the learned Judge's order says: "In these circumstances," he has referred to some matters of suspicion, "it is the more desirable that the Court should see the alleged lunatic and satisfy itself whether there are any grounds for ordering the inquisition formerly prayed for." Those are the words of the learned Judge's own order. He did see the alleged lunatic and her answers are in the paper-book. He came to the conclusion having regard to the allegations in the petition that the whole application of the applicant was a piece of oppression and was *mala fide*, and he dismissed the application then and there. It is said that the learned Judge had begun the inquisition. I quite appreciate the force of the criticism that is made in this connection but here learned Judge had slid into the proceedings proper to an inquisition without knowing it and without making any order or coming to any decision which would entitle him to commence it. It is arguable that the power conferred by sec. 41 of the Indian Lunacy Act is a power which only arises when an inquisition has been ordered. The present case is not a case of the Court exercising a power to require the lunatic to come before it personally. This is a case where the alleged lunatic herself asked to be examined and the learned Judge had at any rate some authority in his support in examining the lady in the presence of the parties, even on the assumption that there was no inquisition. In these circumstances, what happened was that owing to the lady's taking a very reasonable step in making her well-founded application on the 16th of June, the learned Judge saw his error. He came to the conclusion that there was no ground for ordering an inquisition and he must have, I think, repented of the fact that he had not with sufficient care followed the statute and let himself slide into holding an inquisition which he had no jurisdiction to hold. In these circumstances it seems to me that while the alleged lunatic may have some grievance in the matter, the present Appellant has none, and that his appeal should be dismissed with costs, hearing fee two gold mohurs.

(1) I. L. R. 42 All. 504 (1920).

MAHAMMAD MUNWAR SULTAN *v.* SHAMSUN NESSA BEGUM.

PAGE, J.—I agree.

H. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2601 OF 1922.

NEWBOULD, J.
B. B. GHOSE, J.
1923,
20, November.

CHAND MIA MUNSHI and ors., Plaintiffs, Appellants,
v.
TUKAMIA and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), secs 103B, 111A—Right of a person to rear fish in another's tank, if recognised by law—Easement—Declaratory suit under sec. 111A—Cause of action—Presumption under sec. 103B, if applies to non-agricultural land.

Where in respect of the Plaintiff's tank in his possession it was recorded in the record-of-rights prepared under Chap. X of the Bengal Tenancy Act that the Defendant had a right to rear fish, and the Plaintiff brought a declaratory suit under sec. 111A of that Act:

Held—*That the Plaintiff had a cause of action to bring the suit and was entitled to have the declaration that the Defendant had no right to rear or catch fish in the Plaintiff's tank.*

The right of a person to rear fish in another's tank is a novel right which a Court of law cannot recognise and is too vague to give a person a right in law in the nature of an easement.

Although strictly speaking the presumption under sec. 103B of the Bengal Tenancy Act is not applicable to non-agricultural land to the extent to which it is applicable with regard to agricultural land, still an entry in regard to non-agricultural land raises some presumption with regard to the fact recorded in it.

RAJA SASHI KANTA ACHARJYA BAHADUR *v.* SANDHYA MONI DASSYA (1) *referred to.*

(1) 26 C. W. N. 483 (1921).

This was an appeal against the decree of the District Judge of Zillah Noakhali (E. Milsom, Esq.), dated the 20th of July 1922, reversing the decree of the Munsif, 2nd Court at Lakhmipore (Babu Makhan Lal Mukerjee), dated the 22nd of November 1920.

The facts of the case appear from the judgment.

Babus Dhirendra Lal Kastgir and *Nagendra Nath Bose* for the Appellants.

Babu Bhagirath Chandra Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal is against the judgment and decree of the District Judge of Noakhali reversing those of the Munsif of Lakhmipore. The Plaintiffs are the Appellants and the appeal arises out of a suit for confirmation of possession after declaration of the Plaintiff's title to the tank in suit.

The cause of action arose in this way :— There was a record-of-rights of the mouzah in which the tank is situated under Chap. X of the Bengal Tenancy Act. The tank was recorded as within the tenancy of the Plaintiffs, but it was also recorded that the Defendants would be entitled to rear fishes and use the water of the tank. With regard to the use of the water of the tank there is no question and the Plaintiffs had not disputed that right. But the Plaintiffs say that the Defendants have no right to rear fishes in the tank and the record-of-rights is erroneous to that extent.

The suit has been brought for a declaratory decree as provided in the proviso to sec. 111A of the Bengal Tenancy Act. The Defendant No. 1 contested the suit and he pleaded that he and his predecessors before him were the proprietors of 6 annas share of the tank and another person Malika Banu was the proprietor of the re-

CHAND MIA MUNSHI *v.* TUKAMIA.

maining 10 annas share and he further pleaded that he and his ancestors have been exercising possession over the 6 annas share of the tank for the last 50 years by using its water and rearing and catching fishes. The learned Judge on appeal has dismissed the suit entirely, and the first ground on which he holds against the Plaintiffs is that they have no cause of action. He thinks that as the record-of-rights shows the Plaintiffs' title and possession the mere fact that the record shews the Defendants having got the right complained of does not give them a right to bring the present suit. We are unable to agree with him with regard to this proposition. The record, if it is allowed to stand, restricts the absolute ownership of the Plaintiffs and disentitles them from excluding the Defendants from exercising some acts of possession. They have therefore the right to complain against the entry in the record-of-rights and this gives them a good cause of action.

The next ground on which the learned Judge has decided the case is that the entry in the record-of-rights had not been rebutted by the Plaintiffs. It is first urged on behalf of the Plaintiffs that the entry in the record-of-rights not being an entry with regard to agricultural land, nor of any matter between landlord and tenant the presumption under sec. 103B of the Bengal Tenancy Act does not apply. It has, however, been held that although strictly speaking the presumption under sec. 103B is not applicable to non-agricultural land to the extent to which it is applicable with regard to agricultural lands, still such entry raises some presumption with regard to the fact recorded in it; see *Raja Sashi Kanta Acharjya Bahadur* v. *Sandhya Moni Dassya* (1). It is next urged on behalf of the Appellants that the right that is recorded is too vague to give the Defendants a right in law in the nature of an easement, and secondly the Defendants themselves did not claim the right as recorded but claimed ownership to 6 annas share of the tank and pleaded that they exercised the right of ownership in that share of the tank; and the learned Judge having found that the Plaintiffs were the sole owners of the tank and the Defendants had no share in it ought to have made a decree in favour of the Plaintiffs. In our opinion this contention should prevail. The right of one person to rear fishes in another's tank seems to be quite a novel right which a Court of law cannot recognize. The learned Vakil for the Respondents was unable to show us any authority for the proposition that such a right should be recognized. We are therefore of opinion that the Plaintiffs are entitled to the declaration they have sought for that they are owners of the tank and also for confirmation of possession and they are also entitled to have the other declaration that the Defendants have no right to rear or catch any fishes in the tank.

(1) 26 C. W. N. 483 (1921).

We therefore set aside the judgment and decree of the lower Appellate Court and restore those of the Munsif with costs in all Courts.

H. C. S. *Appeal allowed.*

PRIVY COUNCIL

[APPEAL FROM BENGAL.]

LORD DUNEDIN.	SURAPATI ROY and
SIR JOHN EDGE.	ors., Appellants,
MR. AMEER ALI.	*v.*
1923,	RAM NARAYAN
Heard, 16, March.	MUKERJI and ors.,
Judgment, 19, April.	Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 12—Permanent tenure—Transfer by registered document, when complete—Civil Procedure Code (Act V of 1908), sec. 110—Suit for rent—Recurring liability

SURAPATI ROY v. RAM NARAYAN MUKERJI.

charged on land above appealable value—Certificate, if may be granted.

Where the subject-matter in dispute related to a recurring liability for rent and was in respect of a property considerably above the appealable value, a certificate that the case was a fit one for appeal to His Majesty in Council was properly granted by the High Court.

A transfer of a permanent tenure by a registered document is complete under sec. 12 of the Bengal Tenancy Act as soon as the document is registered.

KRISTO BULLUV GHOSE v. KRISTO LALL SINGH (2) *and* HEMENDRA NATH MUKERJI v. KUMAR NATH ROY (1) *referred to.*

These were consolidated appeals from a judgment and two decrees of the High Court, dated the 26th August 1919, reversing decrees of the Subordinate Judge of Hooghly, dated the 28th February 1917, which affirmed a judgment of the Munsif of Hooghly, dated the 30th September 1915, made in certain rent suits.

The suits were brought by the 1st Respondent to recover from the Appellants and the remaining Respondents arrears of rent in respect of *darputni* tenures of which he was *putnidar* under the Maharaja of Burdwan.

By a registered *kobala*, dated the 9th Bhadra 1313 (25th August 1906), the Defendants other than Nos. 3, 14 and 15 purported to transfer their interest to one Ramtarak Bhuttacharji as *benamidar* of the Defendants Nos. 3, 14 and 15.

In 1908 and 1911 rent suits were brought by the *putnidar* against all the Defendants and the trial Judge held that the *kobala* was not a *bonâ fide* document and that Defendants Nos. 3, 15 and 16 had not established their exclusive possession and that the *putnidar* was entitled to rent and the claim was decreed accordingly. Subsequent suits for rent were also decreed against the Defendants, the Court holding that the decision in the previous suits operated as *res judicata.*

On the 22nd Assar 1321 (6th July 1914) the Defendants other than Defendants Nos. 3, 14 and 15 executed a further deed described as a "deed of confirmation" in favour of Defendants Nos. 3, 14 and 15.

The present suits were filed on the 6th November 1914 and the 4th February 1915.

The Defendants other than Defendants Nos. 3, 14 and 15 denied liability and relied on the sale deed of 25th August 1906 and on the deed of confirmation of 6th July 1914.

The suits were tried together by the second Munsif of Hooghly who held that although the *bonâ fides* of the *kobala* was not established yet that the possession of Defendants Nos. 3, 14 and 15 had been proved and that this possession coupled with the deed of confirmation conferred a valid title on them as from the date of the latter deed (6th July 1914). He accordingly passed a decree for rent up to that date against all the Defendants and for the subsequent period only against Defendants Nos. 3, 14 and 15.

On appeal the Subordinate Judge confirmed this decree.

Upon further appeal to the High Court (Nalini Chatterjea and Duval, JJ.), the decrees of the lower Courts were reversed.

The learned Judges held that the questions relating to the deed of sale, dated the 25th August 1906 were "*res judicata*" by reason of the previous decisions and that the assertions in the deed of confirmation, dated the 6th July 1914, cannot "make it valid as against the other party to the previous suits." The Court also

(1) 12 C. W. N. 478 (n) 8

(2) I. L. R. 16 Cal. 642 (1889).

SURAPATI ROY *v.* RAM NARAYAN MUKERJI.

held that the deed of release did not operate as a transfer of rights in praesenti.

On the 12th May 1920, the Appellants applied for leave to appeal to His Majesty in Council from the decrees of the High Court and for consolidation of the appeals. In their petition they alleged that the arrears of rent already decreed or pending in other suits exceeded Rs. 10,000 and that another tenure was affected by the decree of the High Court. They further alleged that the actual subject-matter of the appeals to the Privy Council would be the amounts already accrued and that would accrue in future.

On the 31st May 1920, the High Court directed that "certificates be granted that as regards amount or value and nature the cases fulfil the requirement of sec. 110 of the Code of Civil Procedure."

Mr. W. Wallach for the 1st Respondent.—Referred to sec. 110 of the Civil Procedure Code and contended that no appeal lay to the Privy Council as the value of the subject-matter was insufficient and no proper certificate had been given. He referred to *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (3).

Mr. Dubé for the Appellants.—The High Court was right in granting a certificate in that sums of money considerably over Rs. 10,000 are affected; *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (3) was reconsidered by the Board in *Radhakrishna Ayyar* v. *Sundara Swamier* (4).

(The Board reserved the question of the admissibility of the appeal and directed the appeal to be heard on the merits.)

Mr. Dubé for the Appellants.—A *darputnidar* can assign his interest by a deed of transfer under the provisions of sec. 12 of the Bengal Tenancy Act, VIII of 1885. The deed in this case is effectual for the purpose, *Hemendra Nath Mukerji* v. *Kumar Nath Roy* (1) and the liability for rent of the Defendants other than Nos. 3, 14 and 15 ceased as from its date (6th July 1914).

The question of *res judicata* does not arise.

He also referred to *Chintamoni Dutt* v. *Rash Behari Mondal* (5), *Kristo Bulluv Ghose* v. *Kristo Lall Singh* (2) and *Ismail Solomon Bhamji* v. *Mahomed Khan* (6).

Mr. Wallach for the 1st Respondent.—The document of 1914 does not operate as a valid transfer under sec. 12 of the Bengal Tenancy Act. It was stamped as a release and treated as such by the parties to it and is distinguishable from the document in *Hemendra Nath Mukerji* v. *Kumar Nath Roy* (1) and *Mathura Mohan Saha* v. *Ram Kumar Saha* (7).

No consideration passed with the deed of 1906 and there was accordingly no transfer.

The Courts have decided that and it is *res judicata*. The deed of 1914 is merely an attempt to go behind those decisions and to affirm that a deed held to be invalid is in reality valid.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—These consolidated appeals arise out of two suits brought by the Plaintiff, a *putnidar* under the Burdwan estate, to recover rent from the Defendants in respect of three *darputni* taluks they held under him. The Burd-

(3) L. R. 48 I. A. 31; s. c. I. L. R. 44 Mad. 293; 25 C. W. N. 830 (1920).
(4) L. R. 49 I. A. 211; s. c. 27 C. W. N. 1 (1922).

(1) 12 C. W. N. 478 (1908).
(2) I. L. R. 16 Cal. 642 (1889).
(5) I. L. R. 19 Cal. 17 (1891).
(6) I. L. R. 18 Cal. 360 F. B. (1890).
(7) I. L. R. 43 Cal. 790, 807: s. c. 20 C. W. N. 870 (1916).

SURAPATI ROY *v.* RAM NARAYAN MUKERJI.

wan Raj contains a large number of *putni* tenures, and sub-infeudation is recognised and largely given effect to in that estate. Not only are *putnidars* entitled to grant sub-tenures called *darputnis*, but the *darputnidar* on his side can grant subordinate tenures under himself which bear the designation of *se-putni*. The Plaintiff's case is that the fifteen Defendants whom he sued for the *darputni* rent of the three *darputni* taluks were all jointly interested in the under-tenures. The Defendants, other than Defendants Nos. 3, 14 and 15, contended that although originally they held a share in the *darputni* tenure, they had, on the 25th August 1906, conveyed their 12 annas interest to one Ramtarak Bhuttacharji as the *benamidar* of the Defendants Nos. 3, 14 and 15, and that two years later, *viz.*, in June 1908, Ramtarak had, by a registered document, renounced all interest in the *darputni* in favour of the Defendants Nos. 3, 14 and 15, acknowledging that they were the real purchasers and that he was only their *furzidar*. The Defendants, other than Nos. 3, 14 and 15, accordingly urged that they were not liable for the rent of the under-tenure and were wrongly sued.

It appears that after the execution of the deed of sale in 1906, the Plaintiff had instituted against these several Defendants, including Defendants Nos. 3, 14 and 15, suits for rent in which the Defendants other than Defendants Nos. 3, 14 and 15, denied their liability on the ground that they had parted with their interest in favour of their co-Defendants Nos. 3, 14 and 15, and that in those suits the Court before whom the question came for trial had held that the contending Defendants had failed to establish that the transaction was *bonâ fide* and not a mere sham; and had declared that, notwithstanding the transaction of 1906, the Plaintiff was entitled to rent from all the Defendants, and had decreed his claim accordingly. There were further suits between the parties; the same contentions were raised by the Defendants other than Defendants Nos. 3, 14 and 15; but the defence was disallowed on the ground that the question relating to their liability was *res judicata*. The Defendants other than the Defendants Nos. 3, 14 and 15, thereupon, on the 6th July 1914, executed a fresh document in favour of their co-Defendants Nos. 3, 14 and 15, by which they purported to confirm the transaction of 1906 and release in the latter's favour whatever right and title they possessed in their 12 annas share of the *darputni*.

The present suits are brought for rents partly due for a period prior to July 1914, and partly for a period thereafter. The Munsif, before whom the cases came for trial, held that the rent for the period anterior to the execution of the last document, *viz.*, the release of 1914, came within the terms of the previous decisions and that, consequently, the matter was *res judicata*; but with regard to the period after the execution of the document of the 6th July 1914, he held that the transfer by the contending Defendants to their co-Defendants Nos. 3, 14 and 15, was valid, and that, therefore, they were entitled to be absolved from liability for all subsequent rent. He accordingly decreed the Plaintiff's claim for the rent of this latter period against Defendants Nos. 3, 14 and 15 alone.

From this part of the Munsif's decree, the Plaintiff appealed to the Subordinate Judge of Hooghly, who, on the 28th February 1917, dismissed the appeal and affirmed the decree of the Munsif.

He held that the point in controversy was concluded by the decision in the case of *Hemendra Nath Mukerji* v. *Kumar*

SURAPATI ROY v. RAM NARAYAN MUKERJI.

Nath Roy (1), that the deed which the contending Defendants had executed ratifying the previous transaction of sale was not only a "disclaimer of any subsisting right or interest of the executants, but also purported to vest whatever right or interest they might, by reason of the decisions of Courts in the previous rent suits. be said to have had in the properties covered thereby, in the Defendants Nos. 3, 14 and 15, as from the date of its execution." He held, further, in respect of the contention, that there was no consideration for this last document, that it did not concern the Plaintiff, whether a consideration passed or not between the two parties to the transaction, that was a matter between them and them alone; and that the Plaintiff himself had ample security in the *darputni* tenures. He further held that the Defendants Nos. 3, 14 and 15 were in possession of the property. He accordingly, as already stated, dismissed the Plaintiff's appeal. The Plaintiff, not content with this decision, appealed to the High Court of Calcutta, which reversed the judgment of the Subordinate Judge and decreed the Plaintiff's claim as against all the Defendants.

From these decrees of the High Court in the two suits, the contending Defendants have appealed to this Board. A preliminary objection has been taken as to the competency of the appeal, on the ground, firstly, that the subject-matter is below the appealable value; and secondly, that the certificate granted by the High Court is not sufficient. On both points in their Lordships' opinion the objection fails. The subject-matter in dispute relates to a recurring liability and is in respect of a property considerably above the appealable value. The certificate in the circumstances is quite in order.

(1) 12 C. W. N. 478 (1908).

The reasons upon which the learned Judges of the High Court have based their judgment are somewhat involved, but closely examined they amount to this: that as it had been held in the previous suits that there was no consideration and as there could be no transfer without the proof of consideration, the transaction of July 1911 is affected by the previous decisions and the Plaintiff was entitled to go on suing the Defendants as he had done heretofore. There are certain passages in the judgment which incline their Lordships to think the learned Judges did not clearly apprehend the legal position of the parties in relation to the provisions of sec. 12 of the Bengal Tenancy Act. They say in one place:—

"It cannot be disputed that if the title is perfected by a proper deed, and for consideration, the former decisions cannot operate as *res judicata*."

And then go on to say:—

"But there is no consideration apart from the consideration of the previous kobala; and the question of consideration under the kobala is *res judicata*."

In the case of *Kristo Bulluv Ghose* v. *Kristo Lall Singh* (2), a transfer of a permanent tenure by a registered document was held to be complete under sec. 12 of the Bengal Tenancy Act, as soon as the document was registered, and the same view was expressed in the case of *Hemendra Nath Mukerji* v. *Kumar Nath Roy* (1), already referred to. Their Lordships consider that the present controversy is covered by the latter decision.

Their Lordships are of opinion that the judgment and decrees of the High Court should be set aside and the order of the Subordinate Judge restored. The Appellants will be entitled to their costs here and in the High Court.

(1) 12 C. W. N. 478 (1908).
(2) I. L. R. 16 Cal. 642 (1889).

SURAPATI ROY *v.* RAM NARAYAN MUKERJI.

And their Lordships will humbly recommend His Majesty accordingly.

Solicitors: *Messrs. Chapman, Walker & Shephard* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the 1st Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.	
LORD PHILLIMORE.	NUR MAHOMED
SIR JOHN EDGE.	PEERBHOY and anr,
MR. AMEER ALI.	Appellants,
1922,	*v.*
Heard, 1, 13 and	DINSHAW HORMASJI
14, July.	MOTIWALLA and anr.,
Judgment.	Respondents.
2 , November.	

Specific performance - Contract to purchase immoveable properties—Subsequent sale of one item in execution of a decree - Purchaser's title—Notice to purchaser, to be proved, nature of - Plaintiff's option, when one of the properties has passed by sale o a third party to demand specific performance as to the others, on terms.

Judicial sales would be robbed of all their security if vague references to antecedent contracts could be held to invalidate the buyer's title. The notice to the buyer of the existence of such contracts should be unequivocal.

Where one of the properties which the Plaintiff in a suit for specific performance had contracted to buy was found to have validly passed at an execution sale, he was given liberty to apply to the Court if so advised for specific performance in respect of the other properties on such terms as to the Court may seem just.

These were consolidated appeals from two decrees of the High Court of Bombay. dated the 30th March 1917, reversing a decree of the 1st class Subordinate Judge of Thana, dated the 18th April 1914.

The suit was brought by the Respondent Dinshaw Hormasji Motiwalla against the Appellants and Adam Haji Jacob for specific performance of a contract for sale of property in Bandra.

The property in question belonged in 1911 to Adam Haji Jacob who was heavily indebted.

In August 1911 a prohibitory order was issued by the Thana Court, attaching the property, and in March 1912 a warrant of sale was issued.

On the 17th July 1912, Adam Haji Jacob entered into a contract for the sale of the property to Motiwalla and received Rs. 1,000 as earnest money.

On the 29th August 1912 the decretal amount was paid in by the judgment-debtor and the sale of the property under the above-mentioned attachment was not confirmed.

On the 9th August 1912 a second decree-holder attached the property and applied for rateable distribution which was refused, but the property was sold under this attachment on the 25th April 1913 and purchased by the 1st Appellant and resold to the second Appellant.

The Subordinate Judge refused to decree specific performance of the agreement of the 17th July 1912.

He held that the agreement was void under sec. 64 of the Civil Procedure Code, that the Court sale purchaser and his assignee did not take the property with notice of the agreement of sale, and that the conduct of the Plaintiff at the sale and the general circumstances of the case justified the Court in its discretion in refusing to grant specific performance.

Motiwalla and Adam Haji Jacob filed separate appeals from this decree to the High Court.

In Motiwalla's appeal the Court reversed the decree of the trial Judge.

NUR MAHOMED PEERBHOY *v.* DINSHAW HORMASJI MOTIWALLA.

In their view the agreement of the 17th July 1912 was not affected by sec. 64 of the Civil Procedure Code and did not affect the execution creditors, but the equities created by it could be enforced against the auction-purchaser who was a person claiming under a party to that agreement and not a *bonâ fide* transferee for value without notice.

In Adam's appeal they held that only part of the property was sold at the auction sale and reversed the decree of the Subordinate Judge.

From both these decrees the present consolidated appeal was brought to His Majesty in Council.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellants.—The agreement of the 17th July 1912 is void under secs. 64 and 73 of the Civil Procedure Code not only as against the attaching creditor but as against anyone who is entitled to rateable distribution.

Bibi Miyakhan v. *Gulabchand Ramchand* (1).

These agreements are void so far as they prejudice the rights of any execution creditors.

Dinobundhu Shaw Chowdhury v. *Jogmaya Dasi* (3).

The remedy of the claimant for specific performance is against the assets not against this particular property.

In any event the second Appellant was a purchaser for value without notice.

The evidence as to notice is contradictory, and the probabilities are that no notice was given.

They also referred to :—

Sec. 27, Specific Relief Act.

Dinendra Nath Sanyal v. *Ramcoomar Ghose* (4), *Anundomoyee Dossee* v. *Dhonendro Chunder Mookerjee* (5), *Anund Lall Doss* v. *Jullodhur Shaw* (6), *Lalu Mulji Thakar* v. *Kashibai* (7) and *Ganesh* v. *Purshottam* (8).

Messrs. DeGruyther, K. C. and *Kenworthy Brown* for the Respondents contended that given an agreement to sale, specific performance can be enforced against an auction-purchaser whether or not he has notice.

The agreement was not made during the attachment under which the title of the present Appellant arises.

Mina Kumari Bibi v. *Bijoy Singh Dudhuria* (2).

As regards notice the High Court say the evidence is all one way and that is in favour of the view that full notice was given.

Reference was also made to *Peer Mahomed Dewji* v. *Mahomed Ebrahim* (9) and *Jetha Bhima & Co.* v. *Lady Janbai* (10).

Sir G. Lowndes, K. C. replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The suit in which these two consolidated appeals have arisen was brought in the Court of the First Class Subordinate Judge of Thana on the 11th August 1913, by Dinshaw Hormasji Motiwalla against Adam Haji Jacob, alias Adam Abdulla Patel, Nur Mahomed Purbhai Damji, who is Defendant No. 2, and Waman Ganesh Desai, the Defendant

(1) 13 Bom. L. R. 1189 (1911).

(3) L. R. 29 I. A. 9, 16; s. c. I. L. R. 29 Cal. 154; 6 C. W. N. 209 (1901).

(2) L. R. 44 I. A. 72; s. c. I. L. R. 44 Cal. 662; 21 C. W. N. 585 (1916).

(4) L. R. 8 I. A. 65; s. c. I. L. R. 7 Cal. 107 (1881).

(5) 14 M. I. A. 101, 111 (1871).

(6) 14 M. I. A. 543, 549 (1872).

(7) I. L. R. 10 Bom. 400 (1886).

(8) I. L. R. 33 Bom. 311 (1909).

(9) I. L. R. 29 Bom. 234 (1905).

(10) I. L. R. 37 Bom. 138 (1912).

NUR MAHOMED PEERBHOY v. DINSHAW HORMASJI MOTIWALLA.

No. 3, to obtain under the Specific Relief Act, 1877, a decree for the specific performance of a contract of sale of the 17th July 1912, by which it was agreed that Adam Haji Jacob should sell and convey to Motiwalla, and Motiwalla should purchase :—

"All that piece or parcel of land with the bungalow, trees, plants, shrubs, etc., and a well standing thereon, situate, lying and being at Hill Road, Bandra, in the Thana District, Sub-District Bandra, admeasuring about 5,000 square yards, bearing Municipal No. 139 and City Survey No. 136, and bearing Collector's Survey No. 17, Pot Nos. 2, 3, 4 and 5, admeasuring 25 Gunthas, and bounded on the East by property of Rustomji Muncherji Jasawala, on the West by property of Burjorji Ghamat, on the South by Government Hill Road, and on the North by the land of Mr. Dias, and which said premises are particularly described in the title-deed now in the possession of the mortgagees Sorabshah and Pirojsha Framji Bandrawala,"

for the price of Rs. 15,600, of which Rs. 1,000 were, in compliance with the contract, paid as earnest money by Motiwalla to Adam Haji Jacob on the execution of the contract. The purchase was to be completed within two months from the 17th July 1912. The contract was registered by the Sub-Registrar of Bandra on the 22nd July 1912. The only relief prayed for, to which it is necessary to refer, may, in effect, be briefly stated as follows :—That it should be decreed that Adam Haji Jacob, and the Defendants Nos. 2 and 3, should execute a deed of sale in favour of Motiwalla, of the property described as bearing Municipal Number 139, and that Adam Haji Jacob should execute a deed of sale, in favour of Motiwalla, of the property described as bearing Collector's Survey Number 17, Pot Numbers 2, 3, 4 and 5.

Adam Haji Jacob, by his written statement, admitted that the contract of the 17th July 1912 was made and that he had received as earnest money Rs. 1,000, and pleaded, in effect, that he was ready and willing to convey to Motiwalla the property bearing Collector's Number 17, Pot Numbers 2, 3, 4 and 5, but that he was unable to convey to Motiwalla the property bearing Municipal Number 139, as it had been sold on the 25th April 1913, to the Defendant No. 2, in execution of a decree against him, Adam Haji Jacob.

The Defendants Nos. 2 and 3, who claimed title under the Court-sale of the 25th April 1913, separately filed written statements, in which they pleaded that the contract of the 17th July 1912, was void under sec. 64 of the Code of Civil Procedure, 1908. They also pleaded that all the property in respect of which specific performance was claimed by Motiwalla was purchased at the Court-sale of the 25th April 1913, by the Defendant No. 2, and they further pleaded several other matters, which, in the view that their Lordships take of the case, need not be considered by them.

To the allegation that the whole property was included in the Court-sale the Plaintiff replied that on the face of the sale only the property being Municipal Number 139 was included.

The history of the various executions as regards the lands in question are as given by the learned Judges of the Court of Appeal as follows :—

"On the 19th of August 1911, an attachment was levied by a judgment-creditor under Darkhast No. 32 of 1911, and in June 1912, the property was put up for sale after being attached. On the 29th of August 1912, the judgment-debtor, that is, the first Defendant, paid in the whole of the decretal amount and costs, and therefore the sale was not confirmed, and the Darkhast proceedings were struck off on the 1st of October

NUR MAHOMED PEERBHOY *v.* DINSHAW HORMASJI MOTIWALLA.

1912. Before the payment of the decretal amount, namely, on the 9th of August 1912, another Darkhast was taken out by another decree-holder, being Darkhast No. 120 of 1912, and on the 10th of August the property was attached under that Darkhast. On the 12th of August the new decree-holder applied for rateable distribution of the proceeds of sale of the property. That application was refused on the ground that the money which had then been lodged in Court was not money realised in execution, but paid him in order to avoid the completion of execution, and there were, therefore, no assets rateably distributable. His application having been refused, the second decree-holder applied for sale of the attached property, which was accordingly sold on the 25th of April 1913. It was purchased by the second Defendant for a sum of Rs. 11,500. On payment of the purchase-money by the second Defendant, it became distributable under the provisions of sec. 73 of the Code, and would be assets which those entitled to rateable distribution would look to so far as there had been execution under the attachment at that time subsisting."

The description of the property as given in the prohibitory order of the 19th August 1911, was as follows :—

Creditors of Adam Haji Jacob had obtained against him a money decree, and in execution of that decree they, on the 19th August 1911, obtained from the Court executing that decree a prohibitory order and attachment of the following immovable property of Adam Haji Jacob :—

"1 One tiled house on the Hill Road at Kasba Bandra in Taluka Salsette, District Thana, having four slopes and walls of earth and stones (together with) the ground and the tenement, the front yard and the rear yard and the cut-house and (together with) the room for preparing food and the kitchen and a hut of (*i. e.*, thatched with) palm-leaves for Mali (gardener) and (together with) one other small stable (roofed) with Mangalore tiles and a water-well and a privy and the pipe and (all) the appurtenances thereto. This house bears Municipal No. 139. (The house) including the fruit-bearing and flower-bearing trees and shrubs standing in the compound of this house and together with the fences and hedges. The four boundaries hereof are as follows:—The same is bounded on the east partly by a stone wall and partly by a Mendi hedge, and beyond that there is the property of Jehangir Rustomji Jasawala; on the west by the stone wall belonging to the Defendant himself, and beyond that there is the property of Burjorji Navroji Ghamat; on the south by the public road and on the north by the following Survey Nos. in the Saja of Kasba Bandra :—

Survey No.	Fa(lni) No.	Land.		Assessment.		
		Acres.	Gunthas.	Rs.	a.	p.
17		0	$1\frac{1}{4}$	1	0	0
17		0	$4\frac{1}{4}$	1	0	0
17		0	$12\frac{1}{4}$	3	0	0
17		0	$4\frac{1}{4}$	1	0	0."

Now the schedule of the prohibitory order of the attachment of the 10th August 1912, specifies the property as being Municipal Number 139, and gives first the description of the property as given in the order of the 19th August 1911, without specifying the boundaries. It is clear, therefore, that the sale of the 25th April 1913, which forms the title of Defendants Nos. 2 and 3, cannot include the land described as Survey No. 17, Pot Numbers 2, 3, 4 and 5.

The Subordinate Judge dismissed the suit upon the ground that the contract of which the Plaintiff asks specific performance was made unavailable in respect of sec. 64 of the Code of Civil Procedure, 1908. That section is as follows :—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

NUR MAHOMED PEERBHOY *v.* DINSHAW HORMASJI MOTIWALLA.

"*Explanation*—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

With sec. 64 should be read sec. 73 of that Code, which, so far as it is material in considering the facts of this case, is as follows :—

"(1).—Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

The Court of Appeal reversed this judgment and gave decree for specific performance.

The difference of opinion lay in this. The learned Subordinate Judge, relying on a judgment, *Bibi Miyakhan* v. *Gulabchand Ramchand* (1) held that as sec. 64 with its explanation made any transfer to follow on the contract void in a question with persons having a claim for rateable distribution, and as the executing creditor under the attachment of the 9th August 1912, had applied for rateable distribution under the attachment of the 19th August, 1911, before the proceedings under that attachment were finally closed, that kept, so to speak, any transfer in respect of the contract of July 1912, void until it was made finally void against him by the prohibitory order under his own attachment of the 9th August 1912.

The Court of Appeal held that as the contract of July 1912, was only a contract to sell, and not a transfer with delivery of any property or interest, sec. 64 had no application. They then held that sec. 40 of the Transfer of Property Act directly applied, and that in the terms of that section the Plaintiff was a person entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, and as such entitled to enforce it against a transferee with notice; and they held that the buyers at the Court-sale had notice of the contract.

The point raised by the learned Judge seems to their Lordships to be one of considerable difficulty, and not as easily to be disposed of as was done by the learned Judges of the Court of Appeal. In particular, it would have to be considered whether what was said in the case of *Mina Kumari* v. *Bijoy Singh Dudhuria* (2) has any bearing on the question, or whether that case is rendered inapplicable owing to the difference of phraseology of sec. 64 of the Civil Procedure Code of 1908 from sec. 276 of the Code of Civil Procedure of 1882, under which that case was determined. It would also have to be considered whether at any given moment the Plaintiff was able to get specific performance. Their Lordships, if it had been necessary to determine these questions, would have required further argument. But they do not now think it necessary to decide the question, because they think the Plaintiff's case fails on another ground.

Assuming that sec. 64 has no effect, and that sec. 40 of the Transfer of Property Act has full scope, it is only if the purchaser at the judicial sale bought with notice of the contract that it could be enforced against him. Now on this point the evidence seems to their Lordships quite unsatisfactory. Judicial sales would be robbed of all their security if vague references to antecedent contracts could be

(1) 13 Bom. L. R. 1189 (1911).

(2) L. R. 44 I. A. 72, 78; s. c. I. L. R. 44 Cal. 662; 21 C. W. N. 556 (1916).

NUR MAHOMED PEERBHOY *v.* DINSHAW HORMASJI MOTIWALLA.

held to invalidate the buyer's title. The notice given here is said to have been given by a Mr. Kirtikar, a pleader acting on behalf of the Plaintiff. But Mr. Kirtikar did not arrive at the sale until 4 P.M., the sale being begun before 3 P.M. He says he read the agreement, which was in English, but that he made a general statement in the vernacular that his client would claim on the property; further that the Plaintiff himself would bid at the sale. Kirtikar's statements are denied by the Defendants' witnesses. But taking them at their best, they seem to their Lordships far short of such unequivocal notice as ought, they think, to have been given in the case of a Court-sale.

Their Lordships think that the Plaintiff fails in his case. The result is that, inasmuch as their Lordships have already held that the Appellants have not purchased plots Pot Numbers 2, 3, 4 and 5, and have no *locus standi* to resist the Plaintiff's claim in respect of those plots, but that, on the other hand, they have made out their claim to retain plot Municipal Number 139, the decree for specific performance cannot stand, and the appeal must be allowed; but the first Respondent should have liberty to apply in the High Court, if so advised, to have a decree for specific performance in respect of plots Pot Numbers 2, 3, 4 and 5 upon such terms as to the Court may seem just. The order of the Subordinate Judge that Adam Haji Jacob should repay Motiwalla Rs. 1,000 should stand. The appeal from the decree of the High Court in Adam Haji Jacob's appeal to the High Court should be dismissed. The Appellants will have the costs of the consolidated appeals. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Ashurst Morris Crisp & Co.* for the Respondents.

G. D. M.

[TESTAMENTARY AND INTESTATE JURISDICTION.]

BUCKLAND, J. 1924, 25, February. | In the goods of EFFIE JESSIE CAROLINE MIRANDA, deceased.

Will—Married woman governed by Indian Succession Act, under twenty-one, for whom a guardian has been appointed by Court, if may dispose of property by Will—Indian Succession Act (X of 1865), secs. 3 and 46 and Indian Majority Act (IX of 1875), sec. 3, considered.

A married woman governed by the Indian Succession Act of whose person and property a guardian has been appointed by the Court and who has not attained the age of 21 years cannot dispose of her property by Will.

The facts of the case will appear from the following note submitted by the Registrar in Insolvency, Mr. S. C. Mitra, to Mr. Justice Buckland, and dated the 19th February 1924:—

"This is an application for grant of probate. The deceased was a Christian British subject and the case is governed by the Indian Succession Act.

By an order of this Court, dated the 28th day of January 1920, the mother of the deceased was appointed the guardian of her person and property. (Flag P).

By an order of this Court of the 21st day of April 1920 the former order, so far as it constituted the mother of the deceased as the guardian of her property, was vacated and the Official Trustee of Bengal was appointed Trustee to hold certain funds belonging to the deceased as "trustee" and to make same over to her on the 21st day of February 1924 when she was to have attained the age of 21 years. (Flag Q).

In the goods of EFFIE JESSIE CAROLINE MIRANDA.

The deceased died before attaining the age of 21 years, *viz.*, on the 29th day of October 1923 and prior to her death, *viz.*, on the 28th October 1923 she executed the Will of which probate is sought and was at the date of the execution of the Will of the age of 20 years and 8 months.

The mother of the deceased who had been appointed her guardian died on the 1st day of June 1923.

The question for your Lordship to consider is whether the deceased should be considered an adult at the date of the execution of the Will. It will be noticed that under sec. 3 of the Succession Act a minor is a person "who has not completed the age of 18 years." This definition differs from that of a "minor" given in sec. 3 in Probate and Administration Act which includes persons governed by the Indian Majority Act who have not attained the age of 21 years.

If your Lordship be of opinion that in the present case the testatrix was a minor within the meaning of sec. 46 of the Succession Act, then we can only grant Letters of Administration to her estate. If on the contrary your Lordship holds, in view of the definition of minor in sec. 3 of the Act, that she was an adult at the date of the execution of the Will, then probate can issue.

Another point for your Lordship's consideration is whether before deciding this question, you would direct special citations to be issued to the executor and beneficiaries under the Will and also to the next of kin, so that the validity of the Will may be decided by the Court in the presence of all the parties interested.

It will be noticed that if the Will is held to be operative, the property would go in a different proportion and to persons other than those who would succeed to the estate as in a case of intestacy. (Flag O).

The papers are submitted for orders. Three-fourths goes to the husband who is the executor and the daughter who is an infant of 1 year 9 months, gets the remaining one-fourth."

On 20th February 1914, Buckland, J., made the following order :—

"Let special citations issue to the applicant, and the infant daughter of the deceased, returnable in Chamber on Monday next. I appoint Mr. Maurice Remfry to be guardian *ad litem* of the infant for the purpose of this application."

The matter was set down on the list for argument in Chamber before Buckland, J.

Mr. T. Ameer Ali for the Executor.

Mr. Mehta for Maurice Remfry, guardian *ad litem* of the infant daughter of the deceased.

Cites *Jagon Ram* v. *Mahadeo Prasad* (1).

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—The question which arises in this matter is whether a married woman who died before attaining the age of 21 years and of whose person and property a guardian has been appointed is competent to make a Will or whether she is a minor and therefore not within sec. 46 of the Indian Succession Act which says what persons may dispose of property by Will.

The point is governed by sec. 3 of the Majority Act which in these circumstances postpones majority until the age of 21 years and does so notwithstanding anything contained in the Indian Succession Act.

The point is settled by authority, and from the section of the Majority Act itself it is clear that sec. 3 of the Indian Succession Act which states that a minor is a person who has not completed the age of

(1) I. L. R. 36 Cal. 768 (1909).

In the goods of EFFIE JESSIE CAROLINE MIRANDA.

18 years has no application to the circumstances of this case.

The only other point which has been submitted for my consideration is based upon Exp. 1. sec. 46 of the Indian Succession Act which provides that a married woman may dispose by Will of any property which she could alienate by her own act during her life.

This introduces an aspect of the matter which is not covered by authority, but I do not think that what is stated by way of explanation only can affect the provisions of positive law, nor, if it could, that this explanation is intended to affect the status of a person to whom the Acts with the resulting consequences to which I have already referred, apply.

In these circumstances I must hold that the deceased was a minor and could not dispose of her property by Will and it therefore follows that she died intestate.

Letters of Administration as on an intestacy may issue to the applicant, her husband, on his furnishing security in the usual way. Costs of this matter will be paid by the Administrator out of the estate as between attorney and client. I certify for Counsel.

Mr. G. C. Moses, Solicitor for the Applicant.

Messrs. Fox & Mondal, Solicitors for the guardian *ad litem* of the infant daughter of the deceased.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 2601 TO 2620 OF 1920.

CHATTERJEA, J.
PANTON, J.
1923,
Heard, 2, July.
Judgment, 10, July.

BIJOY CHAND MAHATAB, Plaintiff, Appellant,
v.
AKHIL BHUIA, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 50 (2), 102—Tenancies wholly or in part **hajabadi**—***Custom allowing remission or abatement in respect of*** **hajabadi** *lands in years of flood—Tenancies, if held at uniform rent—Presumption of permanency.*

The presumption of permanency under sec. 50, cl. (2), of the Bengal Tenancy Act does not apply to tenancies which being wholly or in part hajabadi, *the tenants, according to custom, in years in which there is a flood, get an entire remission of the rent where the land of the tenancy is wholly* hajabadi *or an abatement with respect to the* hajabadi *lands in respect of tenancies which are partly* hajabadi *and partly raiyati. It cannot be said in respect of such tenancies that a uniform rent or rate of rent is payable, when it is a case not of the landlord not realising the same rent in years of flood but one in which he cannot in view of the custom realise it.*

RADHAGOBINDA ROY *v.* KYAMATOOLYA TALUKDAR (1) *distinguished.*

This was an appeal preferred on the 16th of November 1920 against the decree of K. K. Sen, Esq., 2nd Additional Special Judge of Zillah Midnapur, dated the 26th July 1920, affirming the decree of Babu Akhoy Kumar Mukherjee, Assistant Settlement Officer of that District, dated the 14th of April 1919.

The facts of the case will appear from the judgment.

Babu Dwarkanath Chakrabarti (with

(1) 21 W. R. 401.

BIJOY CHAND MAHATAB v. AKHIL BHUIA.

him *Dr. D. N. Mitter* and *Babu Sarat Kumar Mittra*) for the Appellant.—It is found by the Courts below that the tenants Defendants did not pay the same rents during the twenty years immediately prior to the institution of the suit; on the other hand, the rents varied, portions of rents were remitted in the years of flood and hence there could be no presumption of fixity of rent under sec. 50 (2), Bengal Tenancy Act.

Mr. Jatindra Nath Sen for the Respondent.—These appeals refer to two classes of tenancies (1) purely *hajabadi* lands in respect of which tenant gets total remission of rents in years of floods, (2) partly raiyati and partly *hajabadi* tenancy in which in years of flood the tenant gets partial remission of rent, *i.e.*, to the extent of the rent shown against *hajabadi* portion. In the first class of tenancy a certain rent is payable for a certain area, in the second class of tenancy a certain rent is payable for the raiyati area and a certain rent is payable for the *hajabadi* area but the sum total of the two rents is shown in the column of rent of the record-of-rights Khatian. At the foot of the Khatian, in the column of special conditions and incidents, it is noted that in tenancies of the first class the entire rent and in a tenancies of the second class the rent for the *hajabadi* portion is remitted. Refers to sec. 102 of the Bengal Tenancy Act, cls. (*e*) and (*h*). The tenants are entitled to the benefit of the presumption of fixity of rent under sec. 50, cl. (2) inasmuch as it has been found by the two Courts that the rents have not been changed for more than 20 years prior to the suit. The tenants might not have paid, as it is found they did not do, owing to the custom prevailing there, the full rent in the years of flood but still it must be considered that the tenancies were held at a uniform rent. It is not necessary to show actual payment of rent to obtain the benefit of presumption. Refers to *Mohini Kanta* v. *Priyanath* (2) and *Narendra Lal Chowdhury* v. *Benode Behari Sadhukhan* (3). In the years of flood in spite of the custom of remission of rent, whether total or partial, as the case may be, the entire rent is payable but it is not realisable by the landlord. Refers to definition of rent in sec. 3, cl. (5). In rent receipts too the full rent is claimed by the landlord but the tenants do not actually pay the full rent as they claim the benefit of the custom and partial payment is considered as acquittance. There is nothing unlawful for the landlord to receive the full rent if the tenants so choose to pay just as a creditor may lawfully receive a debt which is not realizable by suit on the ground of limitation. The presumption of fixity of rent equally extends to the case of tenancies where a fixed sum as rent is payable and receivable but not realizable.

Lastly, the landlord is estopped from contending that the tenancy is not held at the amount of the rent which is put in the rent receipt in the column of the rent payable.

Dr. D. N. Mitter in reply.—It is not the intention of the legislature to give a tenant the benefit of fixity of rent when a remission is granted on the happening of a particular contingency.

The JUDGMENT OF THE COURT was as follows :—

These seventy appeals arise out of as many cases for settlement of fair rents under Chap. X of the Bengal Tenancy Act. In 14 of these cases the lands are entirely *hajabadi* and in the remaining 56

(2) I. L. R. 49 Cal. 661; s. c. 35 C. L. J. 309 (1922).

(3) 27 C. W. N. 740 (1923).

BIJOY CHAND MAHATAB *v.* AKHIL BHUIA.

cases the lands are described partly as *hajabadi* and partly as raiyati. With respect to the *hajabadi* lands the tenants according to a custom get an entire remission of the rent for the year in which there is a flood and the question is whether any presumption can arise under sec. 50, cl. (2) of the Bengal Tenancy Act in respect of such tenancies. Sec. 50, cl. (2) lays down that the presumption would arise if it is proved in any suit or other proceeding that a tenant and his predecessor-in-interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding. The Courts below have held that the presumption does arise.

The Plaintiff (the landlord) has appealed to this Court and relies upon the fact that as no rent is paid in respect of the purely *hajabadi* tenancies in the 14 cases nor in respect of the *hajabadi* portion of the remaining 56 cases in years of flood, there is a change in the rent and the presumption therefore does not apply to such cases. *Primâ facie* there is a variation of the rent.

It has been contended, however, on behalf of the tenants Respondents that the words "held at a rent" in sec. 50 does not mean that the rent shall be actually paid, that it is enough to show that the rent is payable. Reference is made to sec. 102 which provides that the rent payable at the time when the record-of-rights is prepared is to be recorded in the record-of-rights.

It is true that it is not necessary to prove actual payment of rent provided the tenancy is held at a uniform rent or rate of rent for 20 years before the suit. It is difficult, however, to see how it can be said that a particular rent is payable when that rent is not payable according to custom in the years of flood. To take a concrete case—a holding consists of 7 bighas, 4 bighas are described as raiyati at a rent of Rs. 16 and 3 bighas *hajabadi* at a rent of Rs. 8; in the years of flood only Rs. 16 is paid, the tenant getting a remission of the rent of the *hajabadi* portion, namely, Rs. 8. We do not see how after taking the full benefit of the remission the tenant can contend that the rent is not changed in those years.

The case of *Radhagobinda Roy* v. *Kyamatoolya Talukdar* (1) is referred to in the judgment of the Court below. But there a portion of the lands having been rendered unculturable by the overflow of a river, an abatement of rent was allowed in a lump sum upon a lump *jama*. The abatement was proportionate in respect of the quantity of lands and the abatement was held not to vary the rent so as to debar the raiyat from the benefit of the presumption under Act X of 1859. It may be observed that the lands in respect of which proportionate abatement was granted in that case ceased to belong to the holding. The abatement was granted once for all and the rent proportionate to the remaining lands continued to be paid.

In the cases before us the abatement is taken every year in which there is flood and in the illustration given above a rent of Rs. 16 only is paid in years of flood instead of Rs. 24, the rent. In cases of pure *hajabadi* tenancies no rent is paid at all in those years not because the landlord does not realise it, but according to some custom he cannot realise it. The expression "rent" is defined in the act as something lawfully payable or deliverable to the landlord for the use and occupation of the land. Under the custom the rent lawfully payable for a particular year in which there is flood is not the full rent

(1) 21 W. R. 401.

BIJOY CHAND MAHATAB *v.* AKHIL BHUIA.

but a lesser sum, in respect of the mixed tenancies. The landlord cannot sue the tenant in a Court of law for rent in respect of the *hajabadi* tenancies nor the full rent of mixed tenancies in years of flood. We do not think that sec. 50, cl. (2) was intended to apply to cases like these where under a custom a tenant gets an abatement of rent from the landlord.

The decrees of the Courts below are set aside and these cases sent back to the Court of first instance in order that that Court may settle fair rents. Costs of these appeals will abide the result. We assess the hearing fee at Rs. 70 (rupees seventy only) to be distributed equally in all the 70 cases.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2094 OF 1921.

RANKIN, J.	GAJADHAR AGARWALLA
PAGE, J.	and anr., Plaintiffs,
1923,	Appellants,
Heard, 11 and	*v.*
12, December.	SIBANANDA PRADHANI
Judgment,	and ors., Defendants,
12, December.	Respondents.

Transfer of Property Act (IV of 1882), secs. 67, 68, 98—Anomalous mortgage—Provision that if possession not given to mortgagee within the term, mortgagee may sue for the money · Possession not given—Mortgagee, if may get a decree for sale or a money decree only.

Where a mortgage provided inter alia *that the mortgagee should have immediate possession, and continue in such possession for 8 years, that he would apply the profits towards payment of the stipulated interest, that on failure to pay in the mortgage money within the said eight years the property should be sold and the mortgagee's dues recovered therefrom and that in case the mortgagor should, during the term, interfere with the mortgagee's possession the latter would have the right to bring a suit to recover the principal and interest, and it was found that possession had never been delivered by the mortgagor:*

Held *per* CURIAM.—*That this mortgage while it was not a mere usufructuary mortgage was also not a mere combination of a simple and a usufructuary mortgage, and was an anomalous mortgage within the meaning of sec. 98 of the Transfer of Property Act, so that secs. 67 and 68 of the Act did not apply to the case.*

That the document correctly construed did not entitle the mortgagee in the contingency which happened to recover a decree for sale of the property.

This was an appeal preferred on the 11th November 1921 against the decision of the District Judge, Zillah Assam Valley District at Gouhati (E. E. Stinton, Esq.), dated the 16th June 1921, reversing a decree of the Subordinate Judge of that District at Dhubri (Moulvi M. Ahmed), dated the 31st October 1919.

The facts of the case are as follows :—Plaintiffs, as sons of the original mortgagee, instituted the present suit for recovery of the mortgage money by sale of the hypothecated properties. The mortgage was an anomalous one. It provided *inter alia* (1) that the mortgagee would be put in possession of the mortgaged properties and appropriate the usufruct, after paying the landlord's rent, towards payment of interest, (2) that the mortgagor would pay up the debt within eight years and take back the properties, (3) that in case of default, the mortgagee would be entitled to recover his dues by suit, by sale of the mortgaged properties as well as other properties of the mortgagor and (4) that in case any hindrance or obstruction was offered to the possession of mortgagee, he

would be entitled forthwith to sue for and recover the amount of the bond. Plaintiffs alleged that they had not been put in possession of the mortgaged properties as agreed and were thus entitled to recover the amount of the bond by a sale of the mortgaged properties, although the due date had not expired.

The material defence taken was that a suit for sale on the basis of the mortgage bond, was not maintainable, as the due date had not expired.

The learned Munsif found all the issues in favour of the Plaintiffs and passed a preliminary decree for sale. The learned District Judge held that the suit for sale was premature. The due date not having expired the remedy given in the covenant relating to disturbance of possession was a purely personal one; hence he dismissed the Plaintiffs' suit.

The Plaintiffs appealed.

Babu Girija Prosanna Sanyal for the Appellants.—The last two covenants must be read together. It is quite clear that the parties intended that the mortgagee should have a right of sale in both the contingencies. The idea of the mortgagee having merely the right to call for the mortgage money without having the right to enforce his security is very unusual and the covenants ought not to be read in that way.

Babu Bimal Chandra Das Gupta for the Respondents.—The mortgage is an anomalous one—rights of the parties must be governed by the terms of the contract. The two covenants are entirely distinct and are meant to provide for entirely different contingencies. In case of non-payment within the due date, the mortgagee is expressly authorized to enforce his mortgage security by sale. But in case of obstruction to or disturbance of possession, he is merely authorised to call for the mortgage money immediately without waiting for expiry of the due date. This is a purely personal remedy. The language of this latter covenant is exactly similar to that used in sec. 68, cl. (c) of the Transfer of Property Act, which would apply but for the fact that this is an anomalous mortgage, and it has been held that the remedy given by that section is a personal one.

See *Hiralal* v. *Ghositu* (1), *Arunachalam* v. *Ayyavayam* (2) and *Abdul Jasalim* v. *Musstt. Rafiat* (3).

I submit that a right to enforce the security by sale cannot be imported into the latter covenant without doing violence to the language used. The suit for sale is therefore premature and has been rightly dismissed.

Babu Girija Prosanna Sanyal in reply.—The remedy given by sec. 68 is not merely a personal one—it carries with it the right of sale.

See *Linga Reddi* v. *Sama Rau* (4), *Venkatarao* v. *Mahableshwar* (5), *Kangaya Gurukal* v. *Kalimuthu* (6), *Jafar Husen* v. *Ranjit Singh* (7) and *Narpat* v. *Ram Saran* (8).

The cases cited by the Respondents were all cases of purely usufructuary mortgage. I submit where there is a covenant to pay, as is the case here, and some one of the contingencies, mentioned in sec. 68, has happened the right to sue for the mortgage money carries with it the right to enforce the security.

I further submit that having regard to the last covenant, it is quite clear that in

(1) I. L. R. 16 All. 318 (F. B.) (1894).
(2) I. L. R. 21 Mad. 476 (F. B.) (1898).
(3) 2 C. L. J. 493 (1903).
(4) I. L. R. 17 Mad. 469 (1894).
(5) I. L. R. 26 Bom. 241 (1901).
(6) I. L. R. 27 Mad 528 (F. B.) (1903).
(7) I. L. R. 21 All. 4 (1898).
(8) I. L. R. 30 All. 162 (1908).

case of disturbance of possession, the mortgage money would become immediately payable, so that the mortgagee would be entitled to sue for sale under sec. 67 of the Transfer of Property Act, this being not an anomalous mortgage but a simple mortgage usufructuary.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—This is an appeal from the decision of the learned District Judge of the Assam Valley District. The suit was brought by the mortgagees upon a mortgage which the learned Judge describes as admittedly an anomalous mortgage and, in the course of the argument yesterday, that assumption was accepted by both sides. The position is that the Plaintiffs say that their mortgagors have hindered them from getting possession of the mortgaged property and they bring their suit before the expiry of the due date of the mortgage claiming that, by reason of this wrongful conduct on the part of the mortgagors, they have a right not merely to bring a suit to recover possession of the mortgaged property, not merely to bring a suit for a money decree for principal and interest against the mortgagors but to bring a suit for the realization of the mortgage security by sale. The first two remedies they are *ex hypothesi* plainly entitled to. The sole question is whether they are entitled to the third. I confess that when I first read the judgment now under appeal, it struck me as extremely paradoxical to hold as a matter of construction that the provisions with which I am now about to deal did not imply a right not merely to obtain a money decree but to obtain the realization of the security. From the point of view of an English lawyer, there is, I think, no case in which a secured debt becomes due and payable but in spite of that fact the security is not available therefor. On consideration, however, I am satisfied that, under the Indian law, the position is very different, and the position in the case of the present mortgage is a little complex. The substance of the mortgage is this :—First of all the general description which it gives of itself is that of a Khai Khalasi or an usufructuary mortgage. That is its broadest feature. But it is not merely an usufructuary mortgage. First of all, there is a provision that the mortgagee is to apply the profits towards the satisfaction of a certain rate of interest. There is a provision then that he is to enter into possession for eight years from the date of the loan. Further, that he shall relinquish possession if, within the said eight years, he is paid off. The document then goes on to say : "On our failing to discharge the total claim for principal and interest due upon this bond, you will be entitled with the aid of the Civil Court to recover the said total amount of the said principal and interest by selling up the property mentioned in this bond as well as our other properties, immoveable and moveable." That clause occurs immediately after the clause which says that the mortgagee shall be bound to relinquish possession if within the said term of eight years the mortgagors discharge the total claim. It is perfectly plain, therefore, that the provision for enforcement by sale of the mortgaged property comes into effect only after the expiration of eight years. That matter having been dealt with, there is a later clause which says : "If during the term we create any obstruction in regard to your possession, you will be entitled forthwith to sue for the principal and interest of this bond." It is contended now that this provision to sue for principal and interest of the bond must be taken either

GAJADHAR AGARWALLA *v.* SIBANANDA PREDHANI.

to be a reference back to the previous provision which contains the power *inter alia* to realise the security or, even apart from that, it must be taken to imply a right to recover the principal and interest out of the security. It is further contended that, assuming that it does not go so far by itself, there is, by virtue of sec. 67 of the Transfer of Property Act, a provision which attaches to this right to sue the consequence which gives a right to have a sale. The first thing to observe is that this mortgage while it is not a mere usufructuary mortgage is also not a mere combination of a simple and an usufructuary mortgage. It is not what is sometimes called a simple mortgage usufructuary, but it is an anomalous mortgage within the meaning of sec. 98 of the Transfer of Property Act, that is to say, there are elements in the bargain which cannot be brought under either of those two conceptions. How far the rights of the parties in the circumstances are intended to extend must in any possible case, apart from sec. 98, be controlled by the construction of the document. Sec. 98 makes it extremely difficult in a case which is not a mere combination of recognised types to apply sec. 67 at all.' But it may be that the true construction of a document of mortgage, taken by itself, would amount very much to the same thing as is effected by sec. 67. In my judgment, the moment one finds that in the case of a pure usufructuary mortgage, the consequence of a wrongful interference by the mortgagor with the mortgagee's possession would only be that, under sec. 68, the mortgagee would become entitled to a money decree: the moment one finds that and finds that the mortgage is not a combination of a simple mortgage and an usufructuary mortgage, one must examine the document carefully to see whether one has any right to attach by implication the further consequence of the right to realise the security. In the present case, the phrase "to sue for principal and interest under the bond" seems to me very much the same thing as the language of sec. 68. As a matter of construction, I do not think it refers to the previous clause which is a somewhat elaborate clause and it seems to me that in a case where the parties may or may not have intended the rights of the mortgagee to reach up to this point or to that point, we ought to take the ordinary meaning of the document without giving in a "wide" or "benevolent" construction. After all, it is in the nature of a penalty or stringent provision. "If during the term we create any obstruction" a certain right is given and that right being stated there "to sue for the principal and interest under the bond," it seems to me wrong to extend it by implication unless the implication be very plain. It is quite true that in the case of a mortgage which is a mere combination of a simple mortgage and an usufructuary mortgage, the right to sue under sec. 68 would give a right to sell under sec. 67. That is because the statute has elaborately defined the contract in that case. The moment one finds that the mortgage is an anomalous mortgage and that it purports to deal with the question now in point, it is unsafe, to say the least, to rely upon sec. 67 at all. For these reasons, although the question is not easy, I think that this appeal fails and, inspite of the very able argument we have had from the learned vakil for the Appellants, I am of opinion that it must be dismissed with costs.

PAGE, J.—I entirely agree. The document in question in this appeal is obviously and admittedly an anomalous mortgage within the meaning of that term as used in sec. 98 of the Transfer of Property

Act. Under that section, in the case of an anomalous mortgage, "the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed and, so far as such contract does not extend, by local usage." The learned vakil who appeared and skilfully argued the case on behalf of the Appellants urged that there is no provision under sec. 98, and there is no authority to be discovered in the Indian Law Reports, to the effect that the rights and liabilities of the parties to an anomalous mortgage shall be determined only by the terms of the mortgage deed, and so far as such terms do not extend by local usage. In my opinion, the language of sec. 98 is clear and precise, and it is incumbent upon us to consider what are the rights and liabilities of the parties having regard to the provisions of the deed of mortgage. Now, I will refer to two provisions only. The first is this: "On our failing to discharge the total claim for principal and interest due upon this bond, you will be entitled with the aid of the Civil Court to recover the said total amount of the said principal and interest by selling up the property mentioned in this bond as well as our other properties, immoveable and moveable," and, later on, there is found the other provision. "if during the term we create any obstruction or interference of any kind whatsoever in regard to your possession, you will be entitled forthwith to sue for the principal and interest of this bond." Now, I agree with my learned brother in holding as a matter of construction that the latter clause creates special provisions to meet a special contingency, and that this clause is not incidental or referable to the earlier clause which gives the mortgagee a right to sell the mortgaged property on the failure of the mortgagor to discharge the total claim for principal and interest due upon the bond. Under the clause in question, the remedy which is given to the mortgagee is the right forthwith to sue for the principal and interest of the deed; but, on the contingency arising, no power is given to sell the mortgaged property. Therefore, the conclusion at which I arrive is that as there is no power of sale given to the mortgagee under this clause or by local usage, having regard to the terms of sec. 98, no such power is to be implied *aliunde*, and the appeal must be dismissed.

H. C. S.

[CRIMINAL APPELLATE JURISDICTION.]

REF. No. 41 OF 1923
AND
APP. No. 384 OF 1923.

RICHARDSON, J. SUHRAWARDY, J. 1923, 8, August.	THE KING-EMPEROR v. JAMALDI FAKIR and ors.

Evidence Act (I of 1872), sec. 133, conviction on uncorroborated testimony of an accomplice, how far legal—Criminal Procedure Code (Act V of 1898), sec. 307, High Court's powers in a reference under.

There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice and, in the discretion of the Judge, to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence.

R. v. BASKERVILLE (1) *referred to.*

Where the approver's account of the occurrence does not bear on the face of it the impress of truth in all its details, it is

(1) L. R. [1916] 2 K. B. 658.

THE KING-EMPEROR *v.* JAMALDI FAKIR.

common prudence to say that an unprincipled accomplice should not be implicitly trusted and that it is dangerous to convict any person on his uncorroborated testimony.

In a reference under sec. 307, Cr. P. C., the duty of the High Court is to consider the evidence on the record as it stands, to weigh the respective opinions of the Sessions Judge and the jury and to form its own conclusions. On general principles it appears that when the process which sec. 307 directs has been carried out, and the opinions of the Judge and jury have been measured, in the result the verdict of the jury should stand unless the evidence and the opinion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed.

QUEEN *v.* SHAM BAGDI (2) *and* EMPEROR *v.* NEAMUTULLA (3) *referred to.*

This was a Reference under sec. 307, Cr. P. C., dated the 25th May 1923, made by the Sessions Judge of Pabna and Bogra (Mr. G. C. Sen), as he disagreed with the unanimous verdict of the jury.

The facts are briefly these :—Some persons were tried by the Sessions Judge of Pabna and Bogra and a jury on charges of dacoity under secs. 395 and 396 of the Indian Penal Code. The jury in some cases unanimously and in some cases by a majority found all the accused guilty of the offences charged. The learned Sessions Judge accepted the verdict in the cases of four accused whom he convicted. As regards the other accused the Judge disagreed with the verdict of the jury on the ground that as against these accused the only evidence was the uncorroborated testimony of an accomplice who had accepted a tender of pardon and was examined as a witness. His letter of reference was as follows :—

"The jury has unanimously found the accused Fote Mandal, Madhoo Pramanik and Meherali Pramanik guilty under secs. 395 and 396 of the Indian Penal Code and also found by a majority of 3 to 2 Madhoo Fakir guilty under those sections. I have agreed with and accepted the verdict of the jury so far as the accused Fote, Mosha and Meherali are concerned and verdict of the majority so far as Madhoo is concerned, convicted them of the graver offence covered by sec. 396 sentencing each of them to rigorous imprisonment of eight years.

The jury also found by a majority of 3 to 2 the other five accused, *viz.*, Jamaldi Fakir, Kofiruddin, Kudratulla, Haku Mandal, Ainulla guilty under secs. 395 and 396 of the Indian Penal Code. But as I am clearly of opinion that the verdict of the July so far as these accused are concerned is against the clear weight of evidence I have been compelled for the ends of justice to refer the cases of these five accused for orders of the Hon'ble High Court.

The case for the prosecution is that on the 7th of Falgoon at about midnight these nine accused and the approver committed a dacoity in the house of one Isharat Sarkar of Pilgunj and that in committing the dacoity murdered the said Isharat Sarkar.

The defence was a plea of not guilty. As against the five accused Jamaldi, Kudrat, Fakiruddin, Haku and Ainulla, the only evidence is the uncorroborated testimony of the approver : The circumstances of the case are not such that the approver should be believed without material corroboration. The retracted confession of Fote and Madhoo are particularly of no value as against them. Their retracted and

(2) 13 B. L. R. App. 19 (1873).
(3) 17 C. W. N. 1077 (1913).

THE KING-EMPEROR *v.* JAMALDI FAKIR.

therefore vitiated statements cannot in any view be regarded as a sufficient corroboration of the approver's evidence. I should certainly think that the evidence is not, at the best, legally sufficient for the conviction of these accused and that in any case these accused should get the benefit of doubt."

Babu Heramba Chandra Guha for the Accused.

Babu Surendra Nath Guha for the Crown.

The JUDGMENT OF THE COURT was as follows :—

RICHARDSON, J.—In this case, nine accused persons were tried by the Sessions Judge of Pabna and Bogra and a jury on charges of dacoity under secs. 395 and 396 of the Penal Code. This jury in some cases unanimously and in some cases by a majority found all the accused guilty of the offences charged.

The learned Judge accepted the verdict in the cases of four accused whom by his judgment he convicted and sentenced. In these cases there is no ground for our interference and the appeal from the convictions and sentences must be dismissed.

As regards the other five accused Jamaldi Fakir, Kafiraddi Fakir, Kudratulla Mullik, Haku Mandal and Ainulla, the learned Judge disagreed with the verdict of the jury on the ground that as against these accused the only evidence was the uncorroborated testimony of an accomplice who had accepted a tender of pardon and was examined as a witness at the trial. Being of opinion that these five men should be acquitted, the learned Judge referred their cases to the High Court under sec. 307 of the Criminal Procedure Code. Now the learned junior Government pleader appearing for the Crown has conceded that the evidence against these men is confined to that of the approver. No stolen property was found in their houses, nor is there any independent testimony which implicates or tends to implicate them individually in the commission of the offences charged.

In his letter of Reference, the learned Judge says that the evidence of the approver "is not legally sufficient for the conviction of these accused." That is not an accurate statement. It is clear, however, from the learned Judge's charge to the jury that the law on the subject was well known to him and that he explained it to the jury fully and correctly. He gave them the usual and proper warning as to the danger of acting on the uncorroborated testimony of an accomplice. He told them that the approver was an accomplice, that he was a *ganja* smoker, that he came before the jury under a promise of conditional pardon and that his interest would be to secure the conviction of the accused. But he also and rightly told the jury that a conviction even upon the evidence of the approver alone would not be illegal. There is no fault to be found with the charge. The learned Judge clearly had in mind the illustration to sec. 114 of the Evidence Act, according to which the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars; but he did not forget the express provision in sec. 133 of the Act that an accomplice shall be a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

The English law on this topic has recently been reviewed by the Court of Criminal appeal in an authoritative judgment delivered by Lord Reading, C. J. [*R.*

THE KING-EMPEROR *v.* JAMALDI FAKIR.

v. Baskerville (1)] and I think it is satisfactory to find that in a matter of this sort the law and practice in England and in India run upon precisely the same lines. Lord Reading says at page 663 of the Report: "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and, in the discretion of the Judge, to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence."

In my opinion, then it cannot be said that the learned Judge made this Reference because he misapprehended the law. Nor can the verdict of the jury be attributed to any misdirection or any failure to direct the jury, on the part of the learned Judge. It may well be that if he had accepted the verdict and the five accused had appealed, the appeal, regard being had to sec. 423 (2) of the Code, would have been unsuccessful. But the learned Judge has not accepted the verdict of the jury. On the contrary his opinion is that the verdict is erroneous and should be set aside, and the matter comes before us not under sec. 423 but under sec. 307 of the Code. Now sec. 307 lays down that, in dealing with a case submitted thereunder, the High Court "may exercise any of the powers which it may exercise on an appeal" and that "subject thereto, it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it." Our duty accordingly is to consider the evidence on the record as it stands, to weigh the respective opinions of the Sessions Judge and the jury, and then to form our own conclusion. It still remains that the verdict of the jury is first in the field and that the Code, sec. 299, makes it primarily the function of the jury "to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned" and "to decide all questions which according to law are to be deemed questions of fact." On general principles therefore it appears to me that when the process which sec. 307 directs has been carried out, and the opinions of the Judge and jury have been measured, in the result the verdict of the jury should stand unless the evidence and the opinion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed. It is sometimes thought that the expressions of learned Judges in such cases as *Queen* v. *Sham Bagdi* (2) and *Emperor* v. *Sheikh Neamutulla* (3) are not wholly reconcilable in respect of the powers of the High Court under sec. 307 or rather as to the mode in which those powers should be exercised. As each case, however, must so largely depend on its own facts, I doubt whether there is any real inconsistency. Neither the Sessions Judge nor the High Court would wish to interfere with the verdict of a jury unless in his or their opinion there were strong reasons for so doing.

In the present case I have no difficulty in holding that the verdict of the jury is unreasonable.

One incident in the occurrence was the

(1) L. R. [1916] 2 K. B. 658.

(2) 13 B. L. R. App. 19 (1873).

(3) 17 C. W. N. 1077 (1913).

THE KING-EMPEROR *v.* JAMALDI FAKIR.

brutal murder of the owner of the house attacked, Isarat Sarkar. His widow Kabiran Bewa, is, apart from the approver, Sadhu, the only eye-witness, who has been examined. She does not speak to having seen or identified any of the accused, but her evidence invites attention in two respects.

In the first place she mentions Sadhu's name in this way: "Shortly" she says, "before the dacoits left one said that my husband was still alive and that something must be done to put an end of his life; after that I heard some gurgling sound from my husband. One of the dacoits then addressing another said: 'Sadhu, this wicked woman must be tied down else she would give an alarm before we left.' On this one again caught me and another tied me with my cloth which was on me. Then the dacoits left." Sadhu's own account of the part he played is as follows:—"We went into the *bari.* I was asked to stand guard in the south-east corner of the south-facing hut and the others entered into the inner compound. Hearing some *golmal* within the house I left the place where I was and went into the *varandah* of the north-facing hut. From there I saw that a woman was in the *varandah* caught hold of by Ainulla accused and a boy. Entering the house I saw that there was a dead body lying on the floor. Jamaldi had a lighted torch in his hand. Seeing the dead body, I got frightened and sat down. Seeing me thus seated, Jamaldi asked Sadhu (sic) who the man was who was seated. Mehar said, 'Sadhu was seated.' Jamaldi on this got enraged and said why Sadhu who was deputed to stand guard came there. On this Kope who had a knife in his hand wanted to give me slaps. I then came out and stood again in my appointed place." Comparing Kabiran's evidence and Sadhu's, it will be seen that the learned Judge had grounds for suggesting to the jury that Sadhu was reluctant to admit that he played any prominent or active part in the dacoity.

The second matter to which I wish to refer is what Kabiran says about the accused Jamaldi "I know Jamaldi among the accused. He is a disciple of my father-in-law. He was indebted to us. He now and then used to come to our *bari.* My husband secured a decree against him and his brother. They tried to compromise the claim. They offered Rs. 400 or Rs. 500. My husband demanded Rs. 800. So the compromise could not be effected. That was some eight days before the occurrence. They saw my husband once or twice even after that. On the date of last visit they went away in angry mood." It appears therefore that Kabiran knew Jamaldi, and had, or thought she had, reasons for suspecting him.

Now, it is not mere pedantry, it is common prudence to say that an unprincipled rogue or ruffian like Sadhu should not be inplicitly trusted and that it is dangerous to convict any person on his uncorroborated testimony. His own account of the occurrence does not bear on the face of it the impress of truth in all its details and it is so easy in the course of such an account to slip in the name of someone against whom the injured party or his or her friends may have cause of suspicion or a grudge.

In this case, I come to the clear conclusion that the opinion of the Sessions Judge should prevail over that of the jury and that the five accused who are the subject of this Reference should be acquitted. If they are in custody, they will be released. If on bail, they will be discharged from their bailbonds.

I have already said that the appeal of

THE KING-EMPEROR *v.* JAMALDI FAKIR.

the four accused who were convicted and sentenced must be dismissed. In their cases there is independent evidence corroborative of the approver's testimony.

SUHRAWARDY, J.—I agree.

J. N. R. *Reference accepted; Accused acquitted.*

PRIVY COUNCIL

[APPEAL FROM BENGAL.]

LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1923,
Heard, 6, March.
Judgment, 6, March.

SUDHAMANI DAS and anr., Appellants,
v.
SURAT LAL DAS and ors., Respondents.

*Hindu Will—Interpretation—Gift to widow, whether absolute or for life—*Malik*—Power of sale, if cut down, when donee with power directed to offer co-heir or co-sharer an opportunity to buy at an adequate consideration before sale to stranger.*

It has been well-established that, in the absence of anything to the contrary, the words of a Will in India are to be taken as having their ordinary meaning.

The word "malik" *in itself has considerable force as indicating that the person in reference to whom it is used should take absolute interest in the properties conferred.*

When, whilst conferring on his widow the power to sell, a Hindu testator provided that the donee before selling a portion to a stranger shall give the opportunity of purchasing it at an adequate consideration to the donor's heirs and co-sharers, the power of sale was not thereby limited in any degree and the gift should be construed as an absolute gift to the widow.

This was an appeal from a judgment and decree, dated the 30th April 1920, of the High Court of Judicature at Fort William in Bengal, which affirmed a judgment and decree, dated the 12th September 1918, of the second Subordinate Judge of Dacca.

The main question for determination on the appeal was:—Whether on the true construction of the terms of his Will, dated the 11th May 1896, the testator, Banka Behari Saha Das, bequeathed the property in suit to his wife, Kamini Sundari Dasi, absolutely or only for the term of her life. The Subordinate Judge, as well as the learned Judges of the High Court, held against the Appellant and found that the widow obtained an absolute estate.

The facts which gave rise to the litigation were shortly as follows:—The abovenamed testator had a brother, Ganga Charan Saha, who was separate in estate from him. The Appellant No. 1 was the son, and the Appellant No. 2 was the widow of the testator's brother. On the 11th May 1896, the testator executed a Will which, among other things, provided as follows:—

1. . . . . I give my wife permission to adopt five sons in succession. My wife aforesaid is authorised to adopt one to five sons according to her will.

2. If my wife aforesaid should adopt a son in accordance with the authority given by me, the aforesaid son and my wife aforesaid shall succeed to the ownership of the entire properties in equal shares, vested with the power of sale and gift, and no violation of such provision shall be permitted.

* * * * *

4. If the aforesaid adopted son, or my wife aforesaid, should find it necessary to sell any of the properties left by me, they shall be entitled to sell it to a stranger if my heirs and co-sharers refuse to purchase it for an adequate consideration.

5. If no son is taken in adoption by my wife, she shall succeed to all the pro-

SUDHAMANI DAS v. SURAT LAL DAS.

perties left by me after my death, with powers of sale and gift, and my wife aforesaid shall be *malik*, and be in possession, and she shall have power of sale and gift in accordance with the provisions in para. 4.

The testator died on the 13th May 1896, and probate of the above Will was granted to the testator's widow on the 12th May 1898.

The testator's widow, Kamini Sundari Dasi, obtained possession of her husband's estate under the terms of his Will. She did not adopt any son to her husband. She made a Will on the 17th April 1907, dedicating all her moveable and immoveable properties to the deity, Banka Behari Jiu, the present Respondent. She died on or about the 8th November 1911, and probate of her Will was granted on the 12th August 1912.

The Respondents, who were the *shebaits* of the deity above-named, are in possession of the property of the said testator and his widow under the Will of the latter. On the 16th June 1917, the present suit was filed in the Court of the second Subordinate Judge of Dacca. It was alleged in the plaint "that in fact Kamini Sundari had no higher rights than that of life interest only in the eight annas share of the property described in the schedule given below, and that she had no right or power to make a transfer of it in favour of any person by Will." The Plaintiffs therefore claimed to recover possession of the property in suit according to the ordinary Dayabhaga law.

The Defendants denied the claim of the Plaintiffs and filed written statements pleading that under the terms of her husband's Will, Kamini Sundari Dasi obtained an absolute interest in the property. The second Subordinate Judge of Dacca framed a number of issues on the pleadings, but the 9th issue alone is now material, and it is in the following words:—

"Whether Kamini Sundari Dasi got absolute right to any property of her husband by the provision of the Will left by him? If so, to what extent of the property she got that right? If not, is her alleged disposition of the property binding on the Plaintiff, who is now the next heir of her husband?"

The Subordinate Judge delivered judgment on the 12th September 1918. He found the 9th issue as well as the other material issues against the Plaintiffs. Two contentions were raised before him, the first was that under the Hindu law a husband is incompetent to make an absolute gift of immoveable property to his wife; the second was that on the true construction of the terms of the testator's Will, the bequest of the property was for the term of her life only.

In the course of his judgment the Subordinate Judge observed as follows:—

"Whatever might have been the law originally, it has now been settled by authorities that Hindu law does not raise a conclusive presumption against the gift or bequest by a husband to his wife, of a higher than life interest in immoveable property, and that a Hindu husband is not legally incompetent to pass an absolute estate to his wife. . . . It is found therefore that Kamini Sundari got an absolute power of alienation over the whole of her husband's property by the Will and that consequently the disposition she made is valid and binding on the Plaintiffs, although the minor Plaintiff is now the heir of her husband. The Plaintiffs are not entitled to any relief on the above findings."

In the result the Subordinate Judge made a decree dismissing the Plaintiff's

SUDHAMANI DAS *v.* SURAT LAL DAS.

suit with costs, and from that decree the Plaintiffs appealed to the High Court of Judicature at Fort William in Bengal. The appeal was heard by Richardson and Chaudhuri, JJ., who delivered separate judgments on the 30th April 1920.

The High Court affirmed the view taken by the said Subordinate Judge.

Mr. Justice Richardson said as follows :—

"Speaking for myself, I can conceive of no language which would have more clearly indicated the intention of the testator, that his widow should take an absolute estate. I entirely recognise and appreciate the fact that ordinarily a Hindu leaving property to his widow to be enjoyed by her after his death, would desire that the widow should take the usual widow's estate, so that the property should not go out of the testator's family. But it is too late to contend that, if the husband's devise in terms confers upon the widow an absolute estate, even then the widow can only take the limited widow's estate. The law has been otherwise, at any rate, since 1872, when the case of *Prosanna Koomar Ghose* v. *Tarrucknath Sarkar* (1) was decided."

* * * * *

"The right which the testator purported to give to the heirs and co-sharers was a mere right of pre-emption. I agree entirely with the conclusion arrived at by the learned Subordinate Judge and generally for the reasons which he has stated in his judgment."

Mr. Justice Chaudhuri concluded his judgment as follows :—

"With regard to the use of the word '*malik*,' I may refer to the case of *Surjamoni* v. *Rabi Nath Ojha* (2), where their Lordships of the Privy Council say: 'The word *malik* imports full proprietary rights unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for that purpose.' We think that the words used here are stronger than the word *malik*. The same words were used when the gift was made to the son, and that also indicates that an absolute estate was being given to the wife. I agree that the appeal should be dismissed."

The High Court therefore made a decree dismissing the appeal of the Plaintiffs with costs, and from that decree the Appellants appealed to His Majesty in Council.

Mr. L. M. Parikh for the Appellants.—The wife was only given a limited estate as is shown by cl. 4 of the Will which specifically limits her power of sale.

Although the word "*malik*" frequently implies full proprietary rights, those rights may be limited by the context.

Sasiman Chowdhurain v. *Shib Narayan Chowdhury* (3).

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—The only question arising in this case is the proper construction of the Will, dated the 11th May 1896, of the testator Banka Behari Saha Das. He left a widow and a brother, who has since died, and is represented by his son, who if the testator's widow was only entitled to a life estate would be entitled to the property.

It has been well-established that in

(1) 10 B. L. R. 267 (1873).

(2) L. R. 35 I. A. 17: s. c. I. L. R. 30 All. 84; 12 C. W. N. 231 (1907).

(3) L. R. 49 I.A. 25, 35: s. c. 26 C. W. N. 425 (1921).

the absence of anything to the contrary, the words of a Will—in India—are to be taken as having their ordinary meaning. It appears to their Lordships that nothing could be clearer than the following provisions of this Will. At the end of para. 1 the testator says :—

"I give my wife permission to adopt five sons in succession. My wife aforesaid is authorised to adopt one to five sons according to her will." [Para. 2 commences]: "If my wife aforesaid should adopt a son in accordance with the authority given by me, the aforesaid adopted son and my wife aforesaid shall succeed to the ownership of the entire properties in equal shares, vested with the power of sale and gift, and no violation of such provision shall be permitted."

Therefore, if there was an adopted son, no stronger words could be used to confer upon the widow the absolute right and interest in one-half, and on the adopted son the absolute right and interest in the other half of the property.

This is followed by a provision about their living together in the ancestral home :—

"and in the event of disagreement between my adopted son and my wife, my estate shall be divided equally among my adopted son and my wife aforesaid, and after my death, my wife aforesaid shall take out probate of this Will, and when the adopted son attains to the age of twenty-one, my wife aforesaid shall make over his estate to him."

Then paragraph No. 4 provides as follows :—

"If the aforesaid adopted son, or my wife aforesaid, should find it necessary to sell any of the properties left by me, they shall be entitled to sell it to a stranger if my heirs and co-sharers refuse to purchase it for an adequate consideration."

And the last paragraph runs :—

"If no son is taken in adoption by my wife [which is the event which has occurred], she shall succeed to all the properties left by me after my death, with powers of sale and gift, and my wife aforesaid shall be *malik*, and be in possession, and she shall have power of sale and gift in accordance with the provisions in para. 4."

In every one of these provisions it is therefore clear that the testator's intention was to give the absolute property to the wife—either in the whole of the property, or if there was an adopted son, in one-half of the property. As was pointed out in the Court below, the word "*malik*" in itself has considerable force as indicating that the person in reference to whom it is used should take absolute interest in the properties conferred.

The Appellants' argument which is based on the provisions of para. 4 is fallacious. What para. 4 says is this :—

"If the aforesaid adopted son, or my wife aforesaid, should find it necessary to sell any of the properties left by me, they shall be entitled to sell it to a stranger if my heirs and co-sharers refuse to purchase it for an adequate consideration."

This only means that before selling a portion to a stranger, which the widow has perfect right to do, she shall offer it —or give the opportunity of purchasing it at an adequate consideration—to the co-heirs. That by no means limits her power of sale in any degree, and it appears to their Lordships that the decision appealed from was right.

This appeal must therefore be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors : *Messrs. Downer & Johnson* for the Appellants.

Solicitors : *Messrs. Barrow Rogers & Nevill* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD PHILLIMORE.
LORD CARSON.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
LORD SALVESEN.
1922,
Heard, 13, November.
Judgment,
20, December.

BIBI AKHTARI BEGAM,
Appellant,
v.
DILJAN ALI,
Respondent.

Mahomedan (Shiah) Law—**Wakfnama**, *interpretation of—Clause providing for reverter to donor on failure of heir in the line of the* mutwalli—"*Heir,*" *meaning of—Disqualification of immediate heir, if bars next heir.*

A wakfnama *executed by a Shiah Mahammadan provided that only in the event of no heir of the* mutwalli *and naib* mutwalli *being found fit to manage the* wakf *property, the selection is to be made of a competent person from among the heirs of the* wakif. *A daughter of a deceased* mutwalli *who as his next heir would have succeeded to the* tauliat *was found to be* non compos mentis, *whereupon his grand-daughter claimed to succeed but was opposed by the heir of the* wakif:

Held—*That the provision meant that so long as the deceased* mutwalli *left a relation competent to inherit to him and otherwise qualified to administer the* wakf, *the office of* mutwalli *would not revert to the dedicator's heirs.*

Under Shiah law, daughter's children and descendants are not excluded from inheritance in favour of agnatic collaterals, nor does a disqualifying cause which excludes the direct heir from taking the inheritance form a bar under the Mahommadan law, to the succession of the next heir, the heir presumptive.

This was an appeal from the judgment of the High Court at Patna, dated the 5th March 1919, reversing the judgment of the Subordinate Judge, first Court of Bhagalpur, dated the 6th December 1916.

The principal point for determination was as to who was to succeed to the *mutwalliship* of a *wakf* in terms of a *wakfnama*, and as to what is included in the word "waris" according to the Mahammadan law.

On or about 27th March 1857, one Bibi Peary Begum executed a deed of endowment, which she revoked and subsequently executed a *tauliatnama wakfnama* of all her properties on or about 23rd August 1868. The said lady had adopted Mehdi and Tasaduk Husain, whom she made *mutwallis* in the said deed of *wakf*. On her decease in 1873, a dispute arose, one Imam Bux claiming to be Peary's step-brother, alleging to be entitled to all the properties and the *wakf* to be invalid. A compromise was entered into by which Peary's *wakfnama* was declared of no effect and the properties were divided into certain shares, the said Mehdi and Tasaduk receiving 7 annas, while 5 annas share (one-third of Peary's property) was resettled as *wakf*. The deed of *wakf* is dated 5th May 1874. The said Mehdi and Tasaduk were, as before, appointed *mutwallis* of mosque and Khankah and Imambara of Shah Mohammed Sadik Jafri, respectively. In accordance with the wishes of Peary, the said *wakfnama* of Peary was, it appears, treated as Will, and the said Mehdi and Tasaduk were allowed to remain *mutwallis*. Mehdi was empowered to appoint his naib or assistant *mutwalli* and that in case of certain eventualities, one of his "waris" was to succeed him as *mutwalli*. Mehdi died on 2nd January 1876, and was succeeded by his widow Umda Begum, on whose decease on 18th May 1912, a question arose as to who would succeed her. She left a daughter Mohamdi whose daughters

BIBI AKHTARI BEGAM v. DILJAN ALI.

Asghari and Akhtari claimed the *mutwalliship;* of these Akhtari was regarded as the most competent, and the gentry of Bhagalpur, both Shiahs and Sunnis, elected her as *mutwalli.* A Will was also made in her favour by Umda. In the mutation proceedings which followed, Akhtari Begam was declared as rightful person to succeed as *mutwalli.* The Respondent thereupon instituted the present suit.

In the plaint, the circumstances leading up to the present litigation were set forth. It was pleaded that as Umda's daughter Mohamdi was a lunatic, her daughter Akhtari was not the "waris" of Umda, and therefore she could not succeed. It was also alleged that Akhtari was not competent enough to succeed.

Written statement was filed by Akhtari Begam who traversed all the material points in the said plaint and alleged as a matter of Mahommadan law the term "waris" included all persons who were likely to succeed, which term included both "waris kariba" and "baida" (next and remote waris), ascendants as well as descendants, that it was a genuine term as has been laid down by jurists of recognised authority of both the Sunni and Shiah schools; that the intention of the *wakif* was to regard the term of waris in its generic sense; that in consequence she was the proper person to succeed.

On these pleadings some 11 issues were framed, of which the following are material :—

(1) Is the Plaintiff entitled to be the *mutwalli* of the Masjid and Khankah of Takia Shah Mohammed Sadik Jafri, at Gola Ghat, in the town of Bhagalpur, in the place of Bibi Umda Begum, deceased, under the terms of *wakfnama*, dated the 5th May 1874, executed by Imam Bux?

(2) Is the Defendant a "waris" of Umda Begum within the meaning of the word as used in the *wakfnàma.*

The learned Subordinate Judge, after recording evidence both oral and documentary adduced by parties, delivered judgment on 6th December 1916. He held that the word "waris" included all those who were likely to succeed to the *mutwalli;* that the word "waris" in the sense of law had no meaning in case of dismissal of the *mutwalli* in certain eventuality; that the intention of the maker of the *wakf* was also to use the word "waris" as used in the deed according to the Mohammadan law. In the result he decided in favour of the Appellant as entitled to succeed as *mutwalli.*

Being dissatisfied with the said judgment of the Subordinate Judge, the Respondent appealed to the High Court.

On 5th March 1919, the High Court delivered its judgment. It held that the word "waris" was used in its primary and ordinary meaning, that of "legal heir," and that therefore Akhtari was not the legal heir of Umda. It did not, however, apply the principles of the Mahommadan law to the benefaction which was purely Mahommadan. It allowed the appeal.

The Appellant being aggrieved by the said judgment of the High Court, obtained leave to appeal to His Majesty in Council on 25th November 1919.

Messrs. DeGruyther, K. C. and *A. Majid* for the Appellant.—The question at issue turns on the construction of the *wakfnama.*

The word "waris" means any person in a line of succession who could possibly succeed. The rule of succession here was created by the deed.

BIBI AKHTARI BEGAM *v*. DILJAN ALI.

They referred to *Md. Kamil* v. *Imtiaz Fatima* (1).

Roland Wilson's Anglo-Mohammadan Law, sec. 272.

Bayley's Digest of Mohammadan Law, pp. 261 and 324.

Mr. Hyam for the Respondent.—The meaning of the word "heir" depends on the context, it may mean either the legal heir or lineal descendant, but here it is clearly confined to the person entitled to take in direct succession to the deceased *mutwalli* and failing such direct heir there is a reversion to the dedicator or his heirs. *Arumugam Pillai* v. *Vijayammal* (2).

Mr. DeGruyther, K. C. replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The question for determination in this appeal lies within a very small compass, and turns upon the construction of the word waris or "heir" used in a *wakfnama* or deed of dedication, executed by one Mir Imam Bux on the 5th May 1874. It appears that Imam Bux had a step-sister, Bibi Peary Begum, who died in 1873. She left no heir entitled under the Mahammadan Law to her inheritance, excepting the half-brother Imam Bux. Peary Begum appears to have brought up as foster sons two boys named respectively Mian Mehdi Husain and Mian Tasaduk Husain; and on the death of Peary Begum disputes arose between Imam Bux and these two young men respecting the property left by her. These disputes were compromised, and on the 5th May 1874, Imam Bux, as owner of the property left by Peary Begum, executed the *wakfnama* on which the present suit is brought. The parties are governed by the Shiah (Imamia) Law.

By this document he dedicated a part of the property to various religious purposes, including a mosque and a Khankah, and appointed Mehdi Husain to be the *mutwalli* or curator thereof. He similarly dedicated another part of the property to identical objects, and appointed Tasaduk Husain to be the *mutwalli* of this *wakf*. He also appointed his own son Syed Amjad Ali as naib or deputy *mutwalli*. The provision relating to the management of the two *wakfs* is as follows :—

"The management, including the collection of the entire *wakf* estate, the distribution of the allowances to the persons receiving the same, both in perpetuity and for life, the appointment and dismissal of servants, and the payment of Government revenue, shall be made in consultation with all the three persons, *viz.*, the two *mutwallis* and the naib *mutwalli* named above. The *mutwalli* Syed Mehdi Husian shall be at liberty to appoint on his own authority, and at any time he pleases, a competent person as his assistant *mutwalli* for the efficient management of the affairs of the *tauliat*."

Regarding the application of the income of the *wakf* Imam Bux made the following provision :—

"All the three persons together will, from the savings of the *wakf* property, continue to pay the allowance for the maintenance of all persons named herein below, *viz.*, those for whom it is fixed in perpetuity, generation after generation, and those for whom it is fixed for life only—those for whom the allowance is fixed to be paid for ever, shall continue to get it from the above income as long as their lives continue while those for whom it (the allowance) is fixed for life only shall get it until their death. Out of the savings of the income of the *wakf* estate Syed Mehdi Husain, the *mutwalli* of the Masjid and the Khankah at Bhagalpur, shall receive an allowance of Rs. 50 per mensem; Syed Tasaduk Husain, the *mutwalli* of the Imambara at Bhagalpur, the

(1) L. R. 36 I. A. 210: s. c. 14 C. W. N 59 (1909).
(2) I. L. R. 4 Mad. 338 (1881).

BIBI AKHTARI BEGAM *v.* DILJAN ALI.

Masjid at Mohanpur, and the Imambaras at Pirpainti. etc., mentioned above, an allowance of Rs. 20 per mensem; and Syed Amjad Ali, the naib *mutwalli*, an allowance of Rs. 10 per mensem, for the efficient discharge of their duties as *mutwallis* and naib *mutwalli*, and for management of the endowment properties."

Mehdi Husain died in 1876, and on his death his widow Umda Begum succeeded to the *tauliat* or governance of the *wakf* that had been entrusted to him under the *wakfnama*. Umda Begum died on the 15th May 1912, survived by a daughter named Mohamdi Begum and a grand-daughter, the present Appellant. In the ordinary course and in accordance with the provisions of the *wakfnama*, the daughter would be entitled to the *tauliat*, but she was found to be *non compos mentis*. The grand-daughter thereupon claimed the office of *mutwalli*. The Plaintiff Diljan, a son of Imam Bux, disputed her title, alleging that as Mohamdi Begum, the direct heir to Umda Begum, was insane and incompetent to be the *mutwalli*, the *tauliat* had passed to the line of the dedicator. The Revenue Courts accepted Akhtari Begam's claim, and she obtained possession of the *wakf* estate held by her grand-father.

The present suit to oust the Defendant from the governance of the *wakf* was instituted by Diljan on the 13th March 1914, in the Court of the Subordinate Judge of Bhagalpur. The Defendant Akhtari Begam denied the Plaintiff's title, and asserted that as the next in the line of descent, according to the Shiah (Imamia) Law, owing to her mother's incompetency, she was entitled to the *tauliat* under the *wakfnama*.

The Subordinate Judge, after a careful examination of the language and the provisions of the *wakfnama*, held against the Plaintiff's claim and dismissed the suit. He summed up his finding in the following words:—

"There cannot be any doubt that the Defendant is a competent person to hold the post of a *mutwalli*. She is a literate woman, and she can understand accounts. Moreover, when her grand-mother, Umda Begam, who was illiterate, could be considered competent for that, the Defendant is much more competent. She lives at Bhagalpur for the most part, and she can always have the help of her husband. This issue, *viz.*, the issue as to competency, is found in Defendant's favour."

On appeal to the Patna High Court by the Plantiff, the learned Judges took a wholly contrary veiw. They thought that the word "heir" used in the *wakfnama* applied strictly to the person entitled to take in direct succession to the deceased *mutwalli*. In coming to this conclusion they seem to have placed somewhat undue reliance on the words "waris sharye" or "legal heir," used in another part of the document. They thought the expression "legal heir" indicated that the *wâkif* meant that the *tauliat* should go to the direct heir of the deceased *mutwalli*, and if such heir was incompetent it was to revert to the dedicator or his heirs. They accordingly held that on the death of Umda Begum, her daughter being of unsound mind, the descent in the line of Mehdi Husain ceased, and the *wakf* reverted to Imam Bux's heirs, and they accordingly reversed the order of the Subordinate Judge and made a decree in favour of the Plaintiff Diljan. In this connection it should be noted that under the Shiah Law daughter's children and decendants are not excluded from inheritance in favour of agnatic collaterals; nor does a disqualifying cause which excludes the direct heir from taking the inheritance form a bar, under the Mahommedan Law, to the succession of the next heir, the heir

BIBI AKHTARI BEGAM v. DILJAN ALI.

presumptive. The grand-daughter is thus as much a "legal heir" under the Shiah Law as the daughter. Their Lordships are of opinion that the learned Judges of the High Court, in coming to the conclusion at which they arrived, overlooked the passage in which Imam Bux laid down the rule providing for the succession to the office of *mutwalli*. That rule is in these terms:—

"In the event of slackness, negligence or discovery of misappropriation on their part, I or my heirs shall be at liberty to dispense with the services of the said *mutwalli*, and in case of death or dismissal of any *mutwalli*, if any heir belonging to the Imamia sect and competent enough to administer the *wakf* property be not left to the *mutwalli*, the naib *mutwalli* shall succeed him as *mutwalli* and a naib *mutwalli* shall be appointed from among his (naib *mutwalli's*) heirs. In the event of no heir of the *mutwallis* and the naib *mutwalli* being found fit to manage the *wakf* property, selection shall be made of a competent person from among the heirs of me, the executant. If, God forbid, no heir of mine near or remote be found, the authorities for the time being shall be competent to appoint a suitable person belonging to the Imamia sect to administer the *wakf* property mentioned above. But so long as the *mutwallis* and the naib *mutwalli* aforesaid shall manage the affairs of the *wakf* estate faithfully and efficiently, no one shall question (the tenure of the offices by the *mutwallis*) or be competent to complain (urge their dismissal, nor shall they be dismissed) unless the complaint is substantiated before the authorities for the time being."

It will be seen from the above that, in the event of "slackness, negligence or discovery of misappropriation on the part of the *mutwallis*," power is reserved to Imam Bux and his heirs to dispense with their services. At the same time it is distinctly provided that "in case of death or dismissal" (for causes already recited) of any dismissed *mutwalli*, the succession to the office should go to the heir of the deceased; and that when no heir "belonging to the Imamia sect, and competent enough to administer the *wakf*," is left to the *mutwalli*, that the naib *mutwalli* shall succeed him as *mutwalli*, and a naib *mutwalli* shall be appointed from among his (the naib *mutwalli's*) heirs. It is only in the event of no heir of the *mutwalli* and the naib *mutwalli* being found fit to manage the *wakf* property, that selection is to be made of a competent person from among the heirs to the *wakif*.

In their Lordships' opinion this passage in the *wakfnama* clearly shows that so long as the deceased *mutwalli* leaves a relation competent to inherit to him and otherwise qualified to administer the *wakf*, the office of *mutwalli* cannot revert to the dedicator's heirs.

The English cases referred to by the learned Judges of the High Court have, in their Lordships' opinion, no bearing on the present controversy.

The Subordinate Judge in this case has found clearly on the evidence that the Defendant was competent to carry on the administration, and their Lordships do not find anything in the record to suggest to the contrary. They think, therefore, that the judgment and decree of the High Court should be reversed, and that of the Subordinate Judge restored, with costs in the High Court and of this appeal and they will humbly advise His Majesty accordingly.

Solicitor: *Mr. Edward Delgado* for the Appellant.

Solicitors: *Messrs. Barrow Rogers & Nevill* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 273 OF 1920.

MOOKERJEE, J. NEWBOULD, J. 1923. 17, April.	KASHI CHANDRA CHAKRAVARTI, Appellant, *v.* PRIYANATH BAKSHI and ors.. Respondents.

Mortgage—Compromise decree, construction of—Money decree or mortgage decree—Civil Procedure Code (Act V of 1908), Or. 34, r. 14, if applies.

In a suit to recover on a mortgage bond, the decree in terms of a petition of compromise was that "... the Plaintiff will be entitled to realise the whole amount .... by taking out execution: the properties mortgaged shall remain charged under the mortgage ...."

Upon the decree-holder's application for an order absolute:

Held—*That it was not a money decree but a mortgage decree which could be executed against the mortgaged properties without a fresh suit and that Or. 34, r. 14 of the Civil Procedure Code was not applicable to the case.*

HEM BAN *v.* BEHARI GIR (4), GOBINDA CHANDRA PAL *v.* KAILASH CHANDRA PAL (6) *and other cases distinguished.*

ABIR PARAMANIK *v.* JAHAR MAHMUD MONDAL (7) *and* AMBALAL BAPUBHAI *v.* NARAYANA TATYABA (8) *followed.*

Consent decree of this description being valid as between the parties, an order absolute should be obtained on notice before execution.

ASHUTOSH SIKDAR *v.* BEHARILAL KIRTANIA (9), SYAM MANDAL *v.* SATINATH BANERJEE (13) *and other cases referred to.*

(4) I. L. R. 28 All. 55 (1905).
(6) I. L. R. 45 Cal. 530 (1917).
(7) I. L. R. 34 Cal. 886: s. c. 11 C. W. N. 879; 6 C. L. J. 95 (1907).
(8) I. L. R. 43 Bom. 631 (1919).
(9) I. L. R. 35 Cal. 61: s. c. 11 C. W. N. 1011 (F. B.) (1907).
(13) 24 C. L. J. 523 (1916).

This was an appeal preferred on the 20th of February 1920 against the decree of Babu Chandra Bhusan Banerjee, Subordinate Judge, 2nd Court of Zilla Tipperah, dated the 6th of April 1918.

The facts and arguments will appear from the judgment.

Babus Mahendranath Ray, Bepin Chandra Bosu and *Radhikaranjan Guha* for the Appellant.

Babus Gunoda Charan Sen and *Jatis Chandra Guha* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal is directed against an order absolute made on the basis of a consent decree in a mortgage suit.

On the 5th April 1916, the Plaintiffs-Respondents instituted a suit against the Defendant-Appellant to enforce a mortgage security. On the 2nd February 1917 a decree was made by consent of parties. The decree stated that the decree-holders would be entitled to receive from the judgment-debtor Rs. 4,000 on account of principal and Rs. 400 on account of costs. The aggregate sum of Rs. 4,400 was to be paid by annual instalments which were specified in the schedule. The decree then proceeded as follows: "The Defendants will pay to the Plaintiffs Rs. 4,400 on account of the claim and costs as per instalments mentioned below. If default is made in payment of any one instalment, the Plaintiffs will then be entitled to realise the whole amount due for all instalments at one and the same time by taking out execution. The properties mortgaged shall remain charged under the mortgage until the amount due for the last instalment has been paid." It is not disputed that nothing was paid under the decree. The result was that on the 12th October 1917 the Plaintiffs decree-holders applied for

KASHI CHANDRA CHAKRAVARTI *v.* PRIYANATH BAKSHI.

an order absolute, which was made on the 6th April 1918. An appeal was thereupon preferred to the District Judge on the assumption that as the decree was for a sum less than Rs. 5,000, the proper forum of appeal was the Court of the District Judge. It subsequently transpired, however, that the value of the suit was more than Rs. 5,000 and that consequently the appeal lay to this Court. The appeal was consequently lodged here and has now been brought up for final disposal.

The judgment-debtors have urged in support of the appeal that the remedy of the decree-holder is not by way of execution but by way of a regular suit to enforce the consent decree. In support of this contention, reliance has been placed upon the provision of r. 14 of Or. 34 of the Code of Civil Procedure, 1908, which is in these terms: "Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage and he may institute such suit notwithstanding anything contained in Or. I, r. 2." Reference has also been made to the decisions in *Chandranath Dey* v. *Burroda Shundary Ghose* (1), *Abhoyeswari Dabee* v. *Gouri Sankar Pandey* (2), *Matangini Dassi* v. *Chooneymoni Dassee* (3) and *Hem Ban* v. *Behari Gir* (4), which all turned upon the construction of sec. 99 of the Transfer of Property Act, 1882, and *Gobinda Chandra Pal* v. *Kailash Chandra Pal* (5) and *Gobinda Chandra Pal* v. *Kailash Chandra Pal* (6) which were decided on the terms of Or. 34, r. 14. We are of opinion that the cases mentioned are distinguishable and that the provision of Or. 34, r. 14 is not applicable to the present case.

In each of the cases mentioned, the decree was for money and there was a charge upon the properties for security in respect of the judgment-debt. There was no express provision in the decree, as there is in the present case, that the decree-holder would be entitled to realise his dues by execution of the decree. In the case before us, as already stated, it was expressly provided that if default was made in payment of one instalment, the decree-holders would be entitled to realise the whole amount due for all instalments at one and the same time by taking out execution. There is no reason why a restricted meaning should be placed upon the expression "taking out the execution." We cannot accept the contention of the Appellant that this refers merely to taking out execution of the decree as a money decree against properties of the judgment-debtor other than the hypothecated properties. The intention of the parties plainly was that if default was made by the judgment-debtor, the decree-holder would be at liberty to take out execution against the mortgaged properties which were to remain charged until the amount due for the last instalment should be paid. This view is supported by the decisions in *Abir Paramanik* v. *Jahar Mahmud Mondal* (7) and *Ambalal Bapubhai* v. *Narayana Tatyaba* (8). The parties in the case before us were obviously anxious to avoid recourse

(1) I. L. R. 22 Cal. 813 (1895).
(2) I. L. R. 22 Cal. 859 (1895).
(3) I. L. R. 22 Cal. 903 (1895).
(4) I. L. R. 28 All. 58 (1905).
(5) 25 C. L. J. 354 (1916).
(6) I. L. R. 45 Cal. 530 (1917).
(7) I. L. R. 34 Cal. 886; s. c. 11 C. W. N. 879; 6 C. L. J. 95 (1907).
(8) I. L. R. 43 Bom. 631 (1919).

KASHI CHANDRA CHAKRAVARTI *v.* PRIYANATH BAKSHI.

to a fresh suit on the basis of the decree, such as might be necessary in view of the decisions already cited.

The only question which remains is, whether a decree by consent of this description is or is not operative as between the parties thereto. The answer must obviously be in the affirmative. It is sufficient to refer to the Full Bench decision in *Ashutosh Sikdar* v. *Beharilal Kirtania* (9) which was explained in *Bechu Singh* v. *Bicharam Sahu* (10) and shows that sec. 89 (2) was enacted for the benefit of the litigating parties. It is further clear from *Sundari Debi* v. *Sovaram Agarwalla* (11), *Bechu Singh* v. *Bicharam Sahu* (10), *Biswa Nath* v. *Bhagwandin* (12) and *Syam Mandal* v. *Satinath Banerjee* (13), that when a consent decree has been made, as was made in this case, before execution is taken out, an order absolute should be obtained by the decree-holder on notice, so as to allow an opportunity to the judgment-debtor to show cause, if possible, why the decree should not be made final.

The result is that this appeal fails and must be dismissed with costs. We assess the hearing fee at three gold mohurs.

H. D. C.

(9) I. L. R. 35 Cal. 61: s. c. 11 C. W. N. 1011 (F. B.) (1907).
(10) 10 C. L. J. 91 (1909).
(11) 10 C. W. N. 306 (1906).
(12) 14 C. L. J 648 (1911).
(13) 24 C. L. J. 523 (1916).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 352 OF 1921.

NEWBOULD, J.
B. B. GHOSE, J.
1923,
Heard, 26 and 27, November.
Judgment, 6, December.

BEJOY SINGH DUDHURIA, Decree-holder, Appellant,
v.
ASHUTOSH GOSSAMI and ors., Judgment-debtors, Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, r. 66, sub-r. (2), cl. (e) and r. 90—Execution sale—Sale proclamation—Statement of value—Mention in sale proclamation of discrepant valuations as given by both parties, without any valuation by Court, effect of—Material irregularity.

Cases can be conceived when the Court might rightly consider that the value of the property as stated by both parties should be mentioned though it is generally desirable that the Court should attempt to arrive at a fairly accurate value of the property to be mentioned in the sale proclamation in order to enable bidders to judge of the nature and value of the property:

Held, *upon the facts of this case, that this was one of those exceptional cases in which the Court was justified in stating both values instead of attempting itself to value the property, and that the procedure adopted in this case was not irregular; the order of the lower Court setting aside the sale was reversed.*

RAM KRIPAL SINGH *v.* KEDARNATH BOSE (1), SAURENDRA MOHAN TAGORE *v.* HURRUCK CHAND (2) *and* SAADATMAND KHAN *v.* PHUL KUAR (3) *referred to.*

This was an appeal preferred on the 11th November 1921 against an order of the Subordinate Judge, 3rd Court of

(1) 20 C. W. N. xliv (1916).
(2) 12 C. W. N. 512 (1907).
(3) I. L. R. 20 All. 412: s. c. 2 C. W. N. 550 (P. C.) (1898).

BEJOY SINGH DUDHURIA v. ASHUTOSH GOSSAMI.

Hughly (Babu Sirish Chandra Chowdhury), dated the 18th August 1921.

The facts appear sufficiently from the judgment.

Dr. Sarat Chandra Basak and *Babu Ramani Mohan Chatterjee* for the Appellant.

Babus Ram Chandra Majumdar and *Moni Lal Bhuttacharya* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against an order of the Subordinate Judge of Hughly, third Court, granting an application by certain judgment-debtors to set aside a sale held in execution of a decree. This decree was obtained by Raja Bejoy Singh Dudhuria Bahadur, the Appellant before us, in the Court of the Subordinate Judge of Faridpur on the 5th April 1918. The amount decreed was Rs. 20,774-10-9 for arrears of rent and the amount for which the property was attached with the addition of interest and execution costs was Rs. 24,018-1-3. After an order of a transfer, an application for execution was made in the Court of the Subordinate Judge of Hughly on the 21st September 1919. On this application the judgment-debtors' ancestral house in the town of Serampore was attached, sale proclamation issued on the 19th December 1919 and in it the property was valued at Rs. 5,000 which was the decree-holder's valuation. The judgment-debtors objected that the real value of the property was one lakh. The Subordinate Judge on the authority of a decision in this Court [*Ram Kripal Singh* v. *Kedarnath Bose* (1)] directed that the value stated by the decree-holder and also that stated by the judgment-debtors should be mentioned in the sale proclamation, the question as to what was the proper value being left open. Sale proclamation was issued in accordance with this direction on the 2nd March 1920 fixing the 14th April as the date of sale. The judgment-debtors then appealed and obtained a Rule No. 275 against the order directing both valuations to be stated in the sale proclamation and the sale was stayed by an order in Rule No. 201. The appeal was dismissed and the Rule discharged by a Divisional Bench of this Court on the 18th May 1920. The learned Judges referred to and distinguished the decision in the case of *Saurendra Mohan Tagore* v. *Hurruck Chand* (2) and concluded their judgment in Rule No. 275 as follows : " We are unable to hold that the Court can in no case mention in the sale proclamation the value as given by both parties. As however there will be a fresh sale proclamation, the Court will consider the desirability of attempting to arrive at an estimate of the value of the property to be sold." On receipt of the order discharging the Rule No. 201 for stay of execution the Subordinate Judge directed on the 7th June 1920 that execution should proceed and the sale proclamation was again issued on the 23rd June 1920 fixing the 10th August for the sale. On the 3rd August the mother of the judgment-debtors claimed a right of residence and maintenance in respect of the attached property and asked that the property be sold subject to these rights. This application was rejected by the Subordinate Judge. Against this order a Rule No. 594 was obtained from this Court and execution was stayed for three weeks. On the 27th August 1920, this Rule was discharged by a Division Bench of which one of us was a member. That Bench was not satisfied that the application was a

(1) 20 C. W. N. xliv (1916).

(2) 12 C. W. N. 542 (1907).

genuine application on behalf of the Petitioner but believed it to have been made in the interest of her sons, the judgment-debtors. Information of the discharge of this Rule reached the lower Court on the 3rd September 1920 and on the 8th September fresh sale proclamation was issued fixing the 15th November 1920 for the sale. On the 5th October the judgment-debtors applied that the value of the attached property be ascertained by the Court on taking evidence. In support of this application a copy of the judgment of this Court in Rule No. 275 of 1920 was filed. It appears that for some reason which has not been explained the full judgment had not previously been sent to the lower Court. This application was rejected on account of the judgment-debtors' delay in making it. The sale was held on the 18th November 1920. The decree-holder was permitted to bid at the sale "at the highest price" and the property was knocked down to his bid of Rs. 5,000.

We do not understand the meaning of the expression "at the highest price," but nothing turns on this, since the bid-sheet shows that before this bid was accepted the sanction of the Court was taken after drawing attention to the judgment-debtors' as well as the decree-holder's valuation. The 20th December was fixed for the confirmation of the sale. On the 16th December 1920 the judgment-debtors applied to have the sale set aside under Or. 21, r. 90, C. P. C. There was considerable delay in the hearing of this case partly due to the failure of both parties to procure the attendance of their witnesses and partly to the inability of the Court owing to pressure of other business to take up the case on some of the dates fixed. Judgment was delivered on the 18th August 1921 granting the application and setting aside the sale and it is against this order that the present appeal has been preferred.

The learned Subordinate Judge in his judgment has set out the following three points for determination. 1. Whether the proclamation was not served on the property? 2. Whether the property was undervalued by the decree-holder? 3. Have the applicants sustained substantial injury by the sale? He has found the first point in favour of the decree-holder and the second and third points in favour of the judgment-debtors. He has also held that the undervaluation of the property by the decree-holder was a material irregularity in consequence of which the Court accepted his bid for Rs 5,000. For the Appellant it is contended that there was no material irregularity in publishing or conducting the sale and, even if there were, the judgment-debtors have failed to establish that they have sustained substantial injury by reason of such irregularity. On behalf of the Respondents, in addition to supporting the judgment of the lower Court, it is contended that his finding against them on the first point should be reversed.

On the first point relating to service of the sale proclamation on the property, after considering the whole of the evidence, we have come to the same conclusion as the lower Court. We agree with him that the absence of any motive for suppression of service is an important feature. We also agree that the direct evidence of service has not been successfully rebutted by evidence of witnesses who attempt to prove a negative. Our attention has been drawn to an alleged discrepancy in the evidence of the peon and the identifier as to the direction in which the house faced. But the former was speaking of the house and the latter

of the gate of the compound and it is not impossible that the house should face west and the gate north. The learned Subordinate Judge has given his reasons for disbelieving the judgment-debtors' witnesses. What appears to us even more important than his reasons is the fact that he doubted the veracity of these witnesses after they had given evidence before him.

But in dealing with the other points that arise in this case, we think the lower Court has overlooked the importance of the fact that both the decree-holder's and the judgment-debtors' valuations were inserted in the sale proclamation. It has frequently been held that gross under-valuation of the attached property when accepted by the Court and inserted in the sale proclamation amounts to a material irregularity which is likely to cause substantial injury. It is sufficient to cite the leading case on this point, the decision of the Judicial Committee in *Saadatmand Khan* v. *Phul Kuar* (3). In that case a sale was set aside in which an estate of which the value was not less than Rs. 8,000 or Rs. 9,000 was attached for Rs. 565 and was sold for Rs. 670, the estimated value in the sale proclamation having been Rs. 800. But it is clear from the judgment that the principal ground on which that decision was based, was that the acceptance of the decree-holder's low valuation by the Court was likely to mislead bidders. At p. 417 importance is given to the fact that "the value of the property to sell was given at Rs. 800" and at p. 418 it was pointed out "that an intending purchaser would readily accept the assurance of the Court that an estate attached for Rs. 565 was worth no more than Rs. 800." In the present case there has been no valuation at all by the Court. Though the statement of the two different valuations might not be of much assistance to an intending purchaser, it was not likely to mislead him.

(3) I. L. R. 20 All. 412; s. c. 2 C. W. N. 550 (P. C.) (1898).

It was contended on behalf of the Respondents that the insertion of the two valuations and the omission of the Court to give its own valuation was itself a material irregularity. But in the case just cited their Lordships of the Judicial Committee also held that the valuation by the Court was made gratuitously, or, in other words, that there was no legal obligation on the Court to enter the value of the property in the sale proclamation. No case has been cited to us in which it was held that the procedure adopted in the present case was irregular. There is, however, the authority of the case relied on by the Subordinate Judge when he settled the sale proclamation on the 21st February 1920. Further the propriety of this procedure has already been considered by this Court when deciding Rule No. 275 of 1920 and we are in entire agreement with that judgment of which we have already quoted the concluding portion.

We cannot agree with the contention that the concluding remarks should have been treated by the lower Court as a direction to estimate the value of the property. They are clearly so worded as not to fetter the discretion of the lower Court. Lest our decision should be misunderstood as laying down a general rule that in every case where there is a discrepancy between the values of the property given by the decree-holder and the judgment-debtor, it is sufficient to state both in the sale proclamation, we will quote also another portion of this judgment with which we agree. "Cases can be conceived when the Court might

rightly consider that the value of the property as stated by both parties should be mentioned though it is generally desirable that the Court should attempt to arrive at a fairly accurate value of the property to be mentioned in the sale proclamation in order to enable bidders to judge of the nature and value of the property." We hold that this is one of those exceptional cases in which the Court was justified in stating both values instead of attempting itself to value the property. Our reasons for so holding are that the property was one that it was most difficult to value accurately and that to hold an enquiry would have further delayed proceedings which the judgment-debtors were obviously attempting to obstruct by every means in their power.

Our findings that there was no material irregularity in publishing or conducting the sale are sufficient for the disposal of this appeal and we will deal shortly with the other points argued before us relating to the valuation of the property and whether there has been any substantial injury. We agree with the learned Subordinate Judge that the value of the property is Rs. 40,000 with this qualification that this represents the price that would be paid by a willing purchaser to a willing seller. But the difficulty in this case is that the owners of the property are most unwilling to sell and there are no willing purchasers. The house is a large house in a Mofussil town and property of this kind is sometimes practically unsaleable. There is also evidence that the fact that it belongs to Brahmins reduces the number of possible buyers. Further, any one contemplating purchase would realise that if he bought the property he would have long and expensive litigation before he obtained possession. Under these circumstances it is not surprising that the decree-holder was the only bidder at the auction-sale. Even he was not a willing purchaser and has expressed his willingness to part with his bargain if the amount due to him under the decree is paid. The decree-holder's valuation was the price actually fetched at the public auction and we cannot say that from his point of view he grossly undervalued the property. Nor do we hold that the low valuation put by him on the property resulted in substantial loss to the judgment-debtors. There is no evidence that any one was misled or deterred from bidding by the insertion of this low valuation in the sale proclamation and we have pointed out that there were other reasons for the absence of competing bidders. We are not satisfied on the facts of this case that the applicants sustained substantial injury by reason of the alleged irregularity.

We accordingly decree this appeal. We reverse the order of the lower Court setting aside the sale. The Appellant will get his costs in this and the lower Court. We assess the hearing fee in this Court at 5 gold mohurs.

H. C. S.

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE ORDER
No. 99 OF 1923.

CHATTERJEA, J.
PANTON, J.
1923,
14, August.

JOGGESHWAR MAHATA and ors., Decree-holders, Appellants,
v.
JHAPAL SANTAL and ors., Judgment-debtors, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 49K—Aboriginal, tenure held by, sale of, in execution of money decree, whether void or voidable—Application to set aside—Limitation—Limitation Act (IX of 1908), Arts. 12, 166.

The sale of a tenure held by an aboriginal in execution of a money decree in

JOGGESHWAR MAHATA v. JHAPAL SANTAL.

contravention of sec. 49K of the Bengal Tenancy Act is a nullity and not merely an irregular sale.

The sale being a nullity neither Art. 12 nor Art. 166 applies to an application to set it aside.

The mere fact that a statutory provision is intended for the benefit of a class of persons does not necessarily show that it is not based on grounds of public policy and may be waived.

This was an appeal preferred on the 16th February 1923 against an order of the Additional District Judge of Zillah Midnapur (Mr. A. Henderson), dated the 21st November 1922, affirming an order of the Munsif of Jhargram (Babu Abinash Chandra Ghosh), dated the 21th July 1922.

The facts are briefly as follows. The Appellants Joggeshwar Mahata and others obtained a decree for money against the Respondent Jhapal Santal who was an aboriginal residing in the District of Midnapur to which Bengal Act, II of 1918, applies and in execution of the decree put his tenure to sale in August 1920. An application was made to set aside the sale in January 1922, which was far beyond the period prescribed by Art. 166 or 12 of the Limitation Act. The lower Courts held that the sale was a nullity and the question of limitation did not therefore arise.

Dr. Dwarka Nath Mitter and *Babu J. N. Mitter* for the Appellants.

Babu Peary Mohan Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The question involved in this appeal is whether a sale held in contravention of the provisions of the Bengal Act, II of 1918, is merely an irregular sale or a nullity.

The Appellant obtained a decree for money against the Respondent who is an aboriginal residing in the District of Midnapur to which the Act applies and in execution of the decree put up his tenure to sale and purchased it himself on the 20th August 1920. An application was made to set aside the sale on the 13th January 1922. It was for beyond the period prescribed by Art. 166 of the Limitation Act or even Art. 12 of the Limitation Act. The Courts below having come to the conclusion that the sale was a nullity, overruled the objection of limitation and set aside the sale.

The decree-holders have appealed to this Court and it is contended that the sale was not a nullity and that the provisions of the Act having been made for the benefit of a particular class of persons and not for the general public, the Respondents could waive the irregularity of the sale and the sale therefore was not altogether invalid. We have been referred to certain observations made by Mookerjee, J., in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (1). The learned Judge observes "When the object of the statute has been determined, if the statutory provision is not based on grounds of public policy and is intended only for the benefit of a particular person or class of persons, the conditions prescribed by the statute are not considered as indispensable and may be waived, because every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity and which may be dispensed with without infringement of any public right or policy."

(1) I. L. R. 35 Cal. 61 at p. 74: s. c. 11 C. W. N. 1011 (1907).

JOGGESHWAR MAHATA v. JHAPAL SANTAL.

The mere fact that the statutory provision is intended for the benefit of a class of persons does not necessarily show that it is not based on grounds of public policy. As was observed by Lord Campbell, L. C., in *Liverpool Borough Bank* v. *Turner* (2), "that no universal rule can be laid down as to whether mandatory enactment shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scone of the statute to be construed," and the case of *Rajani Kanta Ghosh* v. *Sheikh Rahaman Gazi* (3). At p. 451, Mr. Justice Mookerjee observes: "The only rule that may be adopted is that when the provisions of a statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity." We therefore have to consider the object of the Act. The preamble states "whereas it is expedient to supplement and amend the Bengal Tenancy Act, 1885." Sec. 49 (B) of the Act lays down: "No transfer by an aboriginal tenure-holder, raiyat or under-raiyat of his right in his tenure or holding, or in any portion thereof, by private sale, gift, will, mortgage, lease or any contract or agreement shall be valid to any extent except as provided in this chapter." The voluntary alienation therefore is absolutely prohibited except as provided for in that chapter and sec. 49K lays down, "notwithstanding anything in this Act, no decree or order' shall be passed by any Court for the sale of the right of an aboriginal tenure-holder, raiyat or under-raiyat in his tenure or holding, or in any portion thereof, nor shall any such right be sold in execution of any decree or order." There are certain provisos to which we need not refer. Sec. 49K therefore clearly lays down that there shall be no decree for sale of a tenure of an aboriginal and no sale shall be held in execution of a decree except a rent decree and certain other cases mentioned in the proviso. It is not reasonable to hold that the legislature having enacted that there shall be no voluntary alienation by an aboriginal to any extent except as provided in this chapter should allow an involuntary sale in the same chapter. The enactment is for the protection of the aboriginals against any indiscreet transaction. That being the object of the enactment we think it was not open to him to waive the benefit of the provisions. We do not think that the mere fact that the enactment was made for the benefit of a class of persons, *viz.*, the aboriginals in certain district, does not show that it was not on the ground of public policy. We are therefore of opinion that the sale was a nullity and if the sale is altogether void the question of limitation does not arise. That question arises where the sale is a valid sale until it is set aside as it was in the case of *Malkarjun* v. *Narhari* (4). Having regard to the view taken by us that the sale in the present case was not an irregular sale but a void one, we are of opinion that the application is not barred by limitation.

The appeal is accordingly dismissed with costs. The hearing fee is assessed at one gold mohur.

J. N. R. *Appeal dismissed with costs.*

(2) 2 DeG. F. & J. 502 (1860).
(3) 37 C. L. J. 447 (1922).
(4) L. R. 27 I. A. 216: s. c. I. L. R. 25 Bom. 337; 5 C. W. N. 10 (1900).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 832 OF 1922.

WALMSLEY, J. MUKERJI, J. 1924, Heard, 5, February. Judgment, 12, February.

JOGUNNESSA BIBI, Petitioner, *v.* SATISH CHANDRA BHUTTACHARJA and ors., Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 22, r. 9 (2), substitution of heirs allowed after the period of limitation without objection by opposite party, if to be set aside by Appellate Court—Sec. 115 (c), High Court's powers to correct gross and palpable errors of subordinate Courts.

An application for substitution of heirs of a deceased Opposite Party in a proceeding to set aside a sale was allowed after the period of limitation without any objection by the Opposite Parties. On appeal from the final order in the case, the Appellate Court set aside the order for substitution and dismissed the case:

Held—*That on a proper application under Or. 22, r. 9 (2), C. P. C. and on showing sufficient cause, the abatement could have been set aside. But by reason of the application for substitution being readily allowed by the Munsif and no objection having been taken by the Opposite Party at any stage of the proceedings, the Petitioners were deprived of an opportunity to make an application under Or. 22, r. 9 (2), C. P. C. and they were misled by the course of the proceedings that were adopted. The order for substitution made in the case should therefore be treated as being one setting aside the abatement.*

Held further—*That "acting illegally" in the first part of cl. (c) of sec. 115, C. P. C. does not merely imply the committing of an error of procedure such as "acting with material irregularity" does. That part of the clause was advisedly left in indefinite language in order to empower the High Courts to interfere and correct gross and palpable errors of subordinate Courts.*

This was a Rule issued on the 4th December 1922 against an order of the District Judge of Tipperah (J. Bartley, Esq.), dated the 26th June 1922, passed on appeal from an order of the Munsif at Commillah (B. L. Biswas, Esq.), dated the 18th February 1922.

The facts are fully set out in the judgment of this Court.

M. Mahomed Nurul Huq Chowdhury for the Petitioner.

Babu Nagendra Chandra Chowdhury for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—The facts which have given rise to the present application are these :—

One Umedali applied under Or. 21, r. 90, C. P. C. in the Court of the 6th Munsif at Commillah for setting aside a sale and during the pendency of the said proceedings died on the 18th July 1920. On the 24th July 1920 the death was reported to the Court, and the learned Munsif made a note of it in the order-sheet. Thereafter on five different dates the proceedings were adjourned, on the ground that the heirs had not been made parties and six months had not yet elapsed from the date of death. On the 5th February 1921, one of the dates to which the case was adjourned, an application for substitution was made on behalf of the heirs and legal representatives of Umedali and the same was allowed. It does not appear whether the Opposite Party were present on that date or not; but on none of the dates to which the case was subsequently adjourned, was any objection taken to the order for substitution that had been made, and the proceedings went on with the result that the learned Munsif set aside the sale by an order passed on the 18th February 1922. The Opposite Party

JOGIYNESSA BIBI v. SATISH CHANDRA BHUTTACHARJA.

preferred an appeal to the District Judge of Tipperah and the learned District Judge set aside the Munsif's order and dismissed the application for setting aside the sale, on the ground that the application had as a matter of fact abated by reason of the death of Umedali and the application for substitution was incompetent and the substitution had been wrongly allowed. The Petitioners have thereupon moved this Court and obtained the present rule to show cause why the order of the District Judge should not be set aside and that of the Munsif restored or why such other or further orders should not be passed as to this Court may seem fit.

We have heard the parties and considered the facts and circumstances of the case in so far as they bear upon the present rule. The learned District Judge was undoubtedly right in his view of the law that the proceedings had automatically abated on the 18th January 1921 under Or. 22, r. 3, C. P. C. and no application for substitution could be entertained after that date, but the Petitioners by presenting a proper application under Or. 22, r. 9 (2), C. P. C. and by showing sufficient cause could obtain an order setting aside the abatement. We think, however, that by reason of the application for substitution being readily allowed by the learned Munsif and no objection having been taken by the Opposite Party at any stage of the protracted proceedings that followed in his Court, the Petitioners were deprived of an opportunity to make an application under Or. 22, r. 9 (2), C. P. C. and they were misled by the course of the proceedings that were adopted. The order passed by the learned District Judge reversing the decisions of the learned Munsif and dismissing the application for setting aside the sale has also not given the Petitioners any such chance, and, as matters stand, they are altogether without any remedy.

It has been pressed on us on behalf of the Opposite Party that our powers of interference under sec. 115, C. P. C. are very limited. In my opinion the case does not fall within cl. (*a*) or (*b*) but under the first part of cl. (*c*) of that section. "Acting illegally" in that clause does not merely imply the committing of an error of procedure such as "acting with material irregularity" does. In my opinion this part of the clause was advisedly left in indefinite language in order to empower the High Courts to interfere and correct gross and palpable errors of subordinate Courts, the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of the injustice resulting from it. In the present case, in my opinion, injustice has been done to the Petitioners.

The question then is what should be our order. Having regard to the fact that the Petitioners are all minors with the exception of one who is their guardian and who is said to be a *purdanashin* Mahomedan lady and who as far as can be made out is also illiterate, an application on their behalf under Or. 22, r. 9 (2), C. P. C. stands a good chance of succeeding. I would, therefore, treat the order for substitution as being one for setting aside the abatement, and would set aside the order of the learned District Judge and remit the appeal to him to be dealt with on the merits. No order is made as to the costs of this Rule.

WALMSLEY, J.—I agree.

J. N. R. *Rule made absolute.*

[CRIMINAL APPELLATE JURISDICTION.]

DEATH REF. NO. 5 OF 1923

AND

APPS NOS. 281 AND 295 OF 1923.

NEWBOULD, J.
C. C. GHOSE, J.
1923,
Heard, 17 and 18, July.
Judgment, 30, July.

HASSENULLA SHEIKH, Accused,
v.
THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), secs. 226 and 227—Sessions Judge's powers to add a charge distinct from the charges framed by the committing Magistrate—Negative effect of expert evidence, how far can rebut strong direct evidence.

Some accused were committed to the Sessions Court for trial on certain counts relating to the murder of one person and hurt to another person. The Sessions Judge added certain counts relating to the murder of the latter person also:

Held—*That under proper circumstances a Sessions Judge has power to add a charge distinct from the charges framed by the committing Magistrate.*

QUEEN-EMPRESS v. GORDON (5) *approved.*

BIRENDRA LAL BHADURI v. EMPEROR (1) *distinguished.*

QUEEN-EMPRESS v. APPA SUBHANA MENDRE (2), QUEEN-EMPRESS v. KHARGA (3) *and* SUBRAMANIA AYYAR v. EMPEROR (4) *referred to.*

Where there was strong direct evidence of the place of a certain murder but no blood was detected by the chemical examination of the earth, leaves and grass taken from the alleged place of occurrence:

Held—*That the negative effect of the chemical examiner's report was not sufficient to rebut the strong evidence as to the place of occurrence.*

(1) I. L. R. 32 Cal. 22 (1904).
(2) I. L. R. 8 Bom. 200 (1884)
(3) I. L. R. 8 All. 665 (1886)
(4) L. R. 28 I. A. 257 : s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 866 (1901).
(5) I. L. R. 9 All. 525 (1887).

These were a Reference and two appeals against the convictions and sentences passed by D. Vaughan Stevens, Esq., I.C.S., 1st Additional Sessions Judge of Mymensingh, dated the 14th May 1923.

The facts are fully set out in the judgment.

Babus Manmatha Nath Mukherjee and *Birendra Kumar De* for the Accused.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

Hassenulla Sheikh has been sentenced to death by the 1st Additional Sessions Judge of Mymensingh and the proceedings have been submitted to this Court under sec. 374 of the Code of Criminal Procedure. Hassenulla Sheikh has also appealed against his conviction and so have two other accused, Rezatulla Sheikh and Tamez Sheikh who were convicted at the same trial. Hassenulla presented a separate jail appeal and also a joint appeal on behalf of the three accused was filed by their pleader.

In addition to these three Appellants one Farid Sheikh was also tried with them. Hassenulla Sheikh was charged on two separate counts with having committed murder of two persons, Moulavi Mahjazal Huq and Kaimulla. The other three accused were charged on two separate counts with having, in furtherance of the common intention of all, committed murder of these two persons, offences punishable under sec. 302 read with sec. 34 of the Indian Penal Code. Rezatulla was further charged with having voluntarily caused hurt to Kaimulla with a cutting instrument. The jury unanimously found Farid Sheikh not guilty giving him as they said the benefit of the doubt. By a majority of four to one they found

the other three accused guilty on all the charges framed against them. The Sessions Judge sentenced Hassenulla Sheikh to death and the other accused to transportation for life.

The facts of the case according to the prosecution evidence are as follows: The murdered man Moulavi Mahjazal Huq was a Zeminder of Chikajani in the Jamalpur Sub-division of the Mymensingh District. The three Appellants and the father of Farid were his tenants and had been refractuary since the year 1327 B. S. supporting the claim of the Moulavi's son-in-law Abu Mia that the land held by them had been given to Abu Mia's wife. A criminal case had been instituted by Mohammed Nuruddin (P. W. 28) the Moulavi's *gomostha* on the allegation that execution of a decree against Tamez had been resisted. Tamez, Farid and others were accused in that case. The case was fixed for hearing at Jamalpur on the 4th December last and the Moulavi and Nuruddin were there on that date. Nuruddin returned home that night and was told to send some one to meet the Moulavi the following night. On the night of the 5th December the Moulavi arrived at Prodyotnagar railway station at about 10 P.M. and was met by two of his servants Kaimulla, a *barkandaz*, and Imam Sheikh (P. W. 6). They went towards Chikajani going through some fields till they reached a Local Board Road running North and South parallel to the railway line. It was the night after the full moon. Kaimulla went first carrying the Moulavi's bundle of clothes and Imam Sheikh followed behind the Moulavi carrying some radishes, plantains and a water pot. When they had gone about three quarters of a mile from the railway station they were attacked by the four accused persons. Hassenulla stabbed the Moulavi on the back with a knife. Kaimulla then seized Hassenulla but was attacked by Rezatulla who cut him with a *banki dao* on the head. Kaimulla in consequence let Hassenulla go and seized Rezatulla. Hassenulla then stabbed Kaimulla on the back. After that the accused ran away. Imam who had not been touched ran to the Moulavi's *bari* and returned with Azizul Huq (P. W. 21), a son of the Moulavi and Bhadu and O Miz (P. W. 22 and 23), two servants of the Moulavi's younger brother Fazlal Huq (P. W. 30). Before Imam's return with these witnesses Azijar Rahaman, Amizuddin and Joynulla (P. W. 13, 12 and 19) who were also returning from the railway station came to the place of occurrence. They found the Moulavi being supported by Kaimulla and both were bleeding. News was sent to Azizul's father Golam Wahed (P. W. 20) and when he arrived on the scene the Moulavi was dead. Golam Wahed sent for *palki* bearers and the dead and the wounded man were carried to the Dewanganj Police Station. There the Sub-Inspector Jagatbandhu Biswas, (P. W. 31) commenced taking a first information from Kaimulla. As Kaimulla commenced vomitting the Sub-Assistant Surgeon of the neighbouring Dispensary Moulavi Wahed Ali Khan (P. W. 3) took him there for treatment. The Sub-Assistant Surgeon gave Kaimulla some medicine and bandaged his wound. He then sent for the Sub-Registrar Sudhansu Bhusan Roy (P. W. 4) to take his dying declaration. After this had been recorded Kaimulla was taken back to the thana where the Sub-Inspector finished recording his first information. It was then about 1 A.M. and Kaimulla and the dead body were sent to Jamalpur. Kaimulla was admitted to hospital at 7 A.M. on the 6th December. The Assistant

Surgeon in charge, Dr. Jamini Kanta Sen Gupta (P. W. 2), considered his condition critical, so sent for the Magistrate to record his dying declaration. The Deputy Magistrate Babu Dinendra Nath Saha (P. W. 1) reached the hospital at 8 A.M. and recorded Kaimulla's statement. Kaimulla died the next day at 1-30 P.M. When his body was removed from the bed a bundle of notes of the total value of Rs. 205 was found. The accused were all arrested on the 6th December.

On behalf of the Appellants it is contended that the trial was illegal on the following grounds. The accused were committed for trial on the counts of the charge relating to the murder of Moulavi Mahjazal Huq and the hurt caused to Kaimulla by Rezatulla. The Sessions Judge added the counts relating to the murder of Kaimulla. It is urged that in so doing he acted in excess of his powers under secs. 226 and 227 of the Code. In support of this contention the cases of *Birendra Lal Bhaduri* v. *Emperor* (1), *Queen-Empress* v. *Appa Subhana Mendre* (2) and *Queen-Empress* v. *Kharga* (3) are cited. The facts of the Bombay and Allahabad cases more closely resemble the facts of the present case. Though in both these cases the conviction was upheld, this was done on the ground that though there was an irregularity it was cured by the provisions of sec. 537, C. P. C., a ground of doubtful validity since the decision of the Judicial Committee in *Subramania Ayyar* v. *Emperor* (4). But these decisions have been rendered obsolete by the definition of "charge" in sec. 4 (1) (c) which was inserted for the first time in the Code of Criminal Procedure of 1898. This alteration of the Code is in accord with the dissenting judgment of Scott, J., in the Bombay case cited above. The decision of the majority in that case was also expressly dissented from by Straight, J., in the case of *Queen-Empress* v. *Gordon* (5). There can be no doubt that these dissentient judgments are in accordance with the law as it now stands and that under proper circumstances a Sessions Judge has power to add a charge distinct from the charges framed by the committing Magistrate. In the Calcutta case cited—*Birendra Lal Bhaduri* v. *Emperor* (1)—the facts are clearly distinguishable from those of the present case. The principle on which that case was decided is stated at the conclusion of the judgment in the following terms : "The Sessions Court is not a Court of Original Jurisdiction and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal and not with regard to matter not covered by the indictment." In the present case the murder of Kaimulla was an immediate subject of prosecution. In the order of commitment the Magistrate states : "There is ample evidence to show that Hassenulla committed murder by intentionally causing the death of the Moulavi and his servant Kaimulla and that Tamez, Farid and Rezatulla in furtherance of the common intention with Hassenulla committed murder by intentionally causing the death of the Moulavi and his servant Kaimulla."

Under these circumstances and for the reasons given we hold that the Sessions Judge acted properly and within his powers in adding the charges relating to the murder of Kaimulla.

(1) I. L. R. 32 Cal. 22 (1904).
(2) I. L. R. 8 Bom. 200 (1884).
(3) I. L. R. 8 All. 665 (1886).
(4) L. R. 28 I. A. 257 : s. c. I. L. R. 25 Mad. 61 ; 5 C. W. N. 866 (1901).

(1) I. L. R. 32 Cal. 22 (1904).
(5) I. L. R. 9 All. 525 (1887).

HASSENULLA SHEIKH *v.* THE KING-EMPEROR.

If the prosecution evidence be believed there can be no doubt as to the guilt of the three accused who have been convicted. In their statements before the committing Magistrate and the Sessions Judge the accused made no defence beyond a bare denial of their guilt. At the trial two lines of defence were put forward. It was suggested that Kaimulla himself might have killed the Moulavi and been fatally wounded by him and also that some persons unknown attacked both the deceased and Kaimulla was induced by the Moulavi's brother Fazlal Huq to implicate the accused. Before us the defence urged is that the assailants were not really recognised and the present accused have been implicated because they were suspected on account of their quarrel with the Moulavi. The evidence as to the identity of the accused consists of the statements of Kaimulla, the direct evidence of Imam and the circumstancial evidence of witnesses who saw the accused going to or from the place of occurrence.

It has been strongly contended that the statement made by Kaimulla at the thana by intrinsic evidence strongly supports the case for the defence that he did not recognise his assailant. This first information was partly recorded before and partly after Kaimulla was taken to the dispensary. Though no evidence was elicited as to how much of this statement was first recorded it is suggested that the interruption took place before he had given the names of the assailants and that he was tutored at the dispensary to give the names of the accused. This suggestion is based on the fact that in the first information the occurrence is first described wihout naming the assailants, "4 men came out . . . . one of them stabbed the Moulavi Shanib, I and Imam held him, etc." This is followed by the statement, "I recognised the 4 men as Hassenulla, Rezatulla, Farid and Tamez," and a repetition of the manner in which the wounds were inflicted giving the names of Hassenulla and Rezatulla.

We are unable to accept this suggestion. From the evidence of the Sub-Assistant Surgeon and the Sub-Registrar as to what happened at the dispensary it appears highly improbable that Kaimulla should then have been tutored. It is not improbable that Kaimulla should have commenced his description of the occurrence by first speaking of the assailants without naming them though he knew their names. We find Imam telling his story in a somewhat similar manner both before the committing Magistrate and the Sessions Judge. On both occasions before he named any one he deposed that four men rushed out and one struck the Moulavi with a knife. But there is also abundant evidence that before Kaimulla was taken to the thana, both he and Imam named the accused and we see no reason to doubt that they did so.

There are some discrepancies in the three recorded statements of Kaimulla and the evidence of Imam. The most important is the omission of Farid's name in the last statement of Kaimulla. This no doubt was the reason why Farid was acquitted. As regards the commencement of the occurrence and the manner and the persons by whom the wounds were inflicted, the stories are consistent in main details without anything to suggest that either of them is telling a concocted story. There was bright moon-light, so the accused could easily be recognised. It is highly improbable that Kaimulla should have accused persons other than those who actually wounded him. The case is weakest against the accused Tamijuddin. The story in Kaimulla's last statement

HASSENULLA SHEIKH *v.* THE KING-EMPEROR.

that he raised a *lathi* to strike Tamez is criticised on tho ground that it appears from Imam's evidence that he had Kaimulla's *lathi*. But from the deposition of the Deputy Magistrate who recorded the statement it appears that what Kaimulla said was that he picked up a *lathi* and this may have been dropped bv Imam who was undoubtedly too frightened to render any assistance. Imam is said to have been called *pugla* or half-witted, but there is nothing on the record to indicate that this was more than a nick name and that his intellect was in any way affected.

The case for the prosecution as a whole is attacked by a suggestion that the place of occurrence was elsewhere than that alleged. This suggestion is based on two facts. The first is that earth, leaves and grass taken from the alleged place of occurrence were sent to the chemical examiner but no blood was detected in them by him. The second is that the Local Board Road was not the most direct or the most usual way for the Moulavi to go home from the railway station. The negative effect of the chemical examiner's report is not sufficient to rebut the strong direct evidence as to the place of occurrence. The witnesses who might have explained why the less direct route was chosen were not questioned on this point. We get it from the Sub-Inspector that there were rumours that people were conspiring to kill the Moulavi and this may well have been the reason for his preferring to go home by the more public though longer road.

The finding of the money on Kaimulla's bed after his death is unexplained. It is certainly significant that the amount agrees very nearly with the sum that was in the Moulavi's possession according to an account found on him. But it is impossible to make any deduction which assists the case either for the prosecution or defence.

Having regard to the strength of the case against the Appellants on the direct evidence, the circumstancial evidence is of little importance. Though the jury have not thought this evidence sufficient to remove their doubts as to the guilt of Farid, it cannot be altogether rejected. The strongest evidence is that of Amezuddin who says he recognised the four accused when they were running away from the scene of the murder. We see no reason to doubt the independence of Golam Wahed and the other witnesses of his household and their evidence is very strong corroboration of the prosecution story both as to the place of occurrence and as to the recognition of the assailants by Kaimulla and Imam.

Of the other points that have been urged in attacking the case for the prosecution the most important is the denial of Fazlal Huq that he had any ill-feeling with his brother the Moulavi at the time of his death. That seems to be false but we see no reason in consequence to draw an inference that Fazlal Huq has been concocting evidence to implicate the present accused. His explanation of his delay in starting for the scene of occurrence is not unreasonable. We do not think it necessary to refer to discrepancies in the evidence which appear to us of little importance as for instance the number of *Kaibartas* who came to the scene from the adjoining *bustee*.

On a full consideration of the whole of the evidence and the able arguments of the learned pleader who conducted the defence, we find ourselves in entire agreement with the learned Sessions Judge and the majority of the jury as to the guilt of the accused who have been convicted.

HASSENULLA SHEIKH *v.* THE KING-EMPEROR.

In the case of Hassenulla on the reference under sec. 374 it was our duty to satisfy ourselves that the finding of the jury on the facts was right. On a consideration of the evidence for this purpose we have also come to the conclusion that the Appellants Rezatulla and Tamez were rightly convicted. In their case we cannot alter or reverse the verdict of the jury unless we are of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law laid down by him. We find no misdirection in the charge to the jury either on the law or the facts which was likely to mislead the jury. The only point of law of any difficulty was the application of sec. 34, I. P. C. The jury's attention was drawn to the essential point that it was necessary to find that there was a common intention of all the accused to commit each of the murders and that each of the murders was committed in furtherance of that common intention. On the facts, though the learned Sessions Judge expressed his opinion adversely to the accused on several points, reading the charge as a whole it cannot be said that he did so improperly. We see no reason to suppose that the jury did not fully realise that it was their duty to form their own opinion on the facts.

We hold therefore that the verdict of the jury as against all three Appellants should be upheld. We believe that they deliberately waylaid Moulavi Mahjazal Huq with the intention of killing him. From the nature of the fatal wounds on Moulavi Mahjazal Huq and on Kaimulla Sheikh there can be no doubt that Hassenulla Sheikh killed both these persons intending to do so. For these offences the maximum penalty of the law is not too severe.

We accordingly dismiss these appeals and confirm the sentence of death passed on Hassenulla Sheikh.

J. N. R. *Death sentence confirmed.*

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
1923,
Heard, 30, October.
Judgment, 30, October.

RAM SINGH,
Appellant,
v.
RAM CHAND,
Respondent.

Partnership at will—Dissolution, right of partner to demand, a legal and not an equitable right—Misconduct, if ground for dismissing suit for dissolution.

It is a legal right of a partner in a partnership at will to ask for dissolution. A suit for dissolution of such a partnership cannot be dismissed by the Court on the mere ground of his having destroyed old account books, prepared a false balance-sheet, made false entries in the books and having tried to deprive the firm of a valuable asset.

This was an appeal from a decree, dated the 19th May 1919, of the High Court at Lahore, reversing a decree, dated the 1st June 1914, of the District Judge of Delhi.

The Appellant and the Respondent were partners in the firm of Ram Chand & Co. carrying on business at Delhi. The Appellant claimed that the partnership was dissolved by him by a notice of the 11th February 1911. The partnership was a partnership at will and the suit was brought by the Appellant for dissolution, and for an account of the partnership.

The Respondent alleged misconduct on

RAM SINGH v. RAM CHAND.

the part of the Appellant and denied his right to an account.

The District Judge held that the partnership had been dissolved and ordered an account to be taken.

On appeal the High Court (Rattigan, C. J. and Abdul Rwof, J.) held that the Appellant had been guilty of gross misconduct and was not entitled to any of the reliefs claimed by him. The Plaintiff appealed to His Majesty in Council.

Messrs. Dubé and *Bishan Narain* for the Appellant.

Messrs. DeGruyther, K. C. and *L. M. Parikh* for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—This case is of the simplest nature. A gentleman who has a partnership at will brings a suit for a declaration of dissolution. The learned Judge of the District Court before whom the case depends finds and it is declared "that this partnership shall be deemed to have been dissolved on 11th February 1911, the date of the notice of the Plaintiff to the Defendant," and then he makes a declaration in ordinary form as to accounts being taken, but he puts in one particular finding, No. 3 :—

"An account of all dealings and transactions between Plaintiff and Defendant from December 1897, with the instructions that the debit of Rs. 7,559 against Defendant and credit of Rs. 3,133 in Plaintiff's favour are forgeries and are to be struck off, and all entries relating to interest p yable to either party are wrong."

Both parties appealed against that finding. On appeal, so far as the finding of fraud is concerned, the High Court are entirely in accordance with the learned Judge, and they say in their judgment :—

"From the evidence on the record it is therefore clear that the Plaintiff has been guilty of gross misconduct. He has destroyed the old account books, has falsely prepared a balance sheet, Ex. P. W. 1, has made false entries in the books and has tried to deprive the firm of a valuable asset."

If they had stayed there all would have been well, but they go on to say this :—

"Having done all this he has had the audacity of coming into Court with a prayer for an equitable relief."

But it is not an equitable relief for which he is asking. When it is a partnership at will, a partner is entitled to dissolution; it is a legal right, under the Code and under the contract. Then the learned Judges quote a passage from "Lindley on Partnership" which deals with the circumstances in which a Court may order a dissolution of partnership during the term, which, of course, has nothing to do with this case.

The Appellant here has been forced to admit that he cannot ask for any alteration of para. 3 which has been read, and the Respondent cannot support the judgment of the High Court, which says that there is to be no relief given; but on the question of relief he practically says: "There is no room for an account here at all, because we have already seen that this gentleman has falsified all the account books, and there is nothing to account upon." That is really trying to make this Board do what the Commissioner ought to do when the accounts are being taken.

In the circumstances it is quite clear that the appeal must be allowed with costs, and the decree of the District Court restored. With regard to the costs of the appeal to the High Court which were ordered to be paid by the present Appellant, their Lordships think that having regard to what took place there, neither party should have any costs, and any costs paid under the High Court's order must

RAM SINGH *v.* RAM CHAND.

be repaid. The future costs, which will be incurred on the further proceedings in the District Court, will of course be in the discretion of that Court. Their Lordships will humbly advise His Majesty accordingly.

Messrs. Ranken Ford and *Chester* for the Appellant.

Messrs. T. L. Wilson & Co. for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD BUCKMASTER.	SRI RAJA BOMMADEVARA NAGANNA NAIDU
LORD DUNEDIN.	BAHADUR ZEMINDAR
LORD CARSON.	GARU and anr.,
SIR JOHN EDGE.	Appellants,
LORD SALVESEN.	*v.*
1923,	RAVI VENKATAPPAYYA and ors.,
Heard, 24, April.	Respondents.
Judgment, 29, June.	

Successive rent suits—Zemindar's decree in earlier suit reversed on appeal by the Privy Council—Later suit decreed during pendency of appeal, but not appealed against—Decision of Privy Council, if supersedes later decrees.

In certain suits by the Zemindar against his raiyats to enforce the acceptance by them of pattas or leases of Faslis 1314 and 1315 which had been tendered to them, the latter pleaded that certain rates had been fixed in Fasli 1292 which alone were recoverable and not the asara *or* varam *rates (produce-sharing system) demanded by the Zemindar. The first two Courts upheld the tenants' plea but on second appeal the High Court held that the pattas tendered were proper pattas and the tenants must accept them. The decrees of the High Court were reversed by the Privy Council, but during the pendency of the appeal to the Privy Council, the Zemindar instituted similar suits for arrears of rent in respect of 1316 Fasli to 1322 Fasli against the tenants and recovered decrees which he realised in execution. After the Privy Council decision the tenants, who had made no applications for stay of trial of the later suits pending the disposal of the appeal by the Privy Council, sued the Zemindar for a refund of the amounts paid by them in excess of the rates determined in the previous suit in consequence of the Privy Council decision:*

Held—*That the decision in the later rent suits was not reversed or superseded by the decision of the Privy Council in the earlier suits and the suits for refund were not maintainable.*

SHAMA PURSHAD ROY CHOWDURY *v.* HURRO PURSHAD ROY CHOWDURY (2) *explained.*

Decision of the majority of the Full Bench in JOGESH CHUNDER DUTT *v.* KALI CHURN DUTT (3) *disapproved.*

This was a consolidated appeal from a judgment and a number of orders of remand, dated the 7th March 1919, of the High Court of Judicature at Madras, setting aside a judgment and a number of decrees, dated the 23rd January 1917, of the Court of the District Judge of Kistna, on appeal from a judgment and a number of decrees, dated the 3rd December 1915, of the Court of the Honorary Suits Deputy Collector, Bezwada, in one set and a judgment and a number of decrees, dated the 29th September 1916, of the Court of the Subordinate Judge of Bezwada, in the other set.

The main questions for consideration in this appeal were—

(1) Whether the Respondents were entitled, on account of the order of the

(2) 10 M. I. A. 203 (1865).
(3) I. L. R. 3 Cal. 30 F. B.) (1877).

SRI RAJA BOMMADEVARA NAGANNA NAIDU *v.* RAVI VENKATAPPAYYA.

Privy Council, dated the 16th July 1914, in the suits for Fasli 1315 between the parties, to a refund of the rents paid in excess under final decrees of competent Courts and in execution;

(2) Whether the Civil Courts had jurisdiction to try and decide suits relating to disputes as to rates of rent, and

(3) Whether the final decrees in suits for Faslis 1314, 1316 to 1322 were not *res judicata* between the parties as to rate of rent for Fasli 1323.

The facts of the case may be briefly stated as follows :—The Appellants were the Zemindars of North Vallur Estate in Kistna District and the Respondents are the occupancy tenants of the villages of Maddur and Chodavaram in the said Estate. Originally the lands held by the Respondents were dry lands and up to Fasli 1283 (1873) the rent used to be paid in kind. In that Fasli the rent in kind was, by agreement, commuted into a money rate. This money rate was twice revised subsequently by agreement between the parties and the last revision was in Fasli 1292 (1882).

During the period between Fasli 1283 (1873) and Fasli 1313 (1903) pattas and *muchilikas* were exchanged between the Zemindar and the tenants. These documents contained, in addition to the usual terms, a clause to the effect that, in case any of the lands were converted into wet, and wet or garden crop raised, the Zemindar would be entitled to demand a higher rate of rent and that the tenants would be liable to pay it in respect of such lands. The rate, however, was not stated.

In Fasli 1314 (1904) the Respondents began to cultivate some of their lands with wet crops. The then Zemindar (father of the Appellants) demanded a higher rate of rent for such lands which was refused by the tenants. Thereupon the Zemindar tendered *asara* pattas claiming a share of the produce in respect of lands on which wet crops were raised. The tenants refused to accept them.

The Zemindar (father of the Appellants) instituted summary suits under the Rent Recovery Act (Madras Act, VIII of 1865) to enforce acceptance of pattas for Faslis 1314 and 1315 claiming rent on the *asara* or the produce-sharing system. The suits were dismissed by the Head Assistant Collector, Bezwada Division and the District Judge, on appeal, affirmed the decrees. But on further appeal the High Court reversed the decrees of the lower Courts and decreed the Zemindar's suits. The tenants appealed to His Majesty in Council from the decrees of the High Courts in suits for Fasli 1315 but there was no appeal from the decrees in suits for Fasli 1314. The Privy Council by their order in Council, dated the 16th July 1914, reversed the decrees of the High Court and restored those of the District Judge.

Meanwhile, the Zemindar instituted similar suits for Faslis 1316 and 1317 and obtained similar decrees. Applications for leave to appeal from these decrees were made by the tenants but leave was refused by the High Court and no steps were taken to obtain special leave.

On the 1st July 1908, the Madras Estates Land Act (I of 1908) came into force and the Zemindar instituted suits under that Act for recovery of rents for Faslis 1314, 1316 to 1319, obtained decrees and realised them in execution. Similar decrees were also obtained for rents of Faslis 1320 to 1322. The Respondents did not apply for stay of trial of any of the suits pending the disposal of their appeal to the Privy Council. All of them except those for Fasli 1322 were realised in execution. On the strength of

SRI RAJA BOMMADEVARA NAGANNA NAIDU v. RAVI VENKATAPPAYYA.

the order of the Privy Council, dated the 16th July 1914, the Respondents applied for review of the judgments of the several Courts in suits for other Faslis but those applications were all refused.

On the 2nd October 1914, the father of the Appellants instituted, in the Court of the Sub-Collector, Bezwada, the present suits (first set) for recovery of rent for Fasli 1323 from the Respondents. In his plaint, he claimed dry cash *cist* (rent) for dry lands and claimed Ambaram (rent in kind) or its equivalent in money for the wet lands. He further alleged that he collected rents on that basis up to Fasli 1321 and that, as the decrees in suits for Faslis 1317 to 1322 between the parties became final, the Respondents are bound to pay in the same manner for Fasli 1323. He added that, if the Court holds that he is not entitled to receive Ambaram (rent in kind), he may be decreed the amount mentioned in the *hisseb* (account) therewith annexed at the enhanced rate for wet lands as per agreement effected between the parties. He prayed for a decree accordingly.

On the 3rd March 1915, the Respondents filed their written statements in which they pleaded that the Zemindar was only entitled to dry cash rate on all the lands, that it was so decided by the order of the Privy Council, dated the 16th July 1914, that Devudu and Durbari fees claimed were not proper and that they were ever ready to pay the dry cash rate. They prayed that a decree may be passed only for dry cash rent for all the lands and that the rest of the claim may be dismissed.

The suits were transferred to the Court of the Honorary Suits Deputy Collector, Bezwada. The tenants deposited in Court the sums admitted by them.

On the 13th April 1915, the Court framed the following issues:—

"(1) Is the Plaintiff entitled to claim rent in kind on *asara* system on lands cultivated with wet crops?

(2) Or is he entitled to dry rates only?

(3) If the Plaintiff is entitled to wet rate not in kind but in money, what is that money rent?

(4) What was the yield on wet lands in the suit Fasli and what was the price of the produce?

(5) Is the Plaintiff not entitled to Devudu and Durbar fees?

(6) To what amount is the Plaintiff entitled?

(7) Is the Plaintiff's claim for paddy on *asara* system barred by *res judicata* by reason of the Privy Council decision in *Ravi Veeraragharulu* v. *Venkata Narasimha Naidu* (1) or is the Defendants' contention for not paying according to *asara* system barred by *res judicata* by reason of the decisions of various Courts for Faslis 1314 and 1316 to 1322?

(8) To what relief is the Plaintiff entitled?"

On the 3rd December 1915, the Honorary Suits Deputy Collector, after examining witnesses for both the parties, delivered his judgment in the suits. On the 7th issue he held that the Plaintiff's claim for rent on the *asara* system was negatived by the decision of the Privy Council in suits for Fasli 1315 and that the Defendants were not barred by *res judicata* by reason of the decisions of the various Courts for the previous Faslis. On the second issue he held that the Defendants cannot claim to pay only the dry rates on wet lands and that a suitable rate should be fixed. On the 3rd issue he found that the suitable rate is Rs. 6 an

(1) L. R. 41 I. A. 258: s. c. I. L. R. 37 Mad. 443; 19 C. W. N. 97 (1914).

acre. He held that Devudu and Durbar fees were not legal. He therefore passed decrees allowing the claim at Rs. 6 an acre for the wet lands.

Against the said decrees, dated the 3rd December 1915, Respondents preferred appeals to the District Court of Kistna at Masulipatam and the Appellants' father preferred cross-appeals. On the 23rd January 1917, the District Judge delivered his judgment in the appeals and cross-appeals. He held that the Privy Council decision operated as *res judicata* and had the effect of reversing all the decrees passed by the several Courts for the other Faslis and that the Plaintiff was only entitled to the dry cash rates on all the lands. He therefore modified the decrees of the Court of the Honorary Suits Deputy Collector and decreed rents at Rs. 2-12-0 an acre. He passed decrees allowing the Respondents' appeals to that extent and dismissing the cross-appeals of the Appellants' father.

From the said decrees, dated the 23rd January 1917, the Appellants' father preferred second appeals to the High Court of Judicature at Madras.

On the 9th February 1916, the Respondents instituted, in the Court of the Subordinate Judge of Bezwada, the present suits (second set) against the father of the Appellants, for refund of amounts paid by them in excess of dry rates for the rents of Faslis 1314, 1316 to 1321 and also for an injunction restraining the Appellants' father from executing the decrees of the Revenue Court for Faslis 1322. In their plaints, they alleged that the decision of the Privy Council in suits for Fasli 1315 was to the effect that the Zemindar was entitled only to dry rates of rent for all the lands, that the said decision nullified the decrees of the Collector and of the High Court for all the other Faslis and that they were entitled to get back the amounts paid in excess of the dry rate under those decrees. They prayed for decrees directing the Defendants to pay the amounts they claimed and granting an injunction restraining him from executing the decrees for rents of Fasli 1322.

On the 11th August 1916, the Appellants' father filed his written statement in which he pleaded that, for Faslis 1314, 1316 to 1322, he obtained decrees from competent Courts and realised them in execution; that the decrees for Fasli 1322 were being executed; that, after the Privy Council decision of 1914, the tenants applied to the High Court and the Revenue Courts for review of their decisions which were refused; that the suits were barred by *res judicata;* and that the suits were not maintainable.

On the 11th August 1916, the Subordinate Judge of Bezwada framed the following issues :—

(1) Whether this Court has no jurisdiction to try this suit?

(1*a*) Whether the suit is barred by the rule as to *res judicata*?

(2) Whether Plaintiff cannot recover—

(*a*) as the decrees under which Defendant collected the *cist* are still in force, or

(*b*) as Plaintiff's petitions for review thereof were dismissed?

(3) What is the effect of the Privy Council decision in *Ravi Veeraraghavulu* v. *Venkata Narasimha Naidu* (1) on the amount of *cist* payable by Plaintiff?

(4) What is the amount, if any, recoverable by Plaintiff?

(5) Whether Plaintiff is entitled to the injunction prayed for?

(6) To what relief is Plaintiff entitled?

On the 29th September 1916, the

(1) L. R. 41 I. A. 258: s. c. I. L. R. 37 Mad. 443; 19 C. W. N. 97 (1914).

learned Subordinate Judge of Bezwada, after recording the documentary evidence for both parties delivered one judgment in all the suits. He held that he had jurisdiction to try the suits, that the Privy Council decision in *Ravi Veeraraghavulu* v. *Venkata Narasimha Naidu* (1) superseded the decrees of the Revenue Courts, that those decrees were no longer in force, that there was no question of *res judicata* and that the Plaintiffs were entitled to the injunction prayed for. On the third issue, he found that the Privy Council did not decide that a uniform rate of Rs. 2-12-0 per acre should be paid for all kinds of lands. He, however, accepted the Plaintiffs' statement showing what was due to the Plaintiffs as correct. He passed decrees in accordance with the above findings.

On the 7th March 1917, the father of the Appellants preferred appeals to the High Court against the said decrees, dated the 29th September 1916, of the Court of the Subordinate Judge of Bezwada.

These appeals and the second appeals referred to in para. 9 supra were heard together by the High Court. The Appellants were brought on record as the legal representatives of their deceased father.

On the 7th March 1919, the High Court disposed of the two sets of the appeals by one judgment. The learned Chief Justice in the course of his judgment, said, after referring to the decision in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (3) :—

"The question is one of considerable doubt and difficulty, but on the whole I have come to the opinion that the tenants on reversal of the decree of the High Court by the Privy Council became entitled to recover the rent which they have overpaid in the intermediate suits by reason of this decision. I think, however, the Subordinate Judge was wrong in assuming that the rate of rent fixed in the Revenue Court for Fasli 1315 has been decided to be the proper rent for succeeding Faslis. The decision of the Revenue Court only related to the contents of the patta for Fasli 1315, and all the Privy Council decided was that the High Court had no sufficient grounds for disturbing this finding of fact. Now that the decree of the High Court has gone, it will, in my opinion, be necessary for the Court to find afresh what is the proper rate of rent with a view to ascertaining to what extent, if any, the Plaintiffs are entitled to a refund. I would therefore reverse the decrees and remand the suits for disposal according to law. Costs will abide."

"The connected second appeals relate to suits for the rent of a Fasli subsequent to the decision of the Privy Council. For the reasons already given I hold that decision in the Revenue Suit for 1315 is not binding on the Civil Courts and therefore the decrees must be set aside and the suits remanded for disposal according to law. Costs will abide."

Kumaraswami Sastri, J., agreed with him.

In accordance with the above judgment, two sets of orders were drawn up, one set remanding the suits to the Court of the Subordinate Judge of Bezwada and the other set remanding the suits to the Court of the Honorary Suits Deputy Collector, Bezwada.

Against the said two sets of orders of remand, the Appellants preferred the present consolidated appeal to His Majesty in Council.

Messrs. A. M. Dunne, K. C. and *Nara-*

(3) I. L. R. 3 Cal. 30 (F. B.) (1877).
(1) L. R. 41 I. A. 258 : s. c. I. L. R. 37 Mad. 443; 19 C. W. N. 97 (1914).

simham for the Appellants.—The decision of the Privy Council in 1914 was merely to the effect that the High Court was precluded from setting aside the findings of the lower Courts that the "*asara*" system had been abrogated. It did not affect the decrees in the other suits.

In the Appellants' rent suits the High Court should simply have restored the findings of the Revenue Court.

The tenants were not entitled to recover anything in their suits because the money had been paid under decrees which had never been set aside.

The decision of the majority of the Bench in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (3) is erroneous and the facts in *Shama Purshad Roy Chowdury* v. *Hurro Purshad Roy Chowdury* (2), on which the High Court rely were entirely different to those in the present case, and that decision is not applicable.

The Respondents were not represented at the hearing.

Their LORDSHIPS' JUDGMENT was delivered by

LORD CARSON. The Appellants are the Zemindars of North Vallur Estate in Kistna district, and the Respondents are the occupancy tenants of certain villages in the said estate.

In 1904 the Zemindar, father of the Appellants, brought before the Court of the Head Assistant Collector of the Bezwada Division, Kistna district, forty-nine summary suits under sec. 9 of the Madras Rent Recovery Act, 1865, against the Respondent raiyats to enforce the acceptance by them of pattas or leases of Faslis 1314 and 1315 (1904 and 1905) which had been tendered to them. The Zemindar demanded *asara* or *varam* rates for wet lands. The tenants on the other hand denied the claim of the Zemindar, pleading that certain rates had been fixed in Fasli 1292 (1882), which were alone recoverable and not the *asara* or *varam* rates (produce-sharing system) demanded by the Zemindar. The suits were dismissed by the Head Assistant Collector, Bezwada Division finding as a fact that the conversion of the *asara* rates into cash payment in 1283 Fasli, which was confirmed in 1292 Fasli, and had been acted upon ever since, was a permanent arrangement, and that the Plaintiff (the said Zemindar) was not therefore entitled to impose on the tenants pattas on the *asara* basis. On appeal by the Zemindar, the District Judge affirmed the decrees of the Collector in respect of the finding of fact relative to the character of the arrangement of 1283 Fasli, and upheld the orders dismissing the suits On further appeal to the High Court of Madras, the High Court set aside the orders of the lower Courts, holding that "the pattas tendered by the Plaintiff were proper pattas, and that the Defendants must accept them."

The tenants, thereupon, appealed from the judgment of the High Court to His Majesty in Council, and on the 18th June 1914, the Lords of the Judicial Committee of the Privy Council set aside the judgments and decrees of the High Court on the ground that as there were concurrent findings of fact in the Courts below, an appeal to the High Court was precluded by the Code of Civil Procedure, secs. 581 and 585. Their Lordships, however, ordered that the cases should be sent back to be remitted to the Court of the Collector for the drawing up of proper decrees and dealing with any other questions that might be outstanding in these actions between the

(2) 10 M. I. A. 203 (1865).
(3) I. L. R. 3 Cal. 30 (F. B.) (1877).

parties. The case before this Board is *Ravi Veeraraghavulu* v. *Venkata Narasimha Naidu* (1) where the facts outlined above are more fully stated. Meanwhile during the pendency of the said appeal to His Majesty in Council the Zemindar instituted similar suits for arrears of rent in respect of 1316 Fasli to 1322 Fasli under sec. 77 of Madras Act I of 1908, and decrees were made against the tenants, all of which, except those of 1322 Fasli were realised in execution. No application was made for stay of trial of any of the suits pending the disposal of the appeal to this Board. The matters for determination in the present consolidated decrees raise questions as to the effect, if any, of the decision of this Board of the 18th June 1914, on the subsequent judgments and execution thereunder.

On the one hand, on the 2nd October 1914 the Appellants brought the present suits against the Respondents, claiming dry cash cist (rent) for dry lands and claiming [illegible] (rent in kind, or its equivalent in money) for wet lands, whilst the tenants (Respondents) contended that the Zemindar was only entitled to dry cash rate on all the lands, and that the order of the Privy Council had so decided.

On the other hand, the tenants (Respondents) instituted the present suits against the father of the Appellants, who now represent him, for a refund of amounts paid by them in excess of dry rates for the rents of 1314, 1316—1321 Fasli, claiming that the said decision of the Privy Council in suits for 1915 Fasli was to the effect that the Zemindar was entitled only to dry rates as fixed in 1292 Fasli, and that not only the decisions of the High Court but also those of the Collector and the District Judge, which were given subsequently on the strength of that decision, were void and *ultra vires*.

In the Zemindar's suits the Deputy Collector of Bezwada decreed the suits, fixing the rent at the rate of Rs. 6 per acre for wet land and rates varying from Rs. 3 to Rs. 2-8-6 for dry lands. On appeal, however, the District Judge of Kistna held that the Privy Council judgment operated as *res judicata* with regard to the claim for rent for future years, and he decreed a uniform rent of Rs. 2-12 odd per acre.

In the tenants' (Respondents') actions for recovery of the excess of rent paid during the pendency of the appeal the Subordinate Judge of Bezwada on the 29th September 1916, found in favour of the Respondents (tenants).

The decisions in both sets of cases were challenged, and appeals taken to the High Court of Madras, and both sets of appeal were heard together.

On the 7th March 1919, the High Court gave judgment. With regard to the suits instituted by the Respondents for the refund of rent in consequence of the decision of the Judicial Committee, the Court held "that the tenants (Respondents), on reversal of the decree of the High Court by the Privy Council, became entitled to recover the rent which they had overpaid in the intermediate suits by reason of this decision," and remanded the suits for disposal according to law.

The learned Judges of the High Court based their decision mainly, if not altogether, on the authority of a case decided by this Board, *viz.*, *Shama Purshad Roy Chowdury* v. *Hurro Purshad Roy Chowdury* (2) as interpreted by the majo-

(1) L. R. 41 I. A. 258; s. c. I. L. R. 37 Mad 443; 19 C. W. N. 97 (1914).

(2) 10 M. I. A. 203 (1865).

rity of the Full Bench in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (3) to be referred to later.

Their Lordships cannot agree with this view, nor do they consider that the case cited in evidence is an authority for the conclusions come to. It is clear and settled law, as stated in the case referred to at p. 211 of the report that "money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests as their Lordships apprehend upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been reversed or superseded the money recovered under it ought certainly to be refunded, and as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded?"

Their Lordships entirely agree with this statement of the law, and, applying the test indicated, their Lordships can find no reason for holding that the decrees or judgments executed against the Respondents were either reversed or superseded by the judgment of this Board of the 18th June 1914. By that judgment their Lordships did not propose to deal with anything but the actual subject-matter of the cases before them. In fact, the only point decided was that the High Court, under the circumstances, had no power to reverse the decisions of the Subordinate Courts. The facts in the case of *Shama Purshad Roy Chowdury* v. *Hurro Purshad Roy Chowdury* (2), were, in their Lordships' opinion, entirely different. In that case the Judicial Committee, in applying the test already quoted, *viz.*, "whether the decree or judgment under which the money was originally recovered had been reversed or superseded," were of opinion that it was plainly intended by the order in Council in that case that all the rights and liabilities of the parties should be dealt with under it, and that it would be in contravention of the order to permit the decrees obtained pending the appeal on which it was made to interfere with this purpose. It was also pointed out that the plaint in which the original decree was recovered, described the interest recovered by the decrees under appeal as part of the same cause of suit, holding, therefore, that such decrees were mere subordinate and dependent decrees, which could no longer be held to have remained in force when the decree on which they were dependent had been reversed. It is no doubt true, as stated in the judgment of the High Court, that in the case of *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (3) the decision in *Shama Purshad Roy Chowdury* v. *Hurro Purshad Roy Chowdury* (2) was extended by a majority to apply to a case like the present, where it was sought to recover the difference between the enhanced rent recovered and the fixed rent which the tenant was bound to pay. But for the reasons already stated their Lordships cannot agree with the interpretation of the case of *Shama Purshad Roy Chowdury* v. *Hurro Purshad Roy Chowdury* (2) applied by the majority of the Court, and prefer the reasoning and conclusions set forth in the judgment of

(2) 10 M. I. A. 203 (1865).

(3) I. L. R. 3 Cal. 30 (F. B.) (1877).

SRI RAJA BOMMADEVARA NAGANNA NAIDU *v.* RAVI VENKATAPPAYYA.

Garth, C. J., which were concurred in by Jackson, J.

Their Lordships are therefore of opinion that in the tenants' (Respondents') actions for the recovery of the excess of rent the appeal should be allowed and the actions should be dismissed. In the suits by the Appellan[illegible] the rent of a F[illegible] subsequent to the decision of the Privy Council their Lordships see no necessity for referring the case back to the Court of the Honorary Suits Deputy Collector of Bezwada as has been ordered by the High Court. That Court, by decrees of the 3rd December 1915, found that a suitable rate is Rs. 6 per acre and the Appellants have not before the Board questioned the amount of such decrees. Their Lordships therefore think these decrees should be affirmed.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be allowed but without costs, either in the Courts before whom the suits were litigated or before this Board.

Solicitor: *Mr. Edward Delgado* for the Appellants.

Solicitor: *Mr. Henry S. L. Polak* for the Respondents.

G. D. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 597F OF 1923.

MOOKERJEE, J.
CHOTZNER, J.
1923,
16, July.

SM. PRAMILA BALA DEVI, Appellant, Petitioner,
v.
JYOTINDRA NATH BANERJEE and ors., Respondents, Opposite Party.

Probate and Administration Act (V of 1881), sec. 34—Application for appointment of administrator pendente lite *pending appeal.*

On the 29th June 1921 the executors applied for probate of the alleged Will. On the 20th July 1921 the objectors prayed for the appointment of an administrator pendente lite *which was granted on the 25th July 1921. On the 25th May 1923 judgment was pronounced in favour of the Will and on the 28th May an order was made for the issue of the probate and probate was actually issued on the day following. On that day application was made to the District Judge by the unsuccessful caveators to stay proceedings in order to enable them to file an appeal in the High Court and to bring a stay order. The District Judge held that possession having been already delivered by the administrator* pendente lite *to the executors nothing could be done by him. The appeal was lodged in the High Court on the 29th May and two days later the Rule to show cause why an administrator* pendente lite *should not be continued pending the appeal was issued and the Opposite Party contended that as possession had been obtained by them from the administrator* pendente lite, *no further action should be taken:*

Held—*That the fact that possession had been taken by the executors did not take away the Court's authority to appoint an administrator* pendente lite *pending the appeal to the High Court.*

HUKUM CHAND BOID *v.* KAMALANANDA SINGH (1) *and* SATI NATH *v.* RATANMANI (2) *referred to.*

BELLOW *v.* BELLOW (3) *discussed.*

That it is well-settled that the duties of an administrator and Receiver pendente lite *commence from the order of appointment and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of. In*

(1) I. L. R. 33 Cal. 927 (1905).
(2) 15 C. L. J. 835 (1911).
(3) 4 Sw. & Tr. 58 (61) (1865).

SM. PRAMILA BALA DEVI *v.* JYOTINDRA NATH BANERJEE.

the absence of any appeal, the functions of an administrator pendente lite *terminate with a decree pronounced in favour of a Will and do not continue until the executors obtain probate.*

HORRELL *v.* WITTS (4), TICHBORNE *v.* TICHBORNE (5), BRINDABAN CHANDRA SAHA *v.* SURESWAR SHAHA PRAMANIK (6), TAYLOR *v.* TAYLOR (7), WIELAND *v.* BIRD (8), POLINI *v.* GRAY (9) *and* HUKUMCHAND *v.* PIRTHI CHAND LAL (10) *discussed.*

This was a Rule obtained by the Appellant Petitioner on the Opposite Party to show cause why the administrator *pendente lite* should not continue pending the hearing of the appeal in the Hon'ble High Court.

The facts of the case will appear from the judgment.

Dr. Dwarka Nath Mitter and *Babus Kalikinkar Chakrabarty* and *Ramaprasad Mukerjee* for the Petitioner.

Babus Mahendra Nath Roy, Sitaram Banerjee and *Pramatha Nath Bandopadhaya* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a Rule for the appointment of an administrator *pendente lite* under sec. 34 of the Probate and Administration Act during the pendency of an appeal lodged in this Court against the decree for grant of probate in respect of the estate of one Hari Charan Mukherji who died on the 25th February 1921.

On the 29th June 1921, the executors applied for probate of the alleged Will. On the 20th July 1921, the objectors prayed for the appointment of an administrator *pendente lite* and five days later their application was granted, as the District Judge recorded the opinion that the grounds urged for the appointment of an administrator *pendente lite* were very strong. On the 27th July 1921, upon the joint application of all the parties concerned, Babu Bibhuti Bhuson Banerjee was appointed administrator *pendente lite* on a fixed remuneration of Rs. 60 a month. The application for probate was strenuously contested; but ultimately judgment was pronounced on the 25th May 1923 in favour of the Will. On the 28th May 1923, an order was made for the issue of probate and probate was actually issued on the day following. On that day, an application was made to the District Judge by the unsuccessful caveators in order that proceedings might be stayed so as to enable them to lodge an appeal in this Court and obtain an order for stay. The District Judge stated, however, that possession had already been delivered by the administrator *pendente lite* to the executors. The appeal was lodged in this Court on the 29th May 1923 and two days later the Rule now under consideration was issued. In answer to the Rule, the executors have contended that as possession has been obtained by them from the administrator *pendente lite*, no further action should be taken by this Court.

We are of opinion that the circumstance that the executors have managed to obtain possession from the administrator *pendente lite* with what has been described as unusual speed should not affect the decision of the question, whether the estate in litigation should or should not be secured during the pendency of the appeal in this Court. We may add that the

(4) 1 P. & D. 103 (1866).
(5) 1 P. & D. 730 (1869).
(6) 10 C. L. J. 263 (275) (1909).
(7) 6 P. D. 29 (1881).
(8) [1894] P. 262.
(9) 12 Ch. Div. 438 (1879).
(10) I. L. R. 46 Cal. 670: S. C. 23 C. W. N. 721 (1918).

parties are not agreed as to whether the entire estate has been delivered by the administrator *pendente lite* to the executors; and there seems good ground for the assertion made by the Appellants that the executors managed to obtain possession from the administrator *pendente lite* even before the probate had been actually issued; these matters, however, are not material for our present purpose. The judgment of this Court in *Hukum Chand Boid* v. *Kamalananda Singh* (1), which was applied in *Sati Nath* v. *Ratanmani* (2) makes it abundantly clear that the Court of Appeal will not allow itself to be paralysed by a successful endeavour on the part of a litigant to obtain possession in view of an apprehended appeal to be followed by a stay order.

We have carefully considered the circumstances of this litigation which are set out in the order made by the District Judge, when he held that there were grounds for the appointment of an administrator *pendente lite*. We have taken into account the nature and value of the estate. We cannot overlook the fact that the executors have not furnished security for the due discharge of their duties. We cannot ignore the fact that the executors are bound to administer the estate in terms of the Will which is the source of their authority. We feel no doubt whatever that in the interest of the party who might in the end turn out to be entitled to the estate, it is essential that the estate should be secured during the pendency of the appeal already lodged in this Court. It is well-known that it was not the practice of the prerogative Court to grant administration *pendente* ... unless by consent, or on proof that grant was necessary for the preservation of the property. Soon after the establishment of the Court of Probate, however, Sir J. P. Wilde in a considered judgment in the case of *Bellow* v. *Bellow* (3) observed as follows: "The Rule of the Court of Chancery appears to be, that wherever there is a *bonâ fide* suit pending, the Court will appoint a Receiver quite irrespective of the condition of the estate, or of the person who has the actual possession of it, on the ground that while the suit is pending, there is no one legally entitled to receive or to hold the assets, or to give discharges. I wish to give notice that I shall in future assimilate the practice of this Court to that of the Court of Chancery, and that I shall grant administration *pendente lite*, wherever the Court of Chancery would appoint a Receiver." In the Probate Division, however, the appointment of an administrator *pendente lite* does not follow as a matter of course whenever litigation is pending. The applicant is required to show some necessity for the grant, for example, that it is necessary for the preservation of the estate, for receiving rents, payments of interest or the dividends on shares as they become due, and that no fit and proper person is in a position to discharge these offices; *Horrell* v. *Witts* (4). The Court has power to appoint an administrator *pendente lite* in contested testamentary and administration suits, on the application of a person who is not a party to such suit. Accordingly, in an administration suit which was likely to be protracted, the Court appointed an administrator *pendente lite* at the instance of a creditor who was not a party to the suit: *Tichborne* v. *Tichborne* (5). These principles were applied by this Court in the case of

... L. R. 33 Cal. 927 (1905).
... J. 885 (1911)
(3) 4 Sw. & Tr. 58, 61 (1865).
(4) 1 P. & D. 103 (1866).
(5) 1 P. & D. 730 (1869).

On the

SM. PRAMILA BALA DEVI *v.* JYOTINDRA NATH BANERJEE.

Brindaban Chandra Saha v. *Sureswar Shaha Pramanik* (6). We are of opinion that notwithstanding the judgment of the Court below in favour of the propounder of the Will, the reasons which induced the District Judge to appoint an administrator *pendente lite* are still operative. In fact, from one point of view the necessity has been accentuated by reason of the fact that the executors propose to carry out the provisions of the Will notwithstanding the pendency of the appeal. It is well-settled in England that the duties of an administrator and Receiver *pendente lite* commence from the order of appointment, and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of. In the absence of any appeal the functions of an administrator *pendente lite* terminate with a decree pronounced in favour of a Will and do not continue until the executors obtain probate. The case is not altered if there are no executors: [illegible] (7) and [illegible] v. *Bird* (8). A similar principle has been applied in the case of an injunction where during the pendency of an appeal, the *ad interim* injunction granted by the trial Court is continued; *Polini* v. *Gray* (9). We are not unmindful that, as pointed out by the Judicial Committee in *Hukumchand* v. *Pirthi Chand Lal* (10), the operation of a decree is not suspended or interrupted by the presentation of an appeal. But we feel no doubt that, in the case before us, if nothing had happened immediately on the delivery of judgment by the District Judge, this Court would have without hesitation continued the administrator *pendente lite* during the pendency of the appeal, and as we have said the fact that the executors were able to take out probate and to obtain delivery from the administrator *pendente lite* before the objectors could come up to this Court to lodge their appeal and to obtain an order for stay, does not really affect the decision of the question.

We direct accordingly that this Rule be made absolute and that the gentleman who was appointed administrator *pendente lite* by the District Judge (Babu Bibhuti Bhuson Banerjee) be re-appointed administrator *pendente lite* on the remuneration fixed by the Court below. He will administer the estate subject to the direction of this Court. Liberty is reserved to both parties to apply for further orders. The costs of this Rule will be costs in the appeal. We assess the hearing fee at two gold mohurs. The executors will forthwith place the administrator *pendente lite* in possession of the estate.

H. C.

(6) 10 C. L. J. 263, 275 (1909).
(7) 6 P D 29 (1881).
(8) [1894] P 262.
(9) 12 Ch. Div. 438 (1879).
(10) I. L. R. 46 Cal. 670: s. c. 23 C. W. N. 721 (1918).

CRIMINAL APPELLATE JURISDICTION.]

GOVT. APP. NO. 5 OF 1923

AND

REV. NO. 662 OF 1923.

GREAVES, AND PANTON, JJ.

1923.

Heard, 13 and 14 December.

1924.

Judgment, 5 January.

EMPEROR, Appellant,

v.

PURNA CHANDRA GHOSE, Respondent.

Indian Penal Code (Act XLV of 1860), sec. 499, 9th Exception Defamatory imputation made for public good, how far protected in the absence of proof of due care and attention—Evidence of information produced at the trial, if may establish care and attention without proof that

EMPEROR *v.* PURNA CHANDRA GHOSE.

it was within the knowledge of the accused before the defamatory statement was published—Considerations of public good, if arise where good faith is not established—Court pronouncing on medical questions without trained assistance or expert evidence, propriety of.

Accused published a pamphlet containing certain statements that the complainant, a doctor, in furtherance of a conspiracy drugged the Bhowal Raj Kumar rendering him unconscious and causing him to be led to cremation, and the complainant prosecuted accused for defamation. The defence pleaded bonâ fide *belief of the truth of the statement. The Magistrate found as a result of considering the prescription given for the treatment of the Kumar, largely in the light of passages in certain medical books, that the treatment was not for biliary colic and that the Kumar's symptoms were of arsenical poisoning. He therefore found that a prudent and reasonable man would draw the conclusion that the medicine administered to the Kumar by the complainant doctor caused his collapse and the conduct of the complainant suggested conspiracy to a prudent mind:*

Held—*That for a Magistrate untrained in medicine to attempt, largely without trained assistance, to ascertain what certain medicines were prescribed for and what should be prescribed for biliary colic by reference to medical books was entirely unsound and the conclusion was valueless. Again the assumption that the amount of arsenic contained in the prescriptions would produce arsenical poisoning, collapse and unconsciousness was a conclusion impossible to support without expert evidence.*

That the fact that certain evidence was produced at the trial could not be prayed in aid to establish due care and attention imputed to the accused unless there was evidence to show that some of the information was in his possession at the time the statement was published.

That the accused was not protected by the 9th Exception to sec. 499, I. P. C. as the publication was not made in good faith having regard to the flimsy materials upon which it was based and to the absence of any evidence that the accused made any enquiries before publication or had at his disposal or within his knowledge at that time any of the evidence produced at the trial.

That if good faith was not established it was not strictly necessary to consider if the public good was involved.

This was an appeal by the Government against an order passed by the Deputy Magistrate of Dacca (B. M. Ghose, Esq.), on the 31st May 1923, acquitting the accused of an offence under sec. 500, I. P. C. The complainant also obtained a Rule against the said order.

The facts will fully appear from the judgment.

The Advocate-General and *Babu Surendra Nath Guha* for the Appellant (the Government).

Sir B. C. Mitter, Counsel and *Babus Prafulla Ch. Chakraborty* and *Prokash Chandra Pakrashi* for the Petitioner.

Mr. Langford James, Counsel and *Babus Gobinda Chandra De Rau, Suresh Chandra Taluqdar, Kshitis Chandra Neogi, Hemendra Nath Chatterjee, Jnan Chandra Roy, Jagendra Nath Bose* and *Jyotish Chandra Guha* for the Accused-Respondent, Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

Purna Chandra Ghose was, on the complaint of one Ashutosh Das Gupta, charged with an offence under sec. 500 of the Indian Penal Code. He was tried

EMPEROR v. PURNA CHANDRA GHOSE.

by a Deputy Magistrate of Dacca who acquitted him on the 31st May 1923. The Government have preferred this appeal against his acquittal and a rule has also been issued against the acquittal at the instance of the complainant. For the proper understanding of the matters which arise from this appeal it is necessary to state a few facts.

In the year 1908 three brothers were the owners of the Bhowal Estate at Jaidebpur. In the year 1908, the 2nd brother Kumar Ramendra Narain Rai, fell ill and came to Calcutta for treatment. He was accompanied by the complainant, who is a qualified medical practitioner, and who went as his family physician. He was treated in Calcutta by Dr. Sarbadhikari who advised him to take a change and accordingly in April 1909 the Kumar went to Darjeeling accompanied by the complainant, by his wife and her brother, by a Secretary and by some menial servants.

On the 6th May, it is said, that the Kumar was attacked by biliary colic, a disease from which it is said that he had suffered before and for which he had been treated by Colonel Pardey Lukis.

On the 6th May the disease is said to have become acute and Colonel Calvert, I. M. S., and Rai Shahib Nibaran Chandra Sen, the then Assistant Surgeon in charge of the Darjeeling Hospital, who is now dead, were called in and saw the Kumar on the 7th and 8th May and treated him. The Kumar is said to have died on the 8th May 1909 at midnight. On the 9th May 1909 his body was taken to the cremation ground. The widow and her party left Darjeeling for Jaidebpur on the 10th May and the *shrad* ceremony was performed at Jaidebpur.

In the year 1921, a *sanyasi* appeared in the Dacca District and some persons stated that he was the Kumar who, they said, had never died and there is no doubt that the *sanyasi* had a certain number of adherents who believed him to be the Kumar. The story put forward in support of this belief shortly is that some medicine was administered to the Kumar as a result of which he became unconscious, that those about him thinking he was dead took him to the cremation ground in his unconscious state. That at the cremation ground a storm of rain and hail came on which prevented the cremation being carried out and those with the body fled. That in their absence a *sanyasi* appeared and took away the unconscious Kumar, who was eventually revived by the *sanyasi*. That those who had brought the Kumar to the cremation ground on their return after the storm had abated found that the Kumar had disappeared and therefore set fire to the empty funeral pyre and after it was consumed returned to Darjeeling concealing the disappearance of the body of the Kumar. Further it has been suggested as a variant of the story that after it was found that the Kumar had disappeared a dead body was obtained and that this was burned as the purported corpse of the Kumar.

In the month of July 1921 Purna Chandra Ghose, who is a resident of Jaidebpur, published from the Jagat Art Press of Dacca, a Bengali pamphlet called "Heart's beloved Raja in the guise of a Fakir." Some 1000 copies of the pamphlet were issued and the pamphlet was sold in Jaidebpur, Dacca and elsewhere. This pamphlet contains the passages which are complained of—which are to be found at lines 3, 4, 9--16, 21 and 22 of p. 5 of the pamphlet. As translated the passages are as follows :—Line 3 and 4 "Ashu

EMPEROR v. PURNA CHANDRA GHOSE.

Doctor greatly enjoyed the confidence of the Kumar. In his looks and talk he was a gentleman. In his act he was like *Ea* (meanness)."

Lines 9—16.

"Then went the Khanshamas, Jamini, Akhila, Durwan Sarip Khan and several others. Having planned a scheme they all went with the second Kumar to the Hills. Some sort of medicine Ashu Doctor administered, by taking which the second Kumar became senseless. A great friend of the Kumar was Ashu Babu and so the Kumar took the medicine without suspicion and became unconscious."

Lines 21 and 22 :—

"They were all overjoyed to see the Kumar senseless and hurriedly took him away for cremation"

The defence put forward was that the accused believed the truth of the statements contained in the pamphlet and published it *bonâ fide*. The pamphlet at its commencement contains a statement of the point of view from which the accused wrote it. The passage has been translated to us by the Head Interpreter of this Court as follows :—

"I begin to write by remembering Sri Hari, I shall write all that I hear from people's mouth. I shall go on writing the faults and virtues without judging. I shall declare and publish not knowing the truths or falsehoods," and the Head Interpreter in reply to the accused's counsel stated that "without judging" meant without the accused passing his own personal judgment and that "not knowing the truths or falsehoods" meant "without having personal knowledge if what was stated was true or false." The learned Magistrate propounded the following issues for determination :—

(1) Whether or not the words contained in the lines 4, 5, 9—16, 21 and 22 at p. 5 of the pamphlet was defamatory?

(2) Whether or not the accused published Ex. 1?

(3) Whether or not the accused made the imputations conveyed in the lines in question intending to have or knowing or having reasons to believe that they would harm the reputation of the complainant?

(4) Whether or not the said imputations were true and made for the public good?

(5) Whether or not the said imputations were made in good faith and for the protection of the public good?

As regards the first issue the Magistrate has found that some of the words complained of are defamatory, and on the second issue he finds that the accused published the pamphlet which was marked at the trial as Ex. 1, and on the 3rd issue he found that the imputations were calculated to lower the complainant in the estimation of the public and thereby cause harm to his reputation. It is true that he reserves for consideration the question whether they were malicious but as he states in his judgment he decides issues 1, 2 and 3 in favour of the prosecution. He also decides the 4th issue against the accused holding that his plea of justification under Exception 1 to sec. 499, I. P. C., failed.

As regards the 5th issue he finds that the accused *bonâ fide* believed the imputations to be true, that a prudent man ought to believe them as true, that the accused took due care and attention and that the imputations were made for the public good. He therefore finds the accused's plea of justification under Exception 9 to sec. 499, I. P. C., established and acquits him.

EMPEROR v. PURNA CHANDRA GHOSE.

I gather from the judgment that the learned Magistrate arrived at this conclusion because he did not believe that the Kumar suffered from biliary colic at Darjeeling or died therefrom. He does not accept the complainant's evidence on this point and expunges from the evidence Colonel Calvert's certificate of the cause of death and also the certificate of the Deputy Commissioner. Moreover as a result of considering the prescriptions given for the treatment of the Kumar, largely in the light of passages in certain medical books, he comes to the conclusion that none of the prescriptions were for biliary colic and after considering the Kumar's symptoms he diognises these as symptoms of arsenical poisoning resulting from some medicine which, he concludes from the evidence, was prescribed and given to the Kumar by the complainant and he thinks that a prudent and reasonable man would draw the conclusion that this caused the Kumar's collapse.

He thinks moreover for reasons stated in the judgment that the conduct of the complainant reasonably suggests conspiracy to a prudent mind. The learned Magistrate apparently was satisfied that the accused acted with due care and attention before publishing the imputations because he examined at the trial 22 witnesses, many of them of position, and because he produced at the trial copies of prescriptions and hospital entries. He was also satisfied that he acted for the public good for reasons which he has stated.

With great respect to the learned Magistrate, who devoted much care and attention to his task, I cannot imagine any more unsatisfactory course than the one which he has adopted with regard to the prescriptions. For a mind untrained in medicine to attempt, largely without trained assistance, to ascertain what certain medicines were prescribed for and what should be prescribed for biliary colic by reference to medical books is to my mind entirely unsound and I think the conclusions are valueless. Again to assume that the amount of arsenic contained in the prescription, which he concludes the complainant prescribed and administered, would produce arsenical poison and collapse and unconsciousness is a conclusion impossible to support without expert evidence. Again the fact that certain evidence was produced at the trial cannot be prayed in aid to establish the care and attention imputed to the accused by the Magistrate before publishing Ex. 1 unless there is evidence to show that some of the informations was in his possession at the time Ex. I was published and of this there is no evidence whatsoever in the present case. Indeed this is negatived by the passage at the commencement of Ex. 1 already referred to where the accused says that he does not know whether the statements he is making in the pamphlet are true or false. It seems to us that the whole of the reasoning upon which the Magistrate has decided issue No. 5 in favour of the accused is fallacious. The grounds upon which the reasoning is based are entirely unsound and the conclusions drawn therefrom must accordingly fail. So far as the conclusion of the Magistrate on the first four issues are concerned we accept them and they are the only conclusions, we think, at which it is possible to arrive but having regard to his finding on issue No. 5, and the fact that we cannot accept the conclusion on which it is based it is necessary for us to examine for ourselves the evidence upon the record to ascertain if the accused's plea of justification is well-founded.

EMPEROR *v.* PURNA CHANDRA GHOSE.

The defence witnesses divide themselves into certain categories :—

(1) Those who purport to recognise the *Sannyasi* as the Kumar.

(2) The medical evidence.

(3) Those who speak to the occurrence in May 1909.

Under the 1st head come D. W. 1, D. W. 2, D. W. 3, D. W. 5, D. W. 6, D. W. 8, D. W. 11, D. W. 12, D. W. 18. But their evidence really amounts only to an expression of their own belief and is of no real assistance to the accused upon whom the burden lies of proving the substantial truth of his assertions.

Under the 2nd head comes D. W. 7 who deals with the prescriptions. He practises as a doctor at Jaidebpur and is related to the accused by marriage and stated that the prescriptions were not for biliary colic.

Under the 3rd head come D. W. 4, who only speaks of rumours, D. W. 9, a cook who went to Darjeeling in 1909 and spoke to the Kumar shouting that he felt a burning sensation and asking what medicine had been administered and to statements made to him by Sarip Khan about the disappearance of the dead body from the cremation ground and to a dead body tied up being brought the next day and being cremated, D. W. 10 who speaks of rumours, D. W. 13 who speaks of rumours and what he heard from D. W. 15, D. W. 14 who speaks of rumours and asserts that he was present at the cremation of a body from Stepaside, which I suppose he suggests was not that of the Kumar, D. W. 15, a Station Master, who speaks to seeing the Kumar 12 days after the cremation in the dress of a *Sanyasi*, D. W. 16 who speaks to the disappearance of the body from the cremation ground, D. W. 19 whose evidence is clearly valueless on the face of it

Now we do not conceive it to be any part of our duty on this reference to arrive at a finding as to the truth or falsity of the claim put forward by or on behalf of the *Sanyasi* to be the Kumar. He was not called and the issue does not directly arise. All that we have to do is, rejecting as we do the Magistrate's reasoning upon which his finding on the 5th issue is based, to ascertain if the accused's plea of justification is supported by the evidence and if he brings himself within any of the Exceptions to sec. 499, I. P. C.

Now, the accused has to establish that if it was true that the complainant conspired against the Kumar and that he administered medicine which rendered him unconscious. Having read the evidence we find that there is no evidence of any conspiracy by the accused against the Kumar and no satisfactory evidence whatsoever that he administered to him medicines which rendered him unconscious. Two doctors of experience were in attendance on the Kumar and it is extremely unlikely that they would not have detected anything wrong or that their suspicions would not have been roused if there had been any improper treatment of the Kumar. This being so, the accused is not protected by the 1st Exception to sec. 499, I. P. C. as his imputations are not true. No question therefore of the publication being for the public good arises. Nor do we think that the accused is protected by the 9th Exception to the section as the publication was clearly not made in good faith having regard to the flimsy materials upon which it was based and to the absence of any evidence that the accused made any enquiries before publication or had at his disposal or within his knowledge at that

EMPEROR v. PURNA CHANDRA GHOSE.

time any of the evidence which is now upon the record. If good faith is not established it is not strictly necessary to consider if the public good was involved. But if it were, it is difficult to see how the publication in the present case could have been for the good of the inhabitants of Jaidebpur.

Now, there is no doubt that a Court hesitates to interfere when an accused has been acquitted and that it does not do so unless there has been a miscarriage of justice and we have considered the cases on this point to which we were referred by the Counsel for the accused, but I am unable to say that this is not a case in which we should interfere. I think we should do so, and I think not only that there is no justification for the statements complained of but that there is no evidence worth the name to support them. We accordingly allow the appeal and we also make the Rule absolute. We do not think that it is necessary in the present case to order a retrial. All the evidence has been placed before us and we find the accused guilty of the offence with which he was charged and sentence him to undergo simple imprisonment for one month and to pay a fine of Rs. 1,000 or, in default, to suffer simple imprisonment for a further period of one month. The fine, if recovered, is to be paid to the complainant.

J. N. R. *Appeal allowed; Rule made absolute.*

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 572 OF 1923.

GREAVES, J.
PANTON, J.
1924,
14, February.

BASERUDDI SHEIKH, Appellant,
v.
THE KING-EMPEROR, Respondent.

Criminal Procedure Code (Act V of 1898), sec. 297 - Misdirection, omission to charge the jury with regard to the rights of private defence of property of the accused, apart from private defence of person, if amounts to—Indian Penal Code (Act XLV of 1860), sec. 103, right of private defence of property.

In a charge under sec. 304, I. P. C., the defence was that the deceased man came to the house at night with the intention of robbery and the accused on awaking found him coming from inside the house and inflicted wounds on him which proved fatal. The Judge in charging the jury expounded the law with regard to the right of private defence of the body, but neglected to direct the jury with regard to the right of private defence of property:

Held—*That the Judge should have charged the jury that if they accepted the story for the defence they would have to consider whether there was a reasonable belief in the mind of the accused that the thief was likely to have with him articles which he had taken from inside the hut and he should have further charged the jury that if they accepted this story with regard to the probability that the thief had with him articles taken from inside the hut they should consider whether the accused in the exercise of his rights of private defence of property under sec. 103, I. P. C. used more force than was reasonably necessary for preventing the thief from getting away with the stolen property.*

This was an appeal preferred against a conviction and sentence under sec. 304,

BASERUDDI SHEIKH *v.* THE KING-EMPEROR.

I. P. C., passed by K. N. Chowdhury, Esq., Additional Sessions Judge of Khulna, on the 10th August 1923 in agreement with the verdict of the jury.

The facts are briefly these :—The Appellant Baseruddi Sheikh while sleeping in the *verandah* on a certain night awoke and found a man coming from inside the hut and inflicted wounds upon the man which proved fatal. Baseruddi was thereupon put upon his trial on a charge under sec. 304, I. P. C. The story put forward for the defence was that the deceased broke into the house at night with criminal intent to commit theft and the accused on seeing him coming out of the hut inflicted the wounds. The Judge agreeing with the jury convicted him under sec. 304, I. P. C. and sentenced him to undergo rigorous imprisonment for 7 years. Against this conviction and sentence the present appeal was preferred.

Babu Prafulla Kamal Das Gupta for the Appellant.

Mr. Khundkar for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The accused in this case has been convicted under the provisions of sec. 304 of the Indian Penal Code and he has been sentenced to undergo rigorous imprisonment for a period of seven years. One point only is made with regard to the charge and it is this. It is said that the learned Judge neglected to charge the jury with regard to the rights of the accused under the provisions of sec. 103 of the Indian Penal Code. Now we have read the charge and although the Judge has directed the jury with regard to the right of private defence of the body under sec. 102, we cannot find that there was any direction to the jury with regard to the right of the accused under sec. 103 if the jury accepted the defence put forward on behalf of the accused, namely, that he awoke and found the dead man coming from inside the hut. If the deceased man came to the house with the intention of robbery and if he came from inside the hut as was the story put forward for the defence, the learned Judge should have charged the jury that if they accepted this story for the defence they would have to consider whether there was a reasonable belief or apprehension in the mind of the accused that the thief had with him or was likely to have with him the articles which he had taken from inside the hut and he should have further charged the jury that if they accepted this story on behalf of the accused with regard to the probability that the thief had with him articles taken from inside the hut they should consider whether the accused in the exercise of his rights of defence of property under sec. 103 used more force than was reasonably necessary for preventing the thief from getting away with the stolen property.

Under these circumstances, as this point was not put to the jury at all in the course of the charge, we think that the conviction and sentence must be set aside and we direct the accused to be retried. If at the retrial the accused is convicted the Judge should ascertain the views of the jury upon the matters to which I have referred.

J. N. R. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1121 OF 1923.

GREAVES, J.
PANTON, J.
1924,
5, March.

TARAPADA BISWAS and anr., Accused, Petitioners,
v.
KALIPADA GHOSH, Complainant, Opposite Party.

Commitment to Sessions relying on Civil Court judgment, propriety of Inquiring Deputy Magistrate, if may disbelieve witnesses and refuse to commit to Sessions

A Deputy Magistrate inquiring into certain charges triable by the Court of Sessions disbelieved the witnesses, some of whom were cross-examined before him, and dismissed the complaint. The District Magistrate relying inter alia *on two civil judgments reversed the Deputy Magistrate's decision and committed the accused for trial to the Sessions:*

Held—*That the District Magistrate had no right to rely on the judgments of the Civil Courts which clearly influenced his decision.*

That the Deputy Magistrate had more opportunity than ordinarily arises for arriving at an opinion with regard to the credibility of the witnesses, some of whom were cross-examined before him. It was open to a Deputy Magistrate to form his opinion with regard to the credibility of the witnesses called before him, though it was not his duty to closely criticise the evidence. If a prima facie *case was made out he should clearly have left it to the jury at the Sessions to form their own view as to the credibility of the evidence. But if after hearing the evidence he was satisfied that it was not trustworthy and that a conviction would not result, he was entitled to record his finding that the witnesses could not be believed and that a conviction would not result.*

RASH BEHARI LAL v. EMPEROR (1), KALYAN SINGH v. EMPEROR (2) *and other cases referred to.*

This was a Rule granted on the 27th November 1923 against the orders of the District Magistrate of Nadia (H. G. Blomfield, Esq.), dated the 10th and 19th November 1923, directing commitment of the Petitioners to the Court of Sessions for trial under secs. 465, 467 and 471, I. P. C., who were discharged by the Deputy Magistrate of Krishnagar (S. N. Dutt, Esq.), on the 12th October 1923, under sec. 209, Cr. P. C.

The facts were briefly as follows :—The Petitioners were prosecuted for forgery of certain *kabuliyats*. Some of the witnesses were cross-examined before the inquiring Magistrate, who disbelieved the evidence and discharged the accused. The District Magistrate, however, relying on the judgments of two Civil Courts which suspected the genuineness of the *kabuliyats* reversed the Deputy Magistrate's decision and committed the Petitioners for trial before the Court of Sessions. Against the said order of the District Magistrate the present Rule was obtained.

Sir B. C. Mitter, Counsel and *Babus Amarendra Nath Bose* and *Radhikaranjan Guha* for the Petitioners.

Mr. S. K. Sen, Counsel and *Babus Ramini Mohan Chatterjee* and *Rebati Mohan Chatterjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against two orders of a District Magistrate, dated the 10th of November 1923 and 19th of November 1923, whereby he committed the four Petitioners before us for trial to the Sessions in respect of charges of having forged certain *kabuliyats*. In making his order the District Magistrate reversed the decision of the Deputy Magistrate, who had

(1) 12 C. W. N. 117 : s. c. 6 C. L. J. 160 (1907).

(2) I. L. R. 21 All. 265 (1899).

TARAPADA BISWAS *v.* KALIPADA GHOSH.

dismissed the complaint disbelieving the evidence of the witnesses who were cited before him and holding that no motive for the forgery of the *kabuliyats* by the accused either of their own accord or at the instance of their master had been established. The learned District Magistrate in reversing the Deputy Magistrate's order states that he does so on relying on the judgments of two Civil Courts, which suspected the genuineness of these *kabuliyats* and also on the ground that there was ample evidence of motive for forgery of the *kabuliyats*. The reasons given by the District Magistrate are clearly wrong. He had no right, we think, to rely on the judgments of the Civil Courts which clearly influenced his decision and as to the ground of motive it seems to us that this is not established. Nafar Chandra Pal Chowdhury, the master of the four accused, had a claim for mesne profits against his co-sharers but the *kabuliyats* related to a period subsequent to the period for which mesne profits were claimed and it seems to us that the *kabuliyats* could not have assisted the master of the accused in making his claim for mesne profits. We accordingly think that the District Magistrate was wrong in finding, as he has done, that there was ample motive for the forgery.

The only question that remains is whether it was open to the Deputy Magistrate, as he has done, to disbelieve the evidence of the witnesses. who were called before him in support of the complaint against the accused. If it is the duty of the Deputy Magistrate merely to record the evidence and leave it to the jury at the Sessions to decide as to the credibility of the evidence then clearly the Deputy Magistrate was wrong in expressing an opinion, as he has done, with regard to the credibility of the witnesses who were before him. Some of the witnesses were cross-examined at the time the accused showed cause and consequently the Deputy Magistrate had more opportunity than ordinarily arises for arriving at an opinion with regard to their credibility. It seems to us, however, having regard to the authorities that have been cited, namely, the case in *Rash Behari Lal* v. *Emperor* (1) and the other authorities cited from other High Courts, namely, *Kalyan Singh* v. *Emperor* (2) and *In re Parvati* (3) and the case from Madras, *In re Ponniah Thirumali Vandaya Thevar* (4), that it is open to a Deputy Magistrate to form his opinion with regard to the credibility of the witnesses called before him. In so saying we do not suggest that it is his duty to closely criticise their evidence. If a *primâ facie* case is made out he should clearly leave it to the jury at the Sessions to form their own view as to the credibility of the evidence. But if after hearing the evidence he is satisfied that it is not trustworthy and that a conviction will not result, we think that he is entitled to do as the Deputy Magistrate has done in this case, namely, to record his finding that the witnesses who spoke in support of the charge cannot be believed and that a conviction will not result. Under the circumstances, we do not think that the District Magistrate was justified in reversing the order of the Deputy Magistrate and we accordingly make the Rule absolute.

The accused will be discharged from their bail bonds.

J. N. R. *Rule made absolute.*

(1) 12 C. W. N. 117: s. c. 6 C. L. J. 160 (1907).
(2) I. L. R. 21 All. 265 (1899).
(3) I. L. R. 35 Bom. 163: s. c. 13 Bom. L. R. 923 (1911).
(4) 42 Mad. L. J. 49 (1921).

PRIVY COUNCIL

[APPEAL FROM BENGAL.]

VISCOUNT HALDANE.
LORD DUNEDIN.
SIR JOHN EDGE.
1923,
Heard, 20, March.
Judgment, 13, April.

NABA KUMAR DAS and ors., Appellants,
v.
RUDRA NARAYAN JANA and anr., Respondents.

Sundarbans, reclamation lease of land in—Condition of forfeiture and re-entry, if lessee failed to re-claim one-eighth of the area in five years—Right reserved by lessor to enter and make measurement to see if condition fulfilled—Forfeiture clause, if may be enforced, without taking measurement.

A lease of jungle lands in the Sunderbans for a term of 40 years provided inter alia *that one-eighth of the entire area leased was to be cleared and to be in a fit state for cultivation at the end of the fifth year, and that at any time after the expiration of the fifth year the Sunderbans Commissioner or other officer appointed by the Government or any person authorised by him might enter on the land and cause it to be measured for the purpose of ascertaining whether the condition had been fulfilled, and it further provided that on failure to comply with the above clearing conditions, the lessees should be liable at the discretion of the Government to the forfeiture of all rights in land under the lease or to an annual penalty; and that the Government, if the lease was determined, was to have the right of immediate re-entry:*

Held—*That the representative of the Government who on inspection reported that the clearing conditions had not been fulfilled, was under no obligation to measure the land for the purpose of satisfying himself on the point. There was a right to enter and make measurement but no duty.*

This was an appeal from a decree of the High Court in Bengal, dated the 16th August 1918, which reversed a decree of the Subordinate Judge (3rd Court) of the 24-Parganas, dated the 16th August 1916.

The suit out of which this appeal arose was brought by the Appellants for a declaration that a forfeiture by the Government of a lease and agreement was invalid, and that they were entitled to the possession of the land in dispute.

In 1901, five persons, the parties to the present suit, or their predecessors took settlement from Government of 10,000 bighas of land known as Lot No. 1 Monsadwip in Saugor Island in the Sunderbans. The land was under jungle. The 3rd clause of the lease stipulated that one-eighth of the area should be "cleared and in a fit state for cultivation at the end of the 5th year reckoning from the 13th April 1901" and the 4th clause made all the rights of the lessees liable to forfeiture "on failure to comply with the above clearing conditions."

On the day on which the lease was executed an agreement was executed by the lessees, in which they undertook to construct certain protective works: and a clause in the lease stipulated for the fulfilment of that agreement and for forfeiture in default.

At the expiration of the 5 years Government on the report of the Sunderbans Commissioner, Mr. Sunder, declared resumption on the ground that the clearing conditions had not been complied with, and on the 27th July 1909 they granted a new settlement to the Respondent Rudra Narayan Jana.

The question for determination by the Board was whether or not the clearing conditions had been complied with.

The material evidence and the arguments of Counsel are set out in the judgment of their Lordships.

Messrs. L. DeGruyther, K. C. and *H. N. Sen* for the Appellants.

NABA KUMAR DAS v. RUDRA NARAYAN JANA.

Messrs. A. M. Dunne, K. C. and *T. B. W. Ramsay* for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—In this litigation the High Court at Fort William, as the Court of Appeal, reversed a judgment and decree of the Subordinate Judge, Third Court, 24-Parganahs. The Appellants had brought a suit in the latter Court for a declaration that a forfeiture by the Government of a certain lease and agreement was invalid and that they, as Plaintiffs, were entitled to possession of the land, the subject of the lease. The learned Subordinate Judge decided in favour of the Plaintiffs, but the High Court allowed an appeal from his decision and dismissed the suit. The present appeal is brought by the Plaintiffs, and it seeks to have the decision of the learned Judge of first instance restored. The only question now relevant for determination is whether the resumption by the Government in 1906 of Crown land in the Sunderbans, originally leased on the 7th December 1900, and a subsequent pottah by the Government dated the 27th July 1909, in favour of the Respondent, Rudra Narayan Jana, were validly made.

The only material facts are not numerous. A lot called Monsadwip in Saugor Island, Sunderbans, was put up to auction by the Government for settlement, and the highest bidder was one Golak Chandra Das. At his request, the Government on the 7th December 1900, granted a lease in favour of Golak Chandra Das himself, Narayan Prashad Ballav, Prasanna Kumar Maiti, Narendra Nath Bhuiya and Kubir Charan Patra. By partition deed the shares of the first three were declared to be of four annas each, and the shares of the last two of two annas each. These lessees, or their representatives, were the original Plaintiffs and the Appellants here. In August 1903, the first Respondent, Rudra Narayan Jana, purchased from the successors in title of Golak Chandra Das, who had died, a 2 annas share of the four annas share to which the latter was entitled.

The lease of the 7th December 1900, gave an occupancy right for forty years from April 1901 of jungle land. Under the third clause of this lease one-eighth of the entire area leased was to be cleared and to be in a fit state for cultivation at the end of the fifth year, and at any time after the expiration of the fifth year the Sunderbans Commissioner or other officer appointed by the Government or any person authorised by him might enter on the land and cause it to be measured for the purpose of ascertaining whether this condition had been fulfilled. The fourth clause provided that on failure to comply with the above clearing condition, the lessees should be liable at the discretion of the Government to the forfeiture of all rights in land under the lease or to an annual penalty. The Government, if the lease was determined, was to have the right of immediate re-entry. There was also a provision for the construction by the lessees of "protective works" with a right in the Government to put an end to the lease in case these were not constructed within a time prescribed. In the view which their Lordships take of the case it is not necessary to consider this provision.

By an agreement of the same date with the lease, the 7th December 1900, the lessees covenanted that they would undergo the penalties set forth in "the clauses of the lease," provided that the Sunderbans Commissioner or other officer should give to them or their legal repre-

NARA KUMAR DAS v. RUDRA NARAYAN JANA.

sentatives fifteen days' notice within which to show cause why the penalties should not be enforced. No question now arises on this covenant or proviso.

On the 12th April 1906, Mr. Sunder, who as Settlement Officer had taken over the duties of the Commissioner in the Sunderbans, an office which had been abolished, visited the property leased. He had previously made various intimations of visits which were not carried out and he had, on the occasion on which he actually inspected, arrived three days before the time he had intimated. These circumstances, however, do not affect the question of his right. He appears to have gone to the property and to have looked at it with the aid of his binoculars both when he landed and subsequently from a boat. The property was stated by the trial Judge to be "a vast tract of forest and swamp, comprised in the area of 7,532 miles, known as the Sunderbans," consisting of "a tangled region of estuaries, rivers and watercourses, enclosing a vast number of islands of various shapes and sizes." The property leased was included in Chuck Monsadwip which is in Saugor Island, one of those islands. The Sunderbans is by nature a swampy jungle covered with trees. The soil is alluvial soil, formed by deposit from the Ganges, at whose mouth it is. The Government had, for a long time past, been taking steps to reclaim it, and to convert the jungle from being the mere home of wild beasts into rice tracts. For this purpose it was necessary not only to cut down the trees but to take out their stumps, and improvement leases were being granted on terms, such as those in the lease in question, which should secure that this was done. It is, therefore, plain that the obligations in the lease to clear and to put into a fit state for cultivation, extended to the extraction of these stumps as well as to the cutting down of the timber.

Mr. Sunder appears first to have landed on the lot of the Respondent Rudra Narayan Jana. He subsequently got into a boat in order to have a view of other portions of the property, alighting on at least one spot. He was engaged for, at all events, two hours in looking at the property leased, which extended to about 3,000 acres. He did not take measurements. The learned Subordinate Judge speaks as though he was bound to do this, but it is clear that there was no obligation to do so imposed by the lease. There was a right, if the representative of the Government thought proper, to enter and make measurements, but no duty. What the Settlement Officer had to determine, as a matter of fact, was simply whether one-eighth of the entire area leased had been cleared and put into a state fit for cultivation within the stipulated time.

On the 23rd April, Mr. Sunder reported to the Collector of the 24-Parganahs at Alipur that he had inspected and had found only Rudra Narayan Jana and a few raiyats who held under him on the property. He stated that the clearing conditions had not been fulfilled, and that only a small portion had been cleared by Rudra, who had obtained some paddy from it. He also said that the "protective works" had not been commenced. As to this, however, for reasons connected with the absence of a designation by the Government of the site for them, no question has been raised on the argument in the appeal. He recommended in his report that the lease should be determined and the estate brought under direct management by the Government.

It was contended for the Appellants that the substance of this evidence was

displaced by certain documents put in at the trial by the Government. These documents were in the nature of a rent-roll proceeding on measurements stated to have been made about the beginning of the year 1909. The rent-roll itself was prepared on the 11th January in that year. It was relied on by the Subordinate Judge as showing that the land must have been made fit for cultivation by 1906. The Appellants offered evidence that there had been measurements made for the Government in 1907, but both Courts rejected the testimony of the witnesses as false. In the Court of Appeal it was pointed out that the entries in the rent-roll are ambiguous as to whether more than 942 bighas were stated to have been fit for cultivation on the 6th April 1906. If there was no more than this amount made fit by them, the eighth part of the whole amounting to 1,250 bighas, could not have been made fit within the time stipulated. The rent-roll was prepared by a clerk, Mahesh Chandra Dutta, from material which appeared to have been furnished to him by other clerks. There is no reliable evidence as to the entries having been the work of anyone who had sufficient first-hand knowledge.

The Court of Appeal, moreover, points out that there was ambiguity in the entries as to the dates at which the tenants were treated as actually being in possession of land that had been rendered fit for cultivation.

But however this may stand, there is another objection which their Lordships think fatal to the entries in the rent-roll being relied on as evidence which could outweigh the direct testimony of the witnesses who say that the stipulated eighth part had not been adequately cleared by April 1906. Mr. Sunder went into the witness box and stated that he had seen the property and, as the result, had advised that, as he had found that the clearing stipulated for had not been performed, the Government should resume the property leased, as was actually done. Nothing was put to him in his cross-examination about the rent-roll or the entries in it. If, as was suggested at the Bar, this was because the documents were tendered by the Government, a Defendant at the trial, as part of its case, only after Sunder had been in the box, an application might have been made to recall him for further cross-examination. There is, however, no suggestion that there was any such application. Sunder was not even cross-examined on the alleged perfunctory character of his inspection. The learned Subordinate Judge relied largely on the circumstance that he did not measure." But he was not bound to measure. His evidence was that he could see and saw that the proper quantity of land had not been cleared. If this statement was challenged it should have been challenged by cross-examination directed to the impracticability of forming a judgment by mere inspection, even with the aid of glasses, as to the proportion of area cleared.

After the forfeiture had been declared and an interval had elapsed, a fresh lease was granted to the Respondent Rudra on the 27th July 1909, who, it was admitted, could not be said to have been in a fiduciary position. In consequence of this lease to him he was joined as a Defendant in the suit along with the Secretary of State.

The trial Judge found that the Defendants had failed to prove that the clearing conditions of the lease had been broken, and on this ground gave judgment against them. The Court of Appeal held that the learned trial Judge had laid undue stress

NABA KUMAR DAS *v.* RUDRA NARAYAN JANA.

on jungle cutting alone. The stumps had to be extracted also before the land could be fit for cultivation. It was largely on the ground that this was proved not to have been done that they reversed the decision.

For reasons which they have already sufficiently indicated their Lordships concur in the view taken in the High Court at Fort William on the appeal from the trial Judge, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: *Messrs. Chapman, Walker & Shephard* for the Appellants.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE DEPUTY COMMISSIONER, WARDHA, CENTRAL PROVINCES.]

LORD BUCKMASTER.	
LORD DUNEDIN.	BALIRAM SING and
LORD CARSON.	anr., Appellants,
SIR JOHN EDGE.	*v.*
LORD SALVESEN.	RAI BAHADUR SETH
1923,	NARSINGDAS PRAYAG-
Heard, 17, April.	DAS MOHTA and anr.,
Judgment,	Respondents.
17, April.	

Civil Procedure Code (Act V of 1908), Or. 21, rr. 66, 90—Execution sale, application to set aside—Revenue assessed in estate to be sold not specified in sale proclamation, if a material irregularity—Damage in consequence to be proved

Where a revenue-paying estate is being put up for sale in execution of a decree, omission to specify in the sale proclamation a statement as to the revenue assessed upon the estate, as required by Or. 21, r. 66 of the Civil Procedure Code, is a ground which would enable the judgment-debtor to base an application for setting aside the sale under r. 90 of Or. 21 of the Code if the other conditions provided by the Code are complied with.

The applicant cannot succeed without proving that he has suffered material damage in consequence of the irregularity.

This was an appeal from an order of the Appellate Court of Deputy Commissioner of Wardha, Central Provinces, refusing to set aside the sale of certain Malguzari villages by Collector, dated 27th September 1918.

The principal points for determination were (1) whether there was any irregularity in the sale of the said Malguzari villages, (2) if so, whether the Appellants had proved to the satisfaction of the Court that they had sustained any substantial injury by reason of such irregularity, and (3) whether leave to appeal to His Majesty was granted by the proper Court.

Rai Bahadur Seth Narsingdas Prayagdas Mohta having obtained a decree for Rs. 6,896-8-0 against Baliram Sing and Ramkishan Sing in the Court of the Additional District Judge of Wardha, attached eight annas Malguzari share of Mouza Mangaon and sixteen annas Malguzari share in Mouza Shedgaon. The said decree was sent to the Collector on 6th April 1918, for execution and the sale of the said shares in the said Malguzari villages. Steps were taken by the Sub-divisional Officer from time to time to save the property if possible, but the said judgment-debtors invariably absented themselves although served with notices. At last it was found impossible to save the property and the said Sub-divisional Officer made his final report in form F to the Commissioner recommending the sale of the said property on 3rd July 1918. The sale was sanctioned by the Commissioner on 6th July 1918. Proclamation of sale was issued on 16th July 1918, affixed on the Court-house on 20th July 1918, and affix-

BALIRAM SING *v.* SETH NARSINGDAS PRAYAGDAS MOHTA.

ed on a conspicuous place of the property and announcement made by beat of drum on 22nd July 1918. In the schedule of the property Mouza Shedgaon (with which alone the Respondent No. 2 is concerned) was described "(2) sixteen annas Malguzari share of Mouza Shedgaon, No. 352 Tahsil Higanghat." On 20th August 1918, about a month after the said proclamation was affixed on the Court-house the Appellant Baliram Sing presented a petition for the cancellation of the said proclamation and the issue of a fresh one on the ground of some defect in the same, thereby stopping the sale ordered. Order thereon was reserved and the said Malguzari villages were sold by auction on 23rd August 1918. There were many bids for the sixteen annas Malguzari share of Mouza Shedgaon and it was knocked down to Mathuradas, Respondent No. 2, for Rs. 10,000. In conformity with the order of the Court, dated 20th August 1919, the matter again came before the Court on the return of the sale papers on 27th August. The Appellants were again absent. The Court regarded the irregularity as immaterial and fixed 24th September 1918, for confirmation of the sale.

On 23rd September 1918, the Appellants presented their memorandum of appeal to the Court of Deputy Commissioner and Counsel was heard on their behalf. On 24th September 1918, in support of their said appeal, they did not attempt to prove that as the result of the alleged irregularity the property had fetched an inadequate price.

On 27th September 1918, the Deputy Commissioner Mr. A. McDonald passed his order dismissing the appeal. He held that "the property was described in the proclamation as in the C. form, *viz.*, as a whole Malguzari village and an eight-annas share in another village. This is in my opinion a sufficiently accurate description." On the point that the proclamation was affixed on the Court-house before it was affixed on the property he thought the irregularity was not material, in any case, not one which was likely to have any effect on the bidding in the auction.

The Appellants then applied to the Financial Commissioner of Central Provinces and Berar for revision of the said order of the Deputy Commissioner, dated 27th September 1918. The said application was rejected on 4th November 1918.

The Appellants thereupon obtained leave to appeal to His Majesty in Council from the Court of the Deputy Commissioner on 22nd April 1919.

Messrs. DeGruyther, K. C. and *I. A. C. Skinner* for the Appellants.—The sale of the Appellants' villages in execution was bad because the sale proclamation did not satisfy the requirements of Or. 21, r. 66 of the Civil Procedure Code.

The proclamation omits the acreage of the plots and does not state the revenue.

The proclamation being invalid the sale is invalid.

The Appellants' application for setting aside the proclamation was made prior to the sale but was heard after the sale had taken place. On this application it was impossible to prove damage because the damage was not suffered until the sale took place. No opportunity was given of proving damage later.

Sir G. Lowndes, K. C. and *Mr. A. Majid* for the Respondents.—The appeal does not lie to the Privy Council. There are concurrent findings of fact by the lower Courts and no substantial question of law.

The sale took place in a revenue Court where everyone would be conversant with the revenue of the properties for sale. The omission of the quantity of the revenue was not therefore material.

BALIRAM SING *v.* SETH NARSINGDAS PRAYAGDAS MOHTA.

It lay upon the Appellants to establish that they had suffered damage and they have adduced no evidence to prove this.

Tafaduk Rasul Khan v. *Ahmad Husain* (2).

Mr. L. DeGruyther, K. C., in reply.

This Board has held that the omission of the revenue is a material omission.

Olpherts v. *Mahabir Pershad Singh* (1).

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Their Lordships see no need to reserve further consideration of this case. The question that it raises is a question which is more of procedure than of law, and arises under the execution, by way of sale, of a decree made by the Subordinate Judge of Wardha at a date which is not exactly defined, but which was clearly before the 6th April 1918. On this latter date that decree was sent down to the Deputy Commissioner of the District for execution, and on the 16th July 1918, the sale under that decree was proclaimed.

It is alleged by the Appellants, who were the judgment-debtors under the decree, that that proclamation was imperfect, and the first Appellant, on the 20th August 1918, made an application to the proper Court for the purpose of having the proclamation amended and the sale adjourned. The ground upon which he based that application was that, first, the revenue had not been properly defined in the proclamation, and, further, that there was no adequate description of the property that was about to be sold.

The rules which govern the sale in that District are the same as those established by the Code of Civil Procedure. Under Or. 21, r. 66 of that Code it is plain that the proclamation should contain the statement as to the revenue assessed upon the estate, and this Board, in a case, *Olpherts* v. *Mahabir Pershad Singh* (1), have held that that is a material matter, and that its omission is the omission of a matter which would enable the judgment-debtor to base an application for setting aside the sale if he could comply with the other condition that the Code provides.

The sale had been fixed for the 23rd August 1918, and consequently this application was only three days before the sale was to take place. The Sub-divisional Officer, before whom the matter was heard, did not think that it was desirable that the sale should be postponed; for this purpose it would have been necessary to have had a further month's advertisement, and accordingly he adjourned the application until after the sale had taken place. The sale did duly take place on the 23rd August, and on the 27th August the application was heard. What took place upon that hearing is a matter of some dispute but it is clear that the present Appellants did not appear. Of course, it is plain that if the hearing were regarded as merely the hearing of an adjourned application to postpone the sale, the fact that the sale had already taken place would have itself defeated the application; it would then have become too late. But it appears to have been regarded in a more liberal sense, and the learned Judge before whom it came regarded it as an application under r. 90 of Or. 21 of the Code of Civil Procedure, which entitles a person who has been injured by an imperfect proclamation to apply to the Court to set it aside on the ground of material

(1) L. R. 10 I. A. 25 : s. c. I. L. R. 9 Cal. 656 (1883).

(2) L. R. 20 I. A. 176, 182 : s. c. I. L. R. 21 Cal. 66 (1893).

(1) L. R. 10 I. A. 25 : s. c. I. L. R. 9 Cal. 656 (1883).

BALIRAM SING v. SETH NARSINGDAS PRAYAGDAS MOHTA.

irregularity, provided that he proves to the satisfaction of the Court that the material irregularity has caused him substantial injury.

It is not easy to see exactly what occurred on the hearing because we have no shorthand note of the judgment, and the only reference to it is contained in a summary of the proceedings in the order sheet. That recites the fact of the sale, and refers to the omission of the land revenue as one of the grounds upon which the application for amendment of the proclamation had originally been based, and contains the statement: "I believe the irregularity is immaterial, and such shrewd purchasers as" the two purchasers of the property "would not bid till they knew the land revenue. I, therefore, again reject the objection." If by that was meant that the omission of the land revenue was immaterial for the purposes of r. 90 (*supra*), which entitles the person injured to apply on the ground of a material irregularity, the learned Judge was wrong. If, on the other hand, he meant by it that it was immaterial because, having regard to all the circumstances of the case, there was nothing to lead him to believe that there had been any damage whatever suffered, his observation would be less open to question.

From that judgment an appeal was brought before the Deputy Commissioner himself, one of the grounds of it being that the irregularities complained of had resulted in an inadequate price being realised. It is by no means plain to their Lordships that on that hearing the Appellants did, in fact, insist upon the omission of the land revenue as one of the grounds of complaint. If introduced at all in the notice of appeal it was only introduced by implication, where it was said that the lower Court had admitted that the proclamation was defective. The specific grounds on which it is alleged that the imperative provisions of law relating to proclamations were not followed do not include this matter, but at any rate it was very definitely asserted that the irregularities had resulted in an inadequate price.

Upon the hearing of that appeal, the Appellants appear to have made no application whatever to be permitted to call evidence to prove that they had, in fact, suffered material damage by what had taken place. They did not ask that the matter should be sent back for hearing upon that head by the Sub-divisional Officer, nor, indeed, that the Deputy Commissioner himself should hear evidence upon it. It appears to have been argued on the facts as they stood, and the result was that the Deputy Commissioner decided that the omission was one which was not likely to have had any effect on the bidding in the auction.

In these circumstances, remembering that it lay upon the Appellants to establish before the Court that they had suffered damage before they could start their application for setting aside the sale; that they never did bring forward any evidence whatever upon the point, and they never appear to have asked for liberty to do it, it appears to the Board too late now to come and say that had they had such an opportunity they might have been able to satisfy the Court that they had suffered such damage and that the opportunity should be afforded them now.

For these reasons their Lordships will humbly advise His Majesty that the appeal should fail and should be dismissed with costs accordingly.

Solicitors: *Messrs. Valpy, Peckham & Chaplin* for the Appellants.

Solicitor: *Mr. Edward Dalgado* for the Respondent No. 2.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 57 OF 1923.

SANDERSON, C. J.
RICHARDSON, J.
1924,
19, February.

ROMESH CH. BASU
v.
JADAB CH. MITRA
and ors.

Solicitor and client - Solicitor paying fees to counsel under express verbal authority of the client —Fees not allowed on taxation as between solicitor and client—Solicitor, if entitled to claim such fees—Rules and Orders of Calcutta High Court, Original Side, Chap. XXXVI, rr. 9, 14 and 32—Procedure to be followed by solicitor in such cases—Marking Counsel's brief with fees not actually agreed to, for purposes of taxation, condemned.

The Respondents instituted this suit to recover a sum of Rs. 4,082 from the Appellant, a solicitor of the Calcutta High Court, who had acted for the Respondents in another suit and had been paid various sums of money for the purpose of prosecuting that suit. The Appellant admitted liability for a sum of Rs. 1,724-2-3 which he put into Court. At the trial the dispute was about a sum of Rs. 1,700. It was proved that the said sum had been paid by him to Counsel engaged in the other suit under instructions from the Respondents, although the same was in excess of the scale of fees laid down in r. 32, Chap. XXXVI of the Rules and Orders of the High Court, Original Side, and the payment was made out of money provided by the Plaintiffs for the express purpose of paying the specially arranged Counsel's fees. The amount had been disallowed by the Taxing Officer:

Held by the Court of Appeal (reversing the decision of the lower Court)—*That in view of the special circumstances of the case, the Appellant's bill of costs should be remitted to the Taxing Officer of the Court with a direction that he should allow as between attorney and client the sum of Rs. 1,700 in respect of the fees paid by the Appellant to Counsel.*

S. M. DUTT v. D. M. ROY (1) *referred to.*

When an attorney proposes or is asked by his client to mark on the brief or to pay fees to Counsel which cannot be allowed on taxation by the Taxing Officer, he should in every case before marking or paying such fees make it clear to his client that such fees will not be allowed on taxation and he should obtain a letter signed by his client authorising or ratifying the payment of such fees. When such fees are disallowed by the Taxing Officer, it would not be unreasonable for the Judge in the exercise of his discretion to call for the production of the letter and the acknowledgment and if satisfied allow the fees.

The actual fees which it has been arranged to pay to Counsel must be marked on Counsel's brief and no manipulation thereof can be permitted for the purpose of taxation or otherwise.

This was an appeal preferred against the judgment of Mr. Justice Page, dated the 29th January 1923, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case are fully reported in *Jadab Ch. Mitter* v. *Romesh Chandra Bose* (2).

Mr. N. Sarkar, Mr. B. K. Ghosh and *Mr. S. N. Bose* for the Appellant.

Mr. H. D. Bose and *Mr. S. N. Banerjee (Jr.)* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Defendant from the judgment of my learned brother Mr. Justice Page.

The Defendant had acted as attorney for

(1) I. L. R. 49 Cal. 618 ; s. c. 26 C. W. N. 870 (1921).

(2) 27 C. W. N. 587 (1923).

ROMESH CH. BASU v. JADAB CH. MITRA.

the Plaintiffs in a suit in the High Court in which the present Plaintiffs were Defendants. The present Plaintiffs succeeded in the suit and in the appeal which was filed by the Plaintiffs in that suit.

This suit was brought by the Plaintiffs to recover two sums of Rs. 245-10-3 and Rs. 3,837-1-0. The first of these sums was alleged to be the balance due to the Plaintiffs from the Defendant, in respect of payments made by the Plaintiffs to the Defendant on account of costs after deducting the amount allowed on taxation.

The second amount was part of a sum of Rs. 4,237-1-0, the taxed costs of the previous suit as between party and party, which was paid by the Plaintiffs in the previous suit to the Defendant under an order of the Court as a condition for a stay of execution pending the determination of the appeal.

In respect of this amount it was alleged that the Defendant had paid the Plaintiffs a sum of Rs. 400, leaving a balance of Rs. 3,837-1-0 due to the Plaintiffs.

The Defendant paid into Court the sum of Rs. 1,724-2-3 which he alleged was all that was due to the Plaintiffs.

The Defendant's defence was as follows :—

"2. That for the proper conduct of the said suit and appeal this Defendant engaged various Counsel to represent his said clients therein and he agreed to pay them certain fees under the express authority of his said clients and after duly informing them that the whole of such fees could not be allowed upon taxation but this Defendant owing to his close relationship with the said clients did not take any written authority from them for the payment of the said fees to Counsel.

3. That thereafter this Defendant paid various fees to Counsel under such verbal authority of his said clients as aforesaid and included the same in his bills of costs as will appear from such bills when produced but the Taxing Officer of this Honourable Court disallowed a portion of the said fees so paid on the ground of absence of written authority from the said clients in that behalf.

4. That this Defendant at the request and under the instructions of his said client also expended on their behalf in the said suit and appeal various other sums of money and did certain work for them in respect of a mortgage and reconveyance which was reasonably worth Rs. 290-14-0 but the Defendant did not include the said sums so expended and the costs of the said work so done in his said bills of costs, as under the taxation rules of this Honourable Court it is not the practice to do so.

6. That after giving credit to the Plaintiffs for the various sums received from them as shown in the said annexure B to the plaint there became due to this Defendant a sum of Rs. 2,512-14-9 in respect of the balance of account with the Plaintiffs.

8. That the said appeal was dismissed with costs on the 17th of July 1918 and this Defendant submits that thereupon the said fund of Rs. 4,237-1-0 in his hands became subject to a lien in his favour in respect of the balance of Rs. 2,512-14-9 then due to him by the Plaintiffs.

9. That this Defendant retained the said sum of Rs. 2,512-14-9 so due to him as aforesaid out of the said fund of Rs. 4,237-1-0 leaving a balance of Rs. 1,724-2-3 in his hands payable to the Plaintiffs."

The question at the trial, however, was limited to a sum of Rs. 1,700 or 100 gold mohurs in respect of fees paid by the Defendant to Counsel, which were disallowed on taxation as between attorney and client.

ROMESH CH. BASU v. JADAB CH. MITRA.

This sum was made up of fees paid to Counsel in respect of the suit to the extent of 72 gold mohurs or Rs. 1,224 and fees in respect of the appeal to the extent of 28 gold mohurs or Rs. 476.

There is no doubt, in my opinion, that the special fees, which were paid to Counsel, were arranged by the Defendant with the Counsel on the express instructions of the Plaintiffs; that the Plaintiffs were informed by the Defendant that they would not be allowed on taxation, that inspite of such information the Plaintiff instructed the Defendant to pay the fees to Counsel.

Further, I am satisfied that with the possible exception of a small sum of about Rs. 200 the fees were paid by the Defendant out of money provided by the Plaintiffs for the express purpose of the payment of the fees to Counsel. On the evidence it is possible that the above-mentioned sum of about Rs. 200 was paid out of money provided by the Plaintiffs for that purpose and it is such a small sum that it may be taken for the purpose of this case that the whole of the Rs. 1,700 which is in dispute, was paid out of money provided by the Plaintiffs for the purpose of paying the specially arranged counsel's fees.

There is no doubt that the Defendant paid the specially arranged counsel's fees and in many instances from day to day as the fees became due.

Under these circumstances it is difficult to understand how the Plaintiffs can bring themselves to claim the sum of Rs. 1,700 from the Defendant, especially having regard to the fact that it is not disputed the Defendant served them well as their attorney and that they were successful in the litigation in which they were involved.

The question, however, is whether the Plaintiffs having paid the sum in question to the Defendant for the express purpose of his paying the specially arranged Counsel's fees with full knowledge that they would not be allowed on taxation, and the Defendant having used the money for that purpose and having paid the counsel's fees, the Plaintiffs are entitled to recover the balance of such fees, which was not allowed on taxation between attorney and client.

It was contended on behalf of the Defendant that under the above-mentioned circumstances the Plaintiffs had no cause of action in respect of the Rs. 1,700; on the other hand, it was contended that as the fees constituting the sum of Rs. 1,700 had been disallowed on taxation as between attorney and client, the Defendant was liable to repay the sum to the Plaintiffs.

I do not consider it necessary to refer to the rules in Chap. 36 in detail.

I desire however to draw attention to Chap. 36, r. 14 which provides that in all cases of taxation as between party and party, the bill shall be lodged for taxation as between party and party and also as between attorney and client.

The result is that whenever a bill is carried on for the purpose of taxation as between party and party, there must be not only a taxation as between party and party but also a taxation as between attorney and client.

The scheme of the rules seems to be that the taxation, so provided for, should be final and conclusive subject to an application or reference to the Court or a Judge not only as between the parties to the litigation but also as between the attorney and client.

If therefore the attorney or client is dissatisfied with the taxation, he should adopt the procedure which is laid down by the rules and make an application to

the Judge. This procedure would apply whether the application is for a review of the taxation in respect of certain items, or for an order under r. 32 of Chap. 36 for an allowance of fees to Counsel higher or other than the fees set out in the table embodied in that rule.

That course was not adopted in this case by the attorney.

It may be surmised not unreasonably that the Defendant may have considered that it would not be necessary for him to do so, in view of the fact that he had funds of the Plaintiffs in his hands, that he had paid the specially arranged fees to Counsel on the express instructions of his clients, who are relations of his, and who had full knowledge that the fees would not be allowed on taxation, and he might not unreasonably anticipate that his clients under such circumstances would not claim the money representing such fees from him.

It may however be that the attorney did not appreciate fully the effect of the rules relating to counsel fees, and the result of their being disallowed on taxation even though he had paid them on the express instructions of his clients.

Whatever the reason may be, it is clear that the Defendant did not adopt the proper procedure and the question arises whether he is entitled to any relief in respect of this matter.

The Defendant alleged that in this case he was entitled to make the necessary application to the Court even after the suit had been brought. The circumstances of this case appear to be so special, and the claim of the Plaintiffs is so entirely devoid of merits, that in my judgment, in order that justice should be done between the parties and that the taxation rules should be complied with, the Court should exercise the jurisdiction vested in it by Chap. 36, r. 32, even though a considerable time has elapsed and the attorney did not follow the prescribed procedure.

In my judgment, therefore, the Defendant's bill should be remitted to the Taxing Officer with a direction that the Taxing Officer shall allow as between attorney and client the sum of Rs. 1,700 in respect of the fees paid by the Defendant to Counsel, which are represented by that sum.

The Defendant will then be entitled to debit the Plaintiffs with that sum in his account with them.

The result of that will be that the Plaintiffs will not be entitled to recover in this suit any more than the Defendant has paid into Court.

In my opinion the order and decree of the learned Judge therefore should be varied and an order drawn in accordance with the direction of this Court and a decree should be made in favour of the Plaintiffs for Rs. 1,724 instead of the sum of Rs. 3,421. The order for payment to the Plaintiffs of the money in Court will stand.

On the one hand the Plaintiffs have no merits; on the other hand the Defendant did not adopt the course which he should have done; and, in my judgment each party must pay his or their own costs of the suit and the appeal.

I desire to make it clear that what I am about to say is not to be taken as infringing in any way upon the decision in *S. M. Dutt* v. *D. M. Roy* (1) as to the jurisdiction and discretion of the Court or a Judge being unfettered.

I think however it is desirable to emphasise with a view to the future that when an attorney proposes or is asked by his client to mark on the brief or to pay fees to Counsel, which cannot be allowed on taxation by the Taxing Officer, he should

(1) I. L. R. 49 Cal. 618; s. c. 26 C. W. N. 870 (1921).

ROMESH CH. BASU v. JADAB CH. MITRA.

in every case before marking or paying such fees make it clear to his client that such fees will not be allowed on taxation and he should obtain a letter signed by his client authorising or ratifying the payment of such fees: and if and when such fees are disallowed on taxation, the attorney must adopt the procedure laid down by the rules. Although the jurisdiction and discretion of the Court or a Judge may be unfettered, it would not be unreasonable for the Court or a Judge to require the production of a letter containing the consent in writing of the client to the payment of such fees, and including an acknowledgment that he has been informed that the fees would not be allowed on taxation. Unless such a course is followed in the future the attorney will run a grave risk of the payments made by him in respect of such a special fee being disallowed and becoming irrecoverable by him against his client.

Before parting with this case it is necessary to refer to a part of the evidence, to which our attention has been drawn: it has no bearing upon the decision of the appeal, but it raises a matter of importance.

It appears that the Plaintiffs instructed the attorney, the Defendant, to retain two leading Counsel for the suit. One of the Counsel wanted a fee of 30 gold mohurs per day and the other asked a fee of 15 gold mohurs per day.

It was eventually arranged that the first learned Counsel should receive a fee of 20 gold mohurs per day and the second should receive 12 gold mohurs per day for the trial of the suit. These fees were paid by the attorney to the learned Counsel less a small deduction agreed to by the learned Counsel. When, however, the brief of the first learned Counsel was produced for taxation as between party and party, it was marked 30 gold mohurs cons: 5 gms., and 17 gms. for the 2nd, 3rd, 4th, 5th, 6th and 7th days and 16 gms. for the 8th day.

The second learned Counsel's brief was marked 20 gms. and 3 for consultation and 10 gms. for each of the following days, *viz.*, the 2nd to the 8th.

The learned Counsel signed for their fees. It is to be noted that the fees appearing on the briefs were not in accordance with the fees which had been arranged with the learned Counsel and which the Counsel received.

The fees of 30 gold mohurs and 20 gold mohurs for the first day were not in accordance with the arrangement nor were the refreshers.

[After stating the evidence, His Lordship the Chief Justice went on :—]

It is evident therefore that the fees appearing on the briefs were not those arranged and actually paid to the learned Counsel, but that the fees were marked in the manner appearing on the briefs for the purpose of taxation as between party and party and with the object for getting these fees allowed in taxation and recovering them from the Opposite Party.

I do not mean to suggest that the learned Counsel signed for any fees which they had not received; because they did receive the total appearing on the briefs. The figures on the briefs work out at rather more than 19 gold mohurs per day and 11 gold mohurs per day in the case of the two learned Counsel respectively. The learned Counsel, however, did not receive them in the form and manner appearing on the briefs. It was stated by learned Counsel in Court that this was a common practice, adopted for the purpose of getting the fees allowed in a party and party taxation against the unsuccessful party.

I desire to make it clear that such a prac-

tice cannot be recognised by the Court for a moment.

In our judgment such a practice is reprehensible, and not in accordance with the traditions of the profession and we wish it to be clearly understood that it must not be repeated in the future. If it is, and if it comes to the knowledge of the Court, it may be that the Court will take a serious view of the matter.

I should have thought that what I am about to say was so well-known in the profession that no necessity would arise for referring to it.

The actual fees, which it has been arranged to pay to Counsel, must be marked on the Counsel's brief, and no manipulation thereof can be permitted for the purpose of taxation or otherwise.

Learned Counsel should sign for the fees which have been arranged and paid, and in actual form in which they were arranged and paid, and no departure therefrom can be entertained either for the purpose of taxation or otherwise.

RICHARDSON, J.—I accept with considerable hesitation the order proposed by the learned Chief Justice. An attorney is an officer of the Court and I am disposed to regard it as an improper proceeding on his part to contest in a Court of law, whether as a Plaintiff or as a Defendant, the amount of a bill of costs which has been taxed by the Court's Deputy, the Taxing Officer, subject to the supervision and the orders of the Court.

In the present case, however, the circumstances are exceptional and as to the merits of the dispute there can be no question. That being so, and as I understand that the case is not to be treated as a prece-

I do not press my doubts to the point
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36, r. 32, even th... have fallen from the
learned Chief Justice as to the mode in which Counsel's fees should be marked on their briefs.

Mr. S. N. Ghosh, Solicitor for the Appellant.

Mr. M. N. Dutt, Solicitor for the Respondents.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2365 OF 1921.

RANKIN, J. MUKERJI, J. 1924, Heard, 15, January. Judgment, 22, January.	RAMESH CHANDRA MITRA, Plaintiff, Appellant, *v.* DAIBA CHARAN DAS and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 87—Transfer of non-transferable occupancy holding—Sub-lease by transferee to raiyat—Abandonment—Repudiation—If landlord entitled to eject transferee—"Ordinarily," meaning of—Sec. 87, if exhaustive—Landlord's remedy against transferee, if only a declaratory decree.

Where an entire occupancy holding was sold in execution of a money decree as well as a mortgage decree and thereafter the raiyat took a sub-lease from the transferee and continued to remain in possession of some culturable plots and homestead forming part of the lands of the tenancy but no longer paid rent to the landlord though there was no proof of refusal to pay rent, and the landlord did not recognise the auction-purchase:

Held, *in a suit by the landlord against the transferee for ejectment, that upon the facts found there was in law no abandonment or repudiation of the tenancy by the tenant, and the landlord, not having in consequence the right to present possession, was not competent to eject the transferee, but that in a properly framed*

RAMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS.

suit he would be entitled to a declaration that the transferee had no right in the lands as against the landlord.

SIPERUNNESSA BIBI *v.* RAMDEB RAI (5) *and* MONMATHA KUMAR RAY *v.* JOSADA LAL PODDER (6) *followed.*

DAYAMAYI'S *case* (1) *referred to and explained.*

DINANATH ROY *v.* KRISHNA BIJOY SAHA (2) *and* MADAB MANDAL *v.* MOHIMA CHANDRA MAZUMDAR (3) *not followed.*

Per RANKIN, J.—*The circumstance that the tenant is still upon the homestead land and still cultivating part of the holding is a consideration which takes the case out of the qualification intended by the word "ordinarily" as used in* DAYAMAYI'S *case* (1).

Quære :—*Whether there may be abandonment apart from the terms of sec. 87 of the Bengal Tenancy Act.*

Per MUKERJI, J.—*The sale in this case operated in effect not as a transfer of the entire holding but only of a portion of it.*

NABO KISSORE SAHA *v.* DHANANJOY SAHA (7) *referred to.*

Merely entering into an arrangement with the transferee to hold under him a portion of the holding, the sale whereof is binding on the tenant under the law—a portion of the holding having been sold in execution of a money decree and the rest in execution of a mortgage decree—does not amount to a repudiation of the tenancy.

Mere execution of a kabuliyat *by the raiyat in favour of the transferee does not amount to a repudiation of the tenancy.*

This was an appeal preferred on the 19th November 1921 against the decree of B. K. Basu, Esq., District Judge of Zillah Jessore, dated the 24th of August 1921, reversing the decree of Babu Nirmal Chandra Mittra, Munsif, 1st Court at Narail, dated the 15th of September 1920.

The facts material to this report are as follows :—

This appeal arose out of a suit brought by the Plaintiff, as landlord, to eject the transferee of a non-transferable occupancy holding.

Raj Mohan and Sonatan held the suit lands as occupancy raiyats under the Plaintiff. In execution of a money decree as well as a mortgage decree obtained against them the entire holding was sold and purchased by Defendant No. 1 Daiba Charan Das. Sonatan then took a sub-lease of a portion of the lands under the transferee, the Defendant No. 1, and continued to remain in possession of some culturable plots and homestead forming part of the lands of the tenancy. Raj Mohan and Sonatan no longer paid rent to the Plaintiff. Plaintiff did not recognise the auction-purchase of the Defendant No. 1 and brought this suit against him for *khas* possession of the holding. The defence, *inter alia*, was that there had been no abandonment of the holding by the original tenants Raj Mohan and Sonatan, and that he was the transferee of a portion of the holding. The raiyats Raj Mohan and Sonatan were not made parties to the suit.

Defendant No. 2 claimed to hold the lands by virtue of a settlement obtained from one of the tenants, Sonatan. *Pro formâ* Defendant No. 3 was a co-sharer of the Plaintiff, and it was found that by virtue of a partition between them Plain-

(1) I. L. R. 42 Cal. 172: s. c. 18 C. W. N. 971 (F. B.) (1914).
(2) 9 C. W. N. 879: s. c. 5 C. L. J. 221 (1904).
(3) I. L. R. 33 Cal. 581: s. c. 3 C. L. J. 348 (1906).
(5) 24 C. W. N. 117 (1919).
(6) 28 C. W. N. 200 (1923).
(7) 20 C. W. N. 610 (1916).

RAMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS.

tiff became the sole landlord of the suit lands.

The Munsif of Narail who tried the suit gave a decree to the Plaintiff for *khas* possession of the holding by ejecting the transferee, the Defendant No. 1.

The following portions of his judgment will be found material :—

"The next question is whether the Plaintiff can sue to eject the Defendant No. 1. The Defendant No. 1 is the auction-purchaser of the entire *jama* and it has not been denied that the tenant's interest in that *jama* is non-transferable. The *kabuliyat* (Ex. I) which the tenants executed shows that their interest is non-transferable and upon the Defendant's own showing there has been an abandonment of the *jama* by the tenants. The tenants no longer pay rent to the Plaintiff and Sonatan now claims to hold the homestead and some plots of land within the *jama* under the Defendant No. 1 and not under the Plaintiff. The Defendant No. 1 also says that Sonatan is his tenant in respect of the homestead and three plots of land within the *jama* and there is absolutely no evidence that the tenants still regard the Plaintiff as their landlord. It is thus clear that there has been an abandonment of the tenancy, and my finding is strengthened by the allegation made by the Defendant in the concluding portion of para. 12 of his written statement where he says that he himself possesses the land of the *jama* partly in *khas* and partly through tenants

The next question is whether the Defendant's auction-purchase has been recognised by the Plaintiff. The Defendant has adduced no evidence on this point and I therefore find that he is liable to be ejected.

In the above view of the case it is immaterial whether the tenants are still in possession of their homestead within the *jama* as the Defendant No. 1 says or has left it as the Plaintiff says. In so far as the Plaintiff is concerned there has been an abandonment of the tenancy because the tenants now hold the homestead under the transferee. . . . . The Defendant's contention is that the tenants should have been made parties to this suit but the case of *Sheikh Chand Pramanik* v. *Ramani* (16) does not support his contention.

The Plaintiff is entitled to a decree for *khas* possession as against the Defendant No. 1. The Defendant No. 2 has not appeared to contest the suit but no evidence has been given by the Plaintiff to show that he is liable to be ejected. The suit as against him shall be dismissed.

It is accordingly ordered that the suit be decreed against the Defendant No. 1 and dismissed against the Defendant No. 2, that Plaintiff's title to the lands in suit be declared as against the Defendant No. 1, that the Defendant No. 1 be ejected from the said lands and the Plaintiff do get *khas* possession thereof."

On appeal by the Defendant No. 1, the District Judge of Jessore reversed the decision of the Munsif and dismissed the suit. The following portion of his judgment will be found material to this report :—

"The learned Munsif has held (1) that the Defendant purchased the entire holding from the previous occupancy raiyats Raj Mohan Mandal and Sonatan Mandal, (2) that the auction-purchase has not been recognised by the Plaintiff landlord, (3) that the original tenants are still in possession of their homestead and several of the culturable plots under the transferee. On these findings which seem to be perfectly correct and unchallengable, the learned Munsif has decreed the Plaintiff's

(16) 17 C. W. N. 1105 (1913).

RAMESH CHANDRA MITRA v. DAIBA CHARAN DAS.

suit, apparently on the strength of *Dayamayi's case* (1) and the earlier case of *Shaikh Chand Pramanik* v. *Ramani* (16). But it appears that later rulings have decided that in case the tenant goes on possessing the holding or a portion of it under the transferee, the sale operates not as a sale of the entire holding but only of a portion and in such cases the landlord can only recover on proof of relinquishment or repudiation [*Nabo Kissore* v. *Dhananjoy* (7) and *Siperunnessa* v. *Ramdeb* (5)]. In the present case there was no allegation of relinquishment or repudiation. The plaint spoke of abandonment, but it is amply clear that there has been no abandonment, and it is not denied here that one of the original tenants Sonatan is in possession of the homestead and some of the culturable lands. In the circumstances, Plaintiff's suit should have been dismissed. Appeal allowed with costs throughout. Plaintiff's suit will stand dismissed."

Against this decision of the District Judge, Plaintiff preferred this second appeal.

Rai Surendra Chandra Sen Bahadur (with him *Babu Hemendra Chandra Sen*) for the Appellant.—Upon the facts found and admitted I submit that the tenants have abandoned the holding and repudiated the tenancy and the Plaintiff is entitled to get *khas* possession of the holding by ejecting both the tenants and the transferee. In this case the suit is for ejectment only of the transferee, and the tenants not being parties the question of ejectment against them does not arise. A suit for ejectment only against the transferee without making the transferrors parties is maintainable. See *Sheikh Chand Pramanik* v. *Ramani* (16). The tenants after the sale of their entire holding in execution have taken a sub-lease of a portion from the transferee, they no longer pay rent to their landlord, the Plaintiff, but are paying rent to the transferee. They have attorned to the transferee, and the result is that they must be considered to have repudiated the tenancy under the Plaintiff. No doubt it has been found that the tenants are still in possession of some portion of the lands, but this they possess not as tenants under the Plaintiff but as sub-lessees of the transferee. They have therefore abandoned their original raiyati right under their landlord, the Plaintiff. Sec. 87 of the Bengal Tenancy Act is not exhaustive, and abandonment can be established apart from the provisions of that section. The fact that the sale of the holding took place in execution does not make any difference. The real question is whether the relationship of landlord and tenant still subsists between the Plaintiff and the original tenants. My submission is that the original tenants are no longer the tenants of the Plaintiff, *firstly*, they have repudiated their tenancy under the Plaintiff, and *secondly*, they have abandoned the holding. The facts found and admitted, I submit, do amount in law to abandonment and repudiation.

On a transfer of a non-transferable occupancy holding when the raiyat takes a sub-lease under the transferee, in some cases it has been held that the landlord is entitled to eject both the transferror and the transferee, whereas in other cases it has been held that the landlord is not entitled to get *khas* possession by ejecting the original tenant but is entitled to eject the

(1) I. L. R. 42 Cal. 172; s. c. 18 C. W. N. 971 (F. B.) (1914).
(5) 24 C. W. N. 117 (1919).
(7) 20 C. W. N. 610 (1916).
(16) 17 C. W. N. 1105 (1912).

(16) 17 C. W. N. 1105 (1912).

RAMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS.

transferee. The decisions, however, are all uniform in this respect that the landlord in such cases is entitled to get a declaration that the transferee has not got any title in the land as against the landlord.

Refers to the following cases :—*Dayamayi* v. *Ananda Mohan* (1), *Chandra Benode* v. *Sheikh Ala Bux* (17), *Rajani Kanta* v. *Ekkari* (8), *Dinanath* v. *Krishna Bijoy* (2), *Madar Mandal* v. *Mohima Chandra* (3), *Kali Nath* v. *Upendra Nath* (12), *Kalim Sheikh* v. *Mocham Mondal* (9) and *Kali Churn Ghose* v. *Armom Bibi* (18).

I submit that the cases of *Nabo Kissore* v. *Dhananjoy* (7) *and Siperunnessa* v. *Ramdeb* (5) relied on by the lower Appellate Court are distinguishable.

Babu Trailakya Nath Ghosh for the Respondents.—I submit that the decision of the lower Appellate Court is correct, and the appeal is concluded by the findings of fact.

Plaintiff is not entitled to eject the transferee unless it is proved that the original tenants have abandoned the holding or repudiated the tenancy. The tenants are still residing on the land and cultivating a portion of it. No doubt they are upon a portion of the lands as a sub-lessee under the transferee but this fact does not establish that they have actually abandoned in law or fact their holding under the Plaintiff. The elements to constitute abandonment under sec. 87 of the Bengal Tenancy Act have not been proved. Execution of the *kabuliyat* by the raiyat in favour of the transferee and payment of rent to him had not the effect of a repudiation of the tenancy under the Plaintiff. The tenancy between the Plaintiff and the original raiyats still subsists, though they have taken a sub-lease under the transferee in respect of a portion of their leasehold lands under the Plaintiff. The sale in the present case was in effect of a portion of the holding.

I rely upon the cases in *Nabo Kissore* v. *Dhananjoy* (7) *Siperunnessa* v. *Ramdeb* (5).

Rai Surendra Chandra Sen Bahadur, in reply.—On the 22nd January 1924 when judgment was delivered, the learned vakil for the Appellant pointed out to their Lordships the case of *Monmatha Kumar* v. *Josada Lal* (6) and contended that the Plaintiff was at least entitled to get a declaration in this suit that the transferee had got no right in the lands as against the Plaintiff.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—In this case the landlord sues the transferee of a non-transferable occupancy *jote* for *khas* possession of the holding. It appears that two tenants Raj Mohan and Sonatan held the suit lands as occupancy raiyats under the Plaintiff. In execution of a money decree obtained against the tenants as well as of a mortgage decree obtained against them, the

(1) I. L. R. 42 Cal. 172 : s. c. 18 C. W. N. 971 F. B.) (1914).
(2) 9 C. W. N. 879 : s. c. 5 C. L. J. 221 (1904).
(3) I. L. R. 33 Cal. 581 : s. c. 3 C. L. J. 343 (1906).
(5) 24 C. W. N. 117 (1919).
(7) 20 C. W. N. 610 (1916).
(8) I. L. R. 34 Cal 689 : s. c. 11 C. W. N. 811 (1907).
(9) 24 C. L. J. 113 (1915).
(12) I. L. R. 24 Cal. 212 : s. c. 1 C. W. N. 168 (1896).
(17) I. L. R. 48 Cal. 184 : s. c. 24 C. W. N. 818 (Spl. B.) (1920).
(18) 13 C. W. N. 220 (1908).

(5) 24 C. W. N. 117 (1919).
(6) 28 C. W. N. 800 (1923).
(7) 20 C. W. N. 610 (1916).

RAMESH CHANDRA MITRA v. DAIBA CHARAN DAS.

holding was sold to the Defendant No. 1 and thereupon the tenants took a tenancy under the transferee remaining upon their homestead portion which was part of the land of the tenancy and also remaining as cultivators of a certain number of plots being part of the tenancy. In these circumstances, there has been a difference of opinion between the Courts below. The learned Munsif, following *Dayamayi's* case (1) has held that, as the tenants no longer pay rent to the Plaintiff and as they now claim to hold the homestead and some plots of land within the *jama* under the transferee and not under the Plaintiff and as there is no independent evidence that the tenants still regard the Plaintiff as their landlord, it is clear that there has been an abandonment of the tenancy within the meaning of *Dayamayi's* case (1). He proceeded in theory entirely upon abandonment and, as a matter of fact, in the first Court, little or nothing appears to have been said either about repudiation or relinquishment. The learned District Judge of Jessore has taken another view. He has treated the case as a question solely of abandonment. He has pointed out that the plaint spoke of abandonment and that there is no allegation of relinquishment or repudiation. He has found that, upon *Dayamayi's* case (1) and certain subsequent decisions, there is no abandonment and he has accordingly as against the transferee dismissed the suit.

There was another Defendant against whom the suit was also dismissed. In my opinion that circumstance helps neither party and I do not propose to refer to it again.

This is a typical case and one constantly coming before the Court. The conditions under which we have to decide it are, I think, these:—We are bound by *Dayamayi's* case (1) but the decisions previous to *Dayamayi's* case (1) are not now necessarily binding upon us. This circumstance is of the less importance that the relevant decisions prior to *Dayamayi's* case (1) are in almost no single circumstance consistent or well settled. So far as regards the subsequent cases purporting to interpret *Dayamayi's* case (1) we are, I think, bound either to follow those decisions or to refer the matter to a Full Bench. But above and beyond these cases to which I have just very generally referred, we have to remember that there stand the express provisions of the Bengal Tenancy Act. In dealing with this case, I propose to go first to the decision of *Dayamayi's* case (1) and to examine the state of the authorities applicable to such a case as the present.

In the second paragraph in the reported judgment of *Dayamayi's* case (1), to be found at page 223, the proposition laid down by the Full Bench is in these terms:—"Where the transfer is a sale of the whole holding, the landlord in the absence of his consent, is ordinarily entitled to enter on the holding; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of sec. 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy." It will be observed that, in both branches of that proposition, occurs the word "ordinarily" and that word by itself shows that the circumstances mentioned in each branch are being regarded as evidence of, or, as im-

(1) I. L. R. 42 Cal. 172: s. c. 18 C. W. N. 971 (F. B.) (1914).

(1) I. L. R. 42 Cal. 172: s. c. 18 C. W. N. 971 (F. B.) (1914).

RAMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS.

porting reference to, some higher, more precise or more ultimate test. One asks oneself in the present case whether the circumstance that the tenants are still upon their homestead lands and are still cultivating part of the holding is a consideration which takes the case out of the qualification intended by the word "ordinarily." I am quite clear that such a case as this is not an ordinary case for the purpose of the proposition. In the second part of the proposition, it would appear that the ultimate test is abandonment (under sec. 87), relinquishment or repudiation of the tenancy. But it does seem to me possible that the meaning of the first part of the proposition is that, on proof that a tenant has transferred the whole of his holding out and out, the Court may conclude that there is an abandonment not necessarily within the meaning of sec. 87 or a repudiation of the tenancy that would not necessarily be allowed as by itself a sufficient reason for eviction under sec. 25 of the Bengal Tenancy Act. I say that that is a possible interpretation of the language of the first branch. It has to be remembered that, whether they were right or not there were a considerable number of decisions to the effect that sec 87 is not exhaustive. Whether the Court meant to keep that open is not clear. In like manner as regards repudiation, the law, as I understand it, is that a mere denial of the landlord's title or of the relationship of landlord and tenant is not, by itself, a ground of eviction having regard to the express terms of such sections as secs. 10 and 25; but that, if in a previous suit a tenant successfully denied his landlord's title, then on the principle of estoppel by record an eviction may take place. This question whether in interpreting the word "ordinarily" in the first part of the proposition, we are to have sole regard to sec. 87 and to the provisions of the law as regards eviction which I have already expressed is, to my mind, the main difficulty in these cases. In the present case, however, I am of opinion that, on the evidence and on the findings, there is no justification for our holding that there is, in any legal sense of the word, an abandonment or, in any legal sense of the word, a repudiation. In this matter, one has, first of all, to remember that sec. 87 speaks of the tenant abandoning his residence without making provision for the payment of rent and ceasing to cultivate the holding by himself or another person. In the present case the tenant has not changed his residence and has not altogether ceased to cultivate the holding. There is no proof of refusal to pay rent. It seems to me that on these facts, any mere inference to be drawn from the fact of the sale in execution cannot amount to abandonment or repudiation in any sense of those expressions justifiable under the law. It has to be observed that in this case the sale was forced upon the tenants. Assuming that there was a mortgage decree as well as a money decree, still there can be no doubt that the money decree alone would have necessitated the sale. That being so, the tenants are in this position that they cannot question the title of the transferee. The landlord may elect to do so or may elect not to do so. One has to look to what the tenants in these circumstances have done. Not knowing whether the landlord will or will not assent, they have made terms with their transferee which provide that they shall have still a residence on the suit lands and shall still have the right to cultivate some of the lands. It seems to me that the tenants have done as much as they reasonably could in these circumstances to escape conduct amounting to abandonment or amounting to repudiation.

RAMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS.

I do not propose here to discuss the question whether there is any real justification for the proposition that there may be abandonment apart from the terms of sec. 87. Having regard to the provisions as regards eviction and to the express terms of sec. 87, it is manifest that there is considerable difficulty in maintaining the doctrine of abandonment outside the Bengal Tenancy Act. The only common law on the subject known to me would be the general principle that, for breach of a condition of a tenancy as distinct from a mere covenant the landlord may re-enter. So far as contractual conditions are concerned, they are covered by the express language of such sections as sec. 25. So far as I know, ejectment for breach of an implied condition has always been limited to cases either of estoppel by record or of cases where the tenant has made an attempt to assert a title paramount to the landlord in himself or in some other person.

It was contended by Mr. Sen that, although as between landlord and tenant there might be no right to evict, as between the landlord and the transferee whom he has not recognised and who has no right as against him, a decree for ejectment would be quite admissible. For that proposition there is undoubtedly some authority prior to *Dayamayi's* case (1), in particular in the cases of *Dinanath Roy* v. *Krishna Bijoy Saha* (2) and *Madar Mandal* v. *Mohima Chandra Mazumdar* (3). Since *Dayamayi's* case (1) I do not regard these decisions as binding, and in my opinion, that proposition is absolutely indefensible on any principle. It is perfectly true that the transferee can claim no right as against the landlord; but unless the landlord has a right to present possession, he cannot possibly maintain ejectment against any body whether he be the tenant's transferee, the tenant's invitee or licensee or tenant's uncle, cousin or aunt. It is quite impossible that, on any principle of law, the landlord who has a mere right of reversion expectant on the determination of the tenancy and who has not as against his tenant the right to end the tenancy could maintain ejectment against a third person merely because that third person has no title in himself. Accordingly, in this particular case, the fact that the suit was brought against the transferee and not against the tenants, is, in my opinion, no reason whatever why the landlord should succeed. The correct form of the question in these cases was put by Sir R. Couch in *Narendra Narain Roy* v. *Ishan Chandra Sen* (4) and is quoted in *Madar Mandal's* case (3). One has to find whether nothing is left in the tenant which would prevent the zemindar from recovering the possession from the person who claims under the transfer. The landlord has to show that he is entitled to possession of the land now. If he is not entitled to possession of the land now then the only remedy which he could in any case get against the transferee would be a declaration that the transferee has not got the tenancy right in the landlord's property.

The cases subsequent to *Dayamayi's* case (1) do not, in my opinion, conflict with the view expressed. On the contrary, the

(1) I. L. R. 42 Cal. 172: s. c. 18 C. W. N. 971 (F. B.) (1914).

(2) 9 C. W. N. 879: s. c. 5 C. L. J. 221 (1904).

(3) I. L. R. 33 Cal. 531: s. c. 3 C. L. J. 343 (1906).

(1) I. L. R. 42 Cal. 172: s. c. 18 C. W. N. 971 (F. B.) (1914).

(3) I. L. R. 33 Cal. 531 at p. 535: s. c. 3 C. L. J. 343 (1906).

(4) 22 W. R. 27, 26 (F. B.); 13 B. L. R. 274 (1874).

RAMESH CHANDRA MITRA v. DAIBA CHARAN DAS.

case of *Siperunnessa Bibi* v. *Ramdeb Rai* (5) seems to me almost exactly in point and the case of *Monmatha Kumar Ray* v. *Josada Lal Podder* (6) to which Mr. Sen has been so good as to refer us this morning, in my opinion, exactly to the same point. For these reasons, I think, this appeal fails and should be dismissed with costs.

MUKERJI, J.—I entirely agree in the order proposed to be passed by my learned brother; but in view of the importance of the questions involved I would make a few observations as to what I consider about the matter.

The original tenants, according to the findings of both the Courts below, are still in possession of their homestead and several of the culturable plots, under the transferee, the Defendant No. 1. It has not been found, nor do I think has it been suggested, that the original tenants ever vacated the holding in pursuance of the sale. The sale therefore operated in effect not as a transfer of the entire holding but only of a portion of it. There is authority for the proposition that in such a state of things the sale in substance is a sale of a portion of the holding [see *Nabo Kissore Saha* v. *Dhananjoy Saha* (7)]. Now applying to this position the rule laid down in the case of *Dayamayi* v. *Ananda Mohan Rai Chowdhury* (1) the landlord would not be entitled to recover possession of the holding unless there has been (*a*) an abandonment within the meaning of sec. 87 of the Bengal Tenancy Act or (*b*) relinquishment of the holding or (*c*) a repudiation of the tenancy. It is quite clear then that in order to succeed the landlord will have to bring his case within one or other of the aforesaid three clauses.

Now as to abandonment, it is not open to us upon the plain terms of the aforesaid rule to consider whether the abandonment necessary to be established to confer a right of re-entry on the landlord may not be of a description not covered by sec. 87 of the Bengal Tenancy Act, a point upon which the decisions appear to be apparently conflicting. The terms "abandonment," "relinquishment" and "repudiation" are terms distinct and not interchangeable, though proof of one may be some evidence, though not conclusive, yet relevant, for establishing facts and circumstances which might go to constitute another. Sec. 87 of the Bengal Tenancy Act, though it does not purport to define abandonment, plainly indicates what it is. The material elements are (*i*) that the raiyat should abandon his residence, and that he should do so voluntarily, without notice to his landlord, and without arranging for payment of his rent as it falls due, and (*ii*) that he should cease to cultivate the holding either by himself or by some other person. In the case of *Narendra Nath Roy* v. *Ishan Chandra Sen* (4) which was a case under Act VIII (B. C.) of 1869. Chief Justice Sir Richard Couch observed that if a raiyat having a right of occupancy endeavours to transfer it to any person, and in fact quits his occupation and ceases himself to cultivate or hold the land, he may be rightly considered to have abandoned his right. In *Madar Mandal* v. *Mohima Chandra Mazumdar* (3) the Court observed that there can be no doubt that in order to entitle the landlord to re-enter on abandonment by the tenant, it

(1) I. L. R. 42 Cal. 172: s. c. 18 C. W. N. 971 (F. B.) (1914).
(5) 24 C. W. N. 117 (1919).
(6) 28 C. W. N. 300 (1923).
(7) 20 C. W. N. 610 (1916).

(3) I. L. R. 33 Cal. 581 at p 585: s. c. 3 C. L. J. 343 (1906).
(4) 22 W. R. 22, 26 (F. B.); 13 B. L. R. 274 (1874).

RAMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS.

must be an abandonment in the words of sec. 87, namely, that the raiyat voluntarily abandons his residence without notice to the landlord and without arranging for the payment of his rent as it falls due, and ceases to cultivate. In *Ram Prasad Koeri* v. *Jawahir Roy* (7a), it was held that abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment for his rent as it falls due and for cultivating the land. In *Siperunnessa Bibi* v. *Ramdeb Rai* (5) it was held that where a tenant having a non-transferable right of occupancy sells such right to a third person, and having obtained a sub-lease from the purchaser, remains in possession of the land and cultivates it, the landlord, in the absence of repudiation by the tenant of his relation to the landlord as such, is not entitled to recover possession, inasmuch as it does not amount to abandonment, and the learned Judges relied for this proposition upon the decisions in *Madar Mandal* v. *Mohima Chandra Mazumdar* (3), *Rajani Kanta Biswas* v. *Ekkari Das* (8) and *Kalim Sheikh* v. *Mocham Mondal* (9). The decisions in the cases of *Ishan Chandra Dhupi* v. *Nishi Chandra Dhupi* (10) and *Sailabala Debi* v. *Sriram Bhattacherjya* (11) may perhaps be distinguished on the ground that in those cases the raiyat had parted with the whole of the agricultural portion of the holding and remained in possession of the homestead portion only and ceased paying rent, circumstances from which abandonment might be inferred. The decision in the case of *Kali Nath Chakravarty* v. *Kumar Upendra Nath Chowdhury* (12) in so far as it purports to lay down that where a tenant transfers his non-transferable holding, ceases to pay rent to his landlord and accepts a new tenancy from the transferee; and to be based upon the Full Bench case in *Narendra Nath Rou* v. *Ishan Chandra Sen* (4) referred to above cannot be treated as dealing with a question of abandonment within the meaning of sec. 87 of the Bengal Tenancy Act. In the present case none of the facts which would go to constitute an abandonment has been proved or found by the Courts below. Mere non-payment of rent is not evidence of abandonment though non-payment of rent coupled with non-occupation of land is evidence of an intention to abandon it, *Goher Sheikh* v. *Alifuddin Sheikh* (13).

The next question is, has there been a relinquishment of the holding? It is sufficient for me to say that it was not alleged that there was any. It is true that rent has not been paid, but mere non-payment is not sufficient though coupled with other facts and circumstances which show relinquishment, *Nilmani Dassi* v. *Sonaton Doshayi* (14).

Nextly, has there been a repudiation of the tenancy? I am not prepared to hold that merely entering into an arrangement with the transferee to hold under him a portion of the holding, the sale whereof is binding on the tenant under the law—a portion of the holding having been sold in execution of a money decree and other in execution of a mortgage decree—would

(3) I. L. R. 33 Cal. 531: s. c. 3 C. L. J. 313 (1906).
(5) 24 C. W. N. 117 (1919).
(7a) 12 C. W. N. 899 (1907).
(8) I. L. R. 34 Cal 689: s. c. 11 C. W. N. 811 (1907).
(9) 24 C. L. J. 113 (1915).
(10) 22 C. W. N. 853 (1917).
(11) 11 C. W. N. 873 (1907).
(4) 22 W. R. 22, 26 (F. B.); 13 B. L. R. 274 (1874).
(12) I. L. R. 24 Cal. 212: s. c. 1 C. W. N. 162 (1896).
(13) 30 C. L. J. 12 (1919).
(14) I. L. R. 15 Cal. 17 (1887).

RAMESH CHANDRA MITRA *v.* DAIBA CHARAN DAS.

amount to repudiation of the tenancy. If special facts are proved such as were found in the case of *Rajendra Kanta Biswas* v. *Ekkari Das* (8) or the refusal on the part of the tenant to pay rent continued for a sufficiently long series of years and is based upon the ground of non-liability, repudiation may be inferred. So also in the case of *Monmatha Kumar Ray* v. *Josada Lal Podder* (6) to which our attention has been drawn by Mr. Sen this morning it was held that mere execution of a *kabuliyat* in favour of the transferee does not amount to a repudiation of the tenancy. The original tenants were not parties in the present suit though one of them has been examined as a witness; and what he is alleged to have deposed in the present suit cannot be taken to have constituted a repudiation of the tenancy in the eye of the law.

A further question arose in the case as to whether the landlord could get a decree for *khas* possession against the transferee although there was no abandonment, relinquishment or repudiation made out on the part of the original tenants. Mr. Sen contended on the authority of the several cases of this Court that a landlord is entitled to have such a decree although he may not succeed in ejecting the original tenants. Reliance has been placed upon the decisions in *Madar Mandal* v. *Mohima Chandra Mazumdar* (3) and *Dinanath Roy* v. *Krishna Bijoy Saha* (2) and other cases upon which they are based. Speaking for myself, and I say this with the greatest respect for the learned Judges who decided these cases, I have not been able to discover any principles upon which these decisions are founded. The whole law of re-entry is based upon the principle that so long as the tenancy is not terminated by one or other of the modes indicated above, the tenancy interposes and operates as a barrier and the landlord cannot re-enter. I cannot very well see how the original tenant may not be touched on the ground that the tenancy subsists, and so far as the landlord is concerned the tenancy continues unaffected, and the landlord is entitled to look for payment of rent to the original tenant, and yet the landlord can get a decree for *khas* possession as against the transferee. At any rate, we have not been referred to any decision since the decision in *Dayamayi's* case (1) in which a similar view has been taken. In the case of *Monmatha Kumar Ray* v. *Josada Lal Podder* (6) under similar circumstances it appears that the landlord only obtained a declaration against the transferee that the latter had no right as against the landlord. Of course if the transferee has not acquired any title by his purchase there is nothing to prevent the landlord from getting a declaration in a suit properly framed for the purpose, that the transfer was not binding upon him as was laid down in the case of *Sheikh Guzaffar Hossein* v. *E. Dalgliesh* (15). I therefore agree that this appeal must be dismissed with costs.

H. C. S. *Appeal dismissed.*

(2) 9 C. W. N. 379: s. c. 5 C. L. J. 221 (1904).

(3) I. L. R. 33 Cal. 531 · s. c. 3 C. L. J. 343 (1906).

(6) 28 C. W. N. 300 (1923).

(8) I. L. R. 34 Cal. 689 at p. 693: s. c. 11 C. W. N. 311 (1907).

(1) I. L. R. 42 Cal. 172: s. c. 18 C. W. N. 971 (F. B.) (1914).

(6) 28 C. W. N. 300 (1923).

(15) 1 C. W. N. 162 (1896).

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

ATKINSON.	
LORD SHAW.	
LORD WRENBURY.	MACMILLAN &
LORD CARSON.	CO., LTD.,
SIR ROBERT YOUNGER.	Appellants,
1923,	v.
Heard, 25, 26 and 29, October.	K. & J. COOPER,
Judgment, 14, December.	Respondents.

Copyright Act of 1911 (1 & 2 Geo. 5, c. 46), secs. 1, 8—Compilation with notes of passages from old author, copyright if may be acquired in—Requisites for the acquisition of such right—Abridgment, copyright in.

There is a distinction between the material upon which one claiming copyright has worked and the product of the application of h's skill, judgment, labour and learning to those materials. The product, though it may be neither novel nor ingenious, is the claimant's original work in that it is originated by him, emanates from him and is not copied.

It is therefore not correct to say that a publication, the text of which consists merely of a reprint of passages selected from the work of an author, can never be entitled to copyright. But the skill, judgment, labour, etc., expended should be sufficient to impart to the product some quality or character which the original did not possess and which differentiates the product from the original.

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case and must in each case be very much a question of degree.

The publication in respect of which Appellants claimed copyright, in this case consisted, first, of a number of detached passages selected from North's translation of Plutarch's Life of Alexander, often separated from each other by considerable bodies of print knit together by a few words so as to give these passages, when reprinted, the appearance as far as possible of a continuous narrative. Secondly, there were notes bearing on the text:

Held, *by the Judicial Committee, that the reprint of the passages in question was not an "abridgment" in which copyright could be claimed; and that it did not require such knowledge, judgment, literary skill or taste to compile them as would entitle the compiler to claim copyright therein; but the notes made the book more attractive, the study of it more interesting and informing, enhancing its efficiency and consequently increasing its value as an educational manual, so that the Appellants were entitled to claim copyright in these notes. The Respondents infringed Appellants' copyright by not merely copying but servilely copying many of these notes, and not by publishing a similarly prepared reprint of passages from the same book.*

To select scraps from an author and to print them in a narrative form so that the publication expressed, in the author's own words, some of the ideas, thoughts and opinions set forth in his work, does not require the learning, judgment, literary taste and skill requisite to compile properly and effectively an abridgment deserving the name.

This was an appeal from a judgment and decree, dated the 13th October 1921, of the High Court of Bombay in its Appellate Jurisdiction reversing a decree, dated the 10th March 1921, of the said Court in its Original Jurisdiction.

MACMILLAN & CO., LTD. v. K. & J. COOPER.

The Appellants who are publishers in England and other countries brought the suit against the Respondents who are educational publishers in Bombay.

The Appellants published in 1911 a book which they described as "Plutarch's Life of Alexander (Sir Thomas North's translation) edited by H. W. M. Parr." The text of this book was the text of Blackie's unabridged edition of the translation by Sir Thomas North, less certain portions omitted (either apparently as undesirable or as of insufficient interest). Where the omissions occurred the text was just sufficiently altered to keep the thread of the narrative unbroken. The passages to be omitted were selected by Mr. Parr who also wrote notes to the text, and the book was completed by him with a map, introduction, analysis of contents, chronological list, glossary, etc.

In October 1917 the University of Bombay prescribed, amongst other text books for their English matriculation examination of 1919, "Plutarch—Life of Alexander, translated by North (Macmillan & Co.)."

The Respondents also published, amongst other books, for the use of students at the aforesaid examination a book which they described as "Plutarch's Life of Alexander (North's translation abridged) edited with introduction, full notes, etc, by the Reverend A. Darby." The Respondents made a selection of passages to be omitted from the unabridged translation (Dr. Rouse's edition) and these included most of those omitted from the Appellants' book, but the Respondents retained many passages which the Appellants had omitted. The original translation had 40,000 words; the Appellants omitted 20,000 of these and the Respondents omitted only 13,000.

The Appellants alleged in their plaint that the Respondents' book constituted an infringement of the copyright which the Appellants claimed for their book, and they prayed for an injunction, damages, and other relief.

The facts are more fully set out in the judgment of the Judicial Committee.

The trial Judge (Fawcett, J.) held that the labour, skill and judgment involved in the preparation of the Appellants' book were sufficient to give the text the character of an "original literary work" within the meaning of sec. 1, sub-sec. (1) of the Copyright Act, 1911 and that the Respondents had so far reproduced the Appellants' text as to constitute an infringement of the Appellants' copyright therein.

He further held that there had been an infringement of the copyright in the notes contained in the Appellants' book and he passed a decree in terms of the prayer to the plaint. On appeal the High Court (Macleod, C. J. and Shah, J.) reversed the decision of the trial Judge and dismissed the suit.

The learned Judges were of opinion that the Appellants' book was not entitled to copyright owing to its lack of originality, there being nothing original in picking out for publication portions of a work which is not copyright. With regard to the notes, they were of opinion that although the Respondents' author had had the Appellants' notes before him and had, in some cases, instead of going to a dictionary or other book of reference, saved himself that trouble by accepting the information contained in the Appellants' notes, yet considering the information taken and the number of instances in which it was so taken, there was not sufficient to constitute an infringement of the Appellants' copyright.

From the decree of the High Court on

MACMILLAN & CO., LTD. v. K. & J. COOPER.

appeal the Appellants obtained special leave to appeal to His Majesty in Council.

Sir John Simon, K. C., Messrs. Macminnon, K. C., Macgillivray, K. C. and *A. T. Macmillan* for the Appellants.—The Appellate Court were in error in holding that these selections could not be the subject of copyright.

The Appellants' book, although composed of a series of selections, has nevertheless been produced by the labour, skill, knowledge and judgment of the author.

It is immaterial that the selections are all from the same book, the work of a single author, inasmuch as the completed book of selections is a new and distinct composition.

The question whether there can be copyright in a selection was decided in the affirmative by Sir Arthur Wilson in the Golden Treasury case, *Macmillan* v. *Suresh Chunder Deb* (4), where the principles in *Longman* v. *Winchester* (6) and *Hogg* v. *Scott* (5) were relied upon.

The "Golden Treasury" case was approved by Collins, M. R. in *Moffat and Paige* v. *George Gill & Sons* (8).

See too *Emerson* v. *Davies* (3), *Walter* v. *Lane* (2), *Kelly* v. *Morris* (12) and *Lamb* v. *Evans* (1).

The quality of "originality" is not essential in order to constitute copyright. *University of London Press* v. *University Tutorial Press* (9).

The text of the Appellants' book is the subject of copyright and there are concurrent findings of the lower Courts that the Respondents' text is the same as that of the Appellants.

Messrs. Upjohn, K. C., E. B. Raikes and *Harold Hardy* for the Respondents.—There was no originality in the Appellants' compilation sufficient to entitle them to copyright.

Sec. 1, sub-sec. (*1*) of the Copyright Act, 1911.

Their compilation was merely an extract from another work which itself was not the subject of copyright. If the Appellants had a right to restrain others from publishing their selection it would follow that there was right to restrain the publication of the entire work and the advantage of cessation of the original copyright would be lost. The "Golden Treasury" case, *Macmillan* v. *Suresh Ch. Deb* (4), is distinguishable. The selections there amounted to a new work and it was not argued that they could not be the subject of copyright. Sir A. Wilson's remarks are obiter and are not based on the cases to which he refers. *Longman* v. *Winchester* (6) and *Hogg* v *Scott* (5) which were referred to by him had for their *ratio decidendi* the question whether there had been an infringement, not whether there was a copyright. The basis of the Golden Treasury judgment may have been approved of by Collins, M. R. but not the judgment in its entirety.

There can be no copyright in selections from a single work.

Black v. *Murray & Son* (10).

Abridgement implies a new and original work as distinguished from extracts and the term is not applicable to the Appellants' compilation.

(1) [1893] 1 Ch 219.
(2) [1900] A. C 539.
(3) 3 Story U. S. Rep. 768 (1845).
(4) I. L. R. 17 Cal. 951 (1890).
(5) L. R. 18 Eq. 444 (1874).
(6) 16 Ves 269, 271 (1809).
(8) [1902] 84 L. T. 452; on app 86 L T. 465.
(9) [1916] 2 Ch. 601.
(12) L. R. 1 Eq. 697 (1866).

(4) I. L. R. 17 Cal. 951 (1890).
(5) L. R. 18 Eq. 444 (1874).
(6) 16 Ves. 269, 271 (1809).
(10) 3 Sc. Sess. Cas. 3rd Ser. 340; 9 Rettie. 341, 355 (1870).

MACMILLAN & CO., LTD. v. K. & J. COOPER.

Gyles v. *Wilcox* (13), *Dodsley* v. *Kinnersley* (14) and *Leslie* v. *Young* (15)

Copinger's Law of Copyright, 5th Ed., pp. 64, 148.

With regard to the notes, their matter was trifling and such as could be obtained from any reliable book of reference. Their value was infinitesimal and they cannot lay claim to copyright.

Sir J. Simon, K. C. in reply.—It is incorrect to say that if the Appellant succeeds, any other person can be restrained from publishing extracts from North's translation. The Appellants claim copyright in the work of their author, not an absolute right as of a patent. He referred to Copinger's Law of Copyright, 5th Ed., pp. 134, 135—*Carelis* v. *Grey* (16) and *Leslie* v. *Young* (15).

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—The action out of which this appeal has arisen was brought by the Appellants to restrain the Respondents, K. and J. Cooper, a firm carrying on in Bombay the trade and business of publishers of educational books, from printing, distributing or otherwise disposing of copies of a certain book published by them hereinafter described, and to recover damages and other relief. The ground on which this relief was claimed was that the Appellants were entitled to the copyright of a certain book entitled "Plutarch's Life of Alexander, Sir Thomas North's Translation. Edited for Schools by H. W. M. Parr, M.A.," and that the Respondents by the publication subsequently in the year 1918 of their aforesaid book entitled "Plutarch's Life of Alexander the Great, North's Translation, edited with Introduction, Marginalia, Notes and Summary by A. Darby, M.A." had infringed the copyright to which the Appellants were entitled in the earlier compilation.

The text of the Appellants' book consisted of a number of detached passages, selected from Sir Thomas North's translation, words being in some instances introduced to knit the passages together so that the text should, as far as possible, present the form of an unbroken narrative. The passages so selected were, in the original translation, by no means contiguous. Considerable printed matter in many instances separated the one from the other. North's translation consisted of 40,000 words; the text of the Appellants' book contained half of them, *i.e.*, 20,000 words, while the book published by the Respondents contained not only the aforesaid 20,000 words but 7,000 words in addition.

In addition to this text comprising the 20,000 words, the Appellants' book contained much printed matter which was omitted from the Respondents' book, namely, marginal notes, an introduction dealing with North's translation and Alexander's place in history, an analysis of the book's contents, a chronological table setting forth the principal dates in Alexander's life, and a few short notes introduced into the text styled transition notes. The text was divided into six chapters; notes bearing on the text and a glossary were appended.

On the 14th October 1917, notice had by order of the Syndicate of the Bombay University been published prescribing certain text-books in English which were required to be used for the Matriculation Examination to be held in this University in the year 1919. The Appellants' book

(13) [1740] 2 Atk. 143.
(14) [1761] Amb 403.
(15) [1894] A. C. 335
(16) [1913] 29 T. L. R. 570.

MACMILLAN & CO., LTD. v. K. & J. COOPER.

was included in that list. The title of the Appellants' book gives an indication of the purpose for which it was compiled; but it does not clearly appear from the evidence what was the precise purpose or object of the Appellants in limiting the text to 20,000 words and compressing it as they did. It may possibly have been that its length was so limited in order that its contents might be mastered in the time available for its study, and it also may have been limited because the Appellants desired to exclude everything from it which might be of an indecent or indelicate character, or which it might be thought undesirable for school boys to peruse or study. It did not, it would appear to their Lordships, require great knowledge, sound judgment, literary skill or taste to be brought to bear upon the translation to effect any of these objects as the passages of the translation which had been selected are reprinted in their original form, not condensed, expanded, modified or reshaped to any extent whatever.

In or about the month of November 1917, the Respondents published a hand-bill headed, "Bombay Matriculation 1919. Now Ready. Poetical Series, etc." The last book mentioned in the list was the Respondents' entitled as already set forth, with an announcement that it would soon be ready. The following sentences were then added :—

"In response to . . . should bring out reliable annotated editions of English Texts prescribed for the Bombay Matriculation examination, we have this time published such editions, in the confident hope that they will prove equally useful both to teachers and pupils.

"These editions will be found more useful than any published in England as having been specially prepared for Indian pupils, by those competent to understand their needs; and in every respect more reliable than similar editions brought out in this country by editors more or less incompetent for the task they undertake.

"As all our English Text-books will be ready in the beginning of the next month, teachers will be able to use at least some of them in the Pre-Matriculation Class.

"K. & J. Cooper, Educational Publishers, Bombay."

The Respondents' publication is formed on precisely the same general plan as was that of the Appellants'. Its text consisted of a number of detached passages taken from North's translation joined together, the preceding to the succeeding, by a few words where needed so as if possible to give to the whole text the appearance of a consecutive narrative. Notes were also contained in the Respondents' book which were in many instances servilely copied from those contained in the book of the Appellants.

The learned Judges in the Court of Appeal were of opinion that the Respondents intended and designed to publish a book which the student of the University would buy in preference to the book of the Appellants, and that Mr. Cooper's evidence to the contrary was obviously false. Their Lordships entirely concur with the learned Judges of the Court of Appeal in the opinion they have formed on this point.

If the Appellants were not entitled to a copyright in their book, or any material part of it, then the Respondents were entitled to do what they have done. If, on the contrary, the Appellants were entitled to a copyright in their book, or any material part of it which the Respondents had practically copied, then the Respondents were admittedly guilty of infringement. It is obvious, therefore, that the primary question to be determined on the appeal is whether the Appellants were entitled to a copyright in the text of their book and in those notes attached to it which

MACMILLAN & CO., LTD. v. K. & J. COOPER.

latter the Respondents had in many instances in effect copied.

During the course of the argument much discussion arose as to the result that would follow if North's translation of Plutarch's Life was a publication which was actually the subject of copyright, or was capable of becoming so. These are interesting and rather difficult questions to solve; but their Lordships do not feel themselves called upon to attempt to solve them, because on the facts of this case, they do not arise. North's translation of Plutarch's Life of Alexander does not and never did—and, as the law stands, never can—enjoy the protection of copyright; and the questions which arise for decision must be dealt with upon that assumption.

The books both of the Appellants and the Respondents have in the proceedings been styled abridgments. In the true sense of that word this is an absolute misnomer.

Strictly speaking, an abridgment of an author's work means a statement designed to be complete and accurate of the thoughts, opinions, and ideas by him expressed therein, but set forth much more concisely in the compressed language of the abridger. A publication like that of the Appellants or Respondents, the text of which consists of a number of detached passages selected from an author's work, often not contiguous, but separated from those which precede and follow them by considerable bodies of print knit together by a few words so as to give these passages, when reprinted, the appearance as far as possible of a continuous narrative, is not an abridgment at all. It only expresses, in the original author's own words, some of the ideas, thoughts and opinions set forth in his work. And it is obvious that the learning, judgment, literary taste and skill requisite to compile properly and effectively, an abridgment deserving that name would not be at all needed merely to select such scraps as these taken from an author and to print them in a narrative form.

This point is well brought out in the following passages from the editions of Copinger's "Law of Copyright," published in 1904 and 1915 respectively, *i.e.*, before and after the Copyright Act of 1911. The passages are supported by the authorities relied upon in those editions. The first passage runs thus (p. 39):—

"To constitute a true and equitable abridgment, the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is an exertion of the individuality employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive and more convenient both to the time and use of the reader Independent labour must be apparent, and the reduction of the size and work by copying some of its parts and omitting others confers no title to authorship, and the result will not be an abridgment entitled to protection. To abridge in the legal sense of the word is to preserve the substance, the essence of the work in language suited to such a purpose, language substantially different from that of the original. To make such an abridgment requires the exercise of mind, labour, skill and judgment brought into play, and the result is not merely copying."

That passage is practically reprinted at p. 64 of the edition of 1915. At pages 148 and 566 the following paragraphs are added. The first runs thus:—

"To constitute a proper abridgment, the arrangement of the book abridged must be preserved, the ideas must also be taken and expressed in language not copied but condensed. To copy certain passages and omit others so as to reduce the volume in bulk is not such an abridgment as the Court would recognise as sufficiently original to protect the author."

MACMILLAN & CO., LTD. v. K. & J. COOPER.

And the second thus :—

"From the above cases it seems possible to draw the conclusion that the mere process of selecting passages from works readily accessible to the public is not, but that difficulty in obtaining access to the originals or skill manifested in making or arranging the selection is sufficient to give the character of an 'original literary work' to the selection."

The cases referred to in support of these statements included most of those which had been previously decided : *Lamb* v. *Evans* (1) and *Walter* v. *Lane* (2) amongst them.

The learned Judges in the Appellate Jurisdiction apparently came to the conclusion that a publication, the text of which consisted merely of a reprint of passages selected from the work of an author, could never be entitled to copyright. Their Lordships are unable to concur in that view. For instance, it may very well be that in selecting and combining for the use of schools or universities passages of scientific works in which the lines of reasoning are so closely knit and proceed with such unbroken continuity that each later proposition depends in a great degree for its proof or possible appreciation upon what has been laid down or established much earlier in the book, labour, accurate, scientific knowledge, sound judgment touching the purpose for which the selection is made, and literary skill would all be needed to effect the object in view. In such a case copyright might well be acquired for the print of the selected passages.

The 31st section of the Copyright Act of 1911 provides that no person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this statute or any other statutory enactment for the time being in force. Copyright is therefore a statutory right. Sec. 1, sub-sec. (*1*) of the Act enacts in respect of what it may be acquired. Sub-sec. 2 of the same section defines its meaning, sec. 2 deals with the methods by which it may be protected, and the moral basis on which the principle of those protective provisions rests is the Eighth Commandment, "Thou shalt not steal." It is for this reason that Lord Halsbury begins his judgment in *Walter* v. *Lane* (2) with the following words : "I should very much regret if I were compelled to come to a conclusion that the state of the law permitted one man to make a profit and to appropriate to himself what has been produced by the labour, skill and capital of another. And it is not denied that in this case the Defendant seeks to appropriate to himself what has been produced by the skill, labour and capital of others. In the view I take of this case the law is strong enough to restrain what to my mind would be a grievous injustice." It will be observed that it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material. This distinction is well brought out in the judgment of that profound and accomplished lawyer and great and distinguished Judge,

(1) [1893] 1 Ch. 218.
(2) [1900] A. C. 539.
(2) [1900] A. C. 539 at p. 545.

MACMILLAN & CO., LTD. v. K. & J. COOPER.

Mr. Justice Story, in the case of *Frederick Emerson* v. *Chas. Davies* (3), decided in the United States and reported in Story's United States Reports, Vol. 3, p. 768. Some of the points decided are stated in the head note to be first, that any new and original plan, arrangement or combination of material will entitle the author to copyright therein, whether the materials themselves be old or new. Second, that whosoever by his own skill, labour and judgment writes a new work may have a copyright therein, unless it be directly copied or evasively imitated from another's work. Third, that to constitute piracy of a copyright it must be shown that the original has been either substantially copied or to be so imitated as to be a mere evasion of the copyright. The Plaintiff in the case had compiled and published a book entitled "The North American Arithmetic," described as containing Elementary Lessons by Frederick H. Amson, the purpose and object of the publication being to teach children the elements of arithmetic. The complaint was that the Defendants on a date named had without the Plaintiff's consent exposed for sale and sold fifty copies of the Plaintiff's said work, purporting to have been composed by the Defendant Davis, and had subsequently sold 1,000 copies of the same. The main defence was that the book, copies of which were sold by the Defendants, was composed by themselves, and that neither it nor any part of it was copied, adopted or taken from the Plaintiff's book or any part thereof. At p. 778 of the report the learned Judge expressed himself thus:—

"The book of the Plaintiff is, in my judgment, new and original in the sense in which those words are to be understood in cases of copyright The question is not whether the materials which are used are entirely new and have never been used before, or even that they have never been used before for the same purpose. The true question is whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the Plaintiff is entitled to a copyright, although he may have gathered hints for his plan and arrangement or parts of his plan and arrangement from existing and known sources. He may have borrowed much of his materials from others, but if they are combined in a different manner from what was in use before . . . he is entitled to a copyright. . . . It is true that he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement, or illustrations or combinations, for these are strictly his own. . . . In truth, in literature, in science and in art there are and can be few, if any, things which, in an abstract sense, are strictly new and original throughout."

The learned Judge then deals at length with many, indeed most, of the English authorities, and winds up with a remark in these words, which is singularly applicable to the present case: "I have bestowed a good deal of reflection upon this case, and at last I feel constrained to say that I am unable to divest myself of the impression that in point of fact the Defendant Davis had before him, when he composed his own work, the work of the Plaintiff, and that he made it his model and imitated it closely in his title or section of Addition and in a great measure in that of Subtraction also."

This decision is, of course, not binding on this tribunal; but it is, in the opinion of the Board, sound, able, convincing and helpful. It brings out clearly the distinction between the materials upon which

(3) 3 Story U. S. Rep 768 (1845).

MACMILLAN & CO., LTD. *v.* K. & J. COOPER.

one claiming copyright has worked and the product of the application of his skill, judgment, labour and learning to those materials; which product, though it may be neither novel nor ingenious, is the claimant's original work in that it is originated by him, emanates from him, and is not copied.

It was by confounding the materials with the product that Mr. Upjohn endeavoured to sustain the argument that if the Appellants obtain copyright in their book any reprint of North's translation would be an infringement of it under sec. 8 of the Act of 1911.

Mr. Upjohn also contended as their Lordships understood him that Sir Arthur Wilson did not, in his judgment in the case of *Macmillan* v *Suresh Chunder Deb* (4), decide the question of the existence of copyright in the anthology entitled "The Golden Treasury of Songs and Lyrics"; but that assuming copyright existed he decided merely the question of the infringement of it. That is an extraordinary error. In the long headnote of the case it is stated:

"That the suit was instituted on the 27th February, 1890, and that the Plaintiffs complained that the publication of the Defendant's book constituted a breach of their copyright, and prayed for the usual relief by way of injunction and damages. They contended that, although the copyrights of the works of the original authors had long lapsed, they were entitled to the copyright in the selections made by P. (*i.e.*, Mr. Palgrave). It was contended, on behalf of the Defendant, that there could be no copyright in such a selection, and that if any existed the Defendant's book had not infringed it."

The question of the existence of copyright in the anthology was therefore distinctly raised by the Defendant: and Sir Arthur Wilson is at p 961 reported to have expressed himself thus concerning it:—

"And first I have to consider whether there is copyright in a selection. There has not, as far as I know, been any actual decision upon this question, but, upon principle, I think it clear that such a right does exist, and there is authority to that effect as weighty as anything short of actual decision can be."

He then proceeds to state the law, as he conceived it to be, dealing with the existence of copyright in such work as the Golden Treasury, in the following words:—

"In the case of works not original in the proper sense of the term, but composed of or compiled or prepared from materials open to all, the fact that one man has produced such a work does not take away from anyone else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But, as the law is concisely stated by Hall, V. C, in *Hogg* v. *Scott* (5), the true principle in all these cases is that the Defendant is not at liberty to use or avail himself of the labour which the Plaintiff has been at for the purpose of producing his work; that is, in fact, merely to take away the result of another man's labour or, in other words, his property."

Sir Arthur Wilson then points out that this principle applies to maps, guide books, street directories, dictionaries, to compilations of scientific work and other subjects, and considers that it applies to a selection of poems. He then gives the reason why it applies to Mr. Palgrave's Golden Treasury in the following words:—

"Such a selection as Mr. Palgrave has made obviously requires extensive reading, careful study and comparison, and the exercise of taste and judgment in selection. It is open to any one who pleases to go through a like course of reading, and by the exer-

(4) I. L. R. 17 Cal. 951 (1890).

(5) L. R. 18 Eq. 444 at p. 458 (1874).

MACMILLAN & CO., LTD. v. K. & J COOPER.

cise of his own taste and judgment to make a selection for himself. But if he spares himself this trouble and adopts Mr. Palgrave's selection he offends against the principle"

He then proceeds to quote the following passage from Lord Eldon's judgment in *Longman* v. *Winchester* (6), approved of by Lord Hatherley in *Spiers* v. *Brown* (7): "A work consisting of a selection from various authors, two men might perhaps make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." Sir Arthur Wilson then adds :—

"I am of opinion that the selection of poems made by Mr. Palgrave and embodied in the Golden Treasury is the subject of copyright, and that the Defendant's book has infringed that right."

So far, therefore, from Sir Arthur Wilson not having decided the question whether or not the Plaintiffs were entitled to copyright in the Golden Treasury, he expressly stated it was the first question he had to consider. He devoted the best part of a page of his judgment to dealing with it. He states explicitly that he was of opinion Mr. Palgrave's selection embodied in the Golden Treasury was the subject of copyright and that the Defendants had infringed his right, and, as was his custom and method, he expressed in clear, precise and appropriate language what were the grounds upon which this decision rested.

The contention to the contrary is in their Lordships' view wholly unsustainable

In *Moffat and Paige* v. *Gill* (8), Collins, M. R., as he then was, in the course of his judgment at p. 470, after quoting from Lord Eldon's judgment in *Longman* v. *Winchester* (6), the passage which Sir Arthur Wilson had quoted, proceeds to say :—

"Then there is also the authority of the gentleman who was well known in these Courts before he went to India, and who afterwards became a distinguished Indian Judge (Sir Arthur Wilson), in which the very point is raised and decided in the case of *Macmillan* v. *Suresh Chunder Deb* (4). In that case the matter in question was the well-known series called the Golden Treasury, which is a series of quotations put together by Mr. Palgrave, and the Defendant had reproduced his work practically, super-adding notes of his own; and the learned Judge upheld or sustained a claim for infringement. It seems to me that that is precisely what the Defendant, Mr. Marshall, did in the present case."

Stirling, L. J., does not expressly mention Sir Arthur Wilson's decision, but Cozens Hardy, L. J., said that, as he entirely agreed with all that had fallen from his brethren, he did not think it necessary to add anything. It is clear, therefore, that Sir Arthur Wilson's decision in the Golden Treasury case was approved of and acted upon by the Court of Appeal in this case and treated, as in their Lordships' view it deserved to be, as a sound decision.

From the preface to the Golden Treasury it would appear that the poems in Book IV correspond to the half century just ended at the time of the publication, and that the proprietors of any copyright pieces which were included in this Book IV gave their permission to Mr. Palgrave for their insertion in his work.

In *Walter* v. *Lane* (2) all the relevant authorities on the question of acquisition of copyright down to 6th August 1900,

(6) 16 Ves. 269, 271 (1809).
(7) 6 W. R. (Eng.) 352, 353 (1858).
(8) [1902] 84 L. T. 452; on app. 86 L. T. 465.

(2) [1900] A. C. 539.
(4) I. L. R. 17 Cal. 951 (1890).
(6) 16 Ves. 269, 271 (1809).

MACMILLAN & CO., LTD. v. K. & J. COOPER.

appear to have been cited, and it was held that a person who makes notes of a speech delivered in public and transcribes them and publishes in a newspaper what purports to be a verbatim report of the speech, is the "author" of the report within the meaning of the Copyright Act of 1842, and is entitled to the copyright in the printed report, and can assign it

Lord Halsbury, in his judgment at p. 547, when dealing with the true meaning of the word "author" used in the statute of 1842, points out that every man has a proprietary right in his own literary composition, and that copyright is the exclusive privilege of making copies of it created by this statute which are two wholly different things, and should not be confounded, and restates the question for decision in these words: "The question here is solely whether this book, to use the words of the statute, printed and published and existing as a book for the first time, can be copied by some one other than the producers of it (I avoid the word author), by those who have not produced it themselves but have simply copied that which others have laboured to create by their own skill and expenditure." And again he, at p. 349, seems to express the view that if the skill, labour and accuracy of which he speaks be exercised to reproduce in writing spoken words in a book form, it is, as far as copyright in the written words is concerned, immaterial whether they be wise or foolish, accurate or inaccurate, of literary merit or of no merit at all.

Lord Davey in his judgment pointed out that copyright is merely the right of multiplying copies of a published writing, and has nothing to do with the originality or literary merits of the author or composer, and that the Appellant in that particular case only sought to prevent the Respondents from multiplying copies of this (the Appellant's own report of the speech of Lord Rosebery) and availing himself for his own profit, of the skill, labour and expense by which that report was produced and published.

The only other authority on the point of the acquisition of copyright to which it is necessary to refer is this case of *University of London Press, Ltd.* v. *University Tutorial Press Ltd.* (9) in which Mr. Justice Peterson, dealing with the meaning of the words "original literary work" used in sec. 1, sub-sec. (*1*) of the Act of 1911, at page 608 says:—

"The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of 'literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author."

In their Lordships' view this is the correct construction of the words of sec. 1, sub-sec. (*1*), and they adopt it.

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree. But their Lordships have no hesitation in holding that there is no evidence in the present case to

(9) [1916] 2 Ch. 601.

establish that an amount of these several things has been applied to the composition of the text of the Appellants' book, as distinguished from the notes contained in it, to entitle them to the copyright of it. As to the notes it is altogether different. Their Lordships do not take the view that these notes are trifling in their nature or are useless. On the contrary, they think that the notes make the book more attractive, the study of it more interesting and informing, enhance its efficiency and consequently increase its value as an educational manual. Mr. Upjohn contended that these notes were useless because everything in them was to be found in Lempriere's Classical Dictionary or some other classical dictionary. As if the heads of Indian pupils at school and students about to present themselves for a matriculation examination in the Bombay University were as well stored with classical lore of this nature as are these dictionaries, and that these youths had so keen a recollection of all the matters set forth in these substantial volumes that they did not require to refer to them! If the recollection of the contents of these dictionaries was so faint that they needed to refer to them, it was obviously of advantage to have the information at hand in the notes so that they might dispense with the reference.

Their Lordships are quite of opinion these notes were well chosen, were neatly condensed, were sufficiently copious, were accurate and must have required for the framing of them classical knowledge, literary skill and taste, labour and sound judgment as to what was fitting and useful to be brought to the notice of schoolboys and students about to enter the University. Well, the Respondents have not only copied but servilely copied many of these notes. There is no other way of accounting for the absolute verbal identity of some of the notes in both books.

In the case of *Black* v. *Murray* (10), which dealt with the alleged infringement of the copyright in a volume entitled "Minstrelsy of the Scottish Border," the original edition of which was no longer protected by copyright, but a new edition was published to which valuable notes were added, Lord Kinloch, in delivering judgment, dealt with the question of the effect of these notes upon the edition in which they were printed, in a very clear and forcible judgment. He said at p. 355 of the report :--

"I think it is clear that it will not create copyright in a new edition of a work of which the copyright has expired merely to make a few emendations of the text or to add a few unimportant notes. To create a copyright by alterations of the text these must be extensive and substantial, practically making a new book. With regard to notes, in like manner they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added I cannot doubt that they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation, and often in a very eminent degree, an exercise of intellect and an application of learning which places the annotator in the position and character of author in the most proper sense of the word. . . . In every view the addition of such notes as I have figured puts the stamp of copyright on the edition to which they are attached. It will still, of course, remain open to publish the text which *ex hypothesi* is the same as in the original edition But to take and

(10) 9 Sc. Sess. Cas. 3rd Ser. 341 : 9 Rettie, 341 (1870).

MACMILLAN & CO., LTD. v. K. & J. COOPER.

publish the notes will be a clear infringement."

In *Jarrold* v. *Houlston* (11), the Plaintiffs were the publishers of a book written by Dr. Brewer called the "Guide to Science." The Vice-Chancellor, Sir W. Page Wood, having fully ascertained the object with which this book was compiled and published and the sources from which Dr. Brewer obtained the information necessary to enable him to write it, stated these matters in the following passage and laid down the principle of law applicable to the facts. He said :—

"If any one by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading or out of works consulted by him for the express purpose, the reduction of the questions so collected with such answers under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected. Therefore I now have no hesitation in coming to the conclusion that the book now in question is in that sense an original work and entitled to protection."

The Defendants were publishers of a book called "The Reason Why," which was published in parts styled lectures. The Vice-Chancellor held that the second lecture contained piratical matter, as did also apparently all the lectures from Nos. 5 to 25 inclusive. The Vice-Chancellor made the following order :—

"First, the Plaintiff do bring such action at law against the Defendants as they may be advised . . . for the publication of the book called 'The Reason Why' . . . . and that they undertake to abide by any order that this Court may make with reference to any damage occasioned by this order, in the event of the jury finding in favour of the Defendants. And also on Plaintiffs undertaking to bring such action to restrain Defendants from publishing the book called 'The Reason Why' containing the lectures numbered 2, 3 and from 5 to 25 both inclusive, or any passage or passages copied, taken or colourably altered from the book called 'The Guide to Science,' in the Plaintiffs' Bill mentioned."

(11) 3 K. & J. 708 (1857).

Following that precedent, their Lordships having come to the conclusion that the Appellants are not entitled to a copyright in the text of this book extending from page 1 to page 82 thereof both inclusive, but are entitled to copyright in the notes printed in pages 83 to 94, both inclusive, they will therefore humbly advise His Majesty that the decree of the High Court in its Appellate Jurisdiction, dated the 13th October 1921, should be set aside with costs, and that the decree of Mr. Justice Fawcett of the 10th March 1921, should be amended by inserting after the words "mentioned in the plaint herein" the words "containing the notes and glossary printed on pages 83 to 94, both inclusive, of the said book or any of them, or any portion or portions of the said notes or any passage or passages from the same," and directing that the Respondents should pay to the Appellants all the costs of the hearing of the action before that Judge, and that subject to these amendments that the decree of the first Court ought to be affirmed.

Under the circumstances the parties will bear their own costs of this appeal.

Solicitors : *Messrs. Sandersons & Orr Dignams* for the Appellants.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 368 OF 1922.

WALMSLEY, J.
MUKERJI, J.
1924,
Heard, 12 and 13, February.
Judgment, 14, February.

MATHURAPUR ZEMINDARY CO., LTD., Appellants,
v.
BHASARAM MANDAL and ors., Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, r. 16, assignment of properties together with all arrears of rent—Subsequent decree for back rents, if assigned by operation of law—Doctrines of equity, if applicable in considering whether there was assignment by operation of law—Assignment in writing of back rents, if amounts to an "assignment in writing" of a subsequent decree for the said back rents—Bengal Tenancy Act (VIII of 1885), sec. 148 (h), how far allows transferees of properties with back rents to execute subsequent decrees for the back rents.

Where an assignment of some properties had been made by the landlord together with all arrears of rent and a decree was subsequently obtained by the landlord in respect of a portion of the said arrears:

Held—*That the assignee had no* locus standi *to apply for execution of the decree under the provisions of Or. 21, r. 16, C. P. C. as there was no assignment of the decree in fact in writing, and the assignment could not be construed as an assignment of the decree "by operation of law." An execution Court is not warranted in applying doctrines of equity in considering whether there has been an assignment by operation of law, for the word decree-holder must be construed as meaning decree-holder in fact and not as including a party who in equity may afterwards become entitled to the rights of the actual decree-holder and the words of the section relating to the transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the agreement. Though there was an assignment of the properties with all its back or future rents, it was essentially different from a transfer of the decree itself.' Ordinarily transferees by operation of law would be legal representatives of the deceased decree-holder or the Official Assignee in the case of an insolvent debtor or the purchaser of a decree at a Court sale or a minor succeeding to the estate which was in the hands of an executor, and other instances where there is a vesting of the interest by operation of statute.*

ANANDA MOHAN ROY *v.* PRAMATHA NATH GANGULI (1), THAKURI GOPE *v.* MALIK MOKHTAR AHMED (2), PARVATA *v.* DIGAMBAR (3), JATINDRA NATH BASU *v.* PEYER DEYE DEBI (4) *and several other cases referred to and discussed.*

That sec. 148 of the Bengal Tenancy Act did not entitle the assignee to execute the rent decree merely because the landlords' interest in the properties were assigned to the former. The provisions of the section only impose on the transferee of a rent decree a further disability which must be removed before he can apply for executing the decree as a rent decree.

This was an appeal preferred on the 13th of November 1922 against the order of the Subordinate Judge of Maldah (Babu Srish Chandra Banerjee) in Zillah Rajshahi, dated the 19th of July 1922, affirming the order of the Munsif, 1st Court (Babu Kumud Kanta Sen) at Maldah, dated the 18th of April 1921.

The facts of the case were briefly as follows:—In February 1920 one Mr. Hen-

(1) 25 C. W. N. 863 (1920).
(2) [1922] Pat 256
(3) I. L. R. 15 Bom. 307 (1890).
(4) L. R. 43 I. A. 103; s. c. I. L. R. 43 Cal. 990; 20 C. W. N. 866 (1916).

MATHURAPUR ZEMINDARY CO., LTD. v. BHASARAM MANDAL.

nessy and others obtained a decree against Bhasaram Mandal and others for rent. The decree-holders in September 1919 and in January 1920 had assigned their properties with all back and future rents to the Mathurapur Zemindary Co. The latter accordingly in July 1920 applied for execution of the decree on being substituted in the place of the decree-holders upon the basis of the assignments. The Munsif disallowed the application, and the order was upheld on appeal. Hence the present second appeal to the High Court.

Mr. U. N. Sen Gupta and *Babu Apurba Charan Mukerjee* for the Appellants.

Babu Debendra Narain Bhattacharjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—The facts which have given rise to this appeal are quite simple.

On the 4th February 1920, Mr. G. Hennessy and others obtained a decree for rent against the Respondents. The Appellants, the Mathurapur Zemindary Co., Ld., on the 17th July 1920, applied for execution of the said decree after being substituted in the place of the decree-holders on the basis of certain assignments in respect of the decree-holders' properties alleged to have been made in the first instance in September 1919 and thereafter in January 1920. The learned Munsif in whose Court the said application was made issued notice on the judgment-debtors to show cause why the substitution should not be made. The judgment-debtors appeared, denied that there was any assignment of the decree in question and challenged the *locus standi* of the Appellants to get themselves substituted or proceed with the execution. The learned Munsif held that the Appellants were not transferees of the decree either by assignment in writing or by operation of law and therefore they were not competent to apply for execution and consequently dismissed the application for execution. On appeal being taken from the said order, the order was affirmed and hence the present appeal to this Court.

It was contended on behalf of the Appellants that by reason of the provisions of sec. 148 of the Bengal Tenancy Act a mere assignment of the decree would not have enabled them to execute the same as a rent decree and inasmuch as they are assignees of the decree-holders' properties in respect of which the rent decree was passed, they were in a better position than mere assignees of the decree, that though there was no assignment of the decree in writing, there was one by operation of law inasmuch as the assignment of the properties had been made together with all arrears of rent, and on principles of equity it should have been held that they were transferees of the decree by assignment. Reliance was placed on their behalf upon the case of *Ananda Mohan Roy* v. *Pramatha Nath Ganguli* (1). It is unnecessary to refer to the other cases cited as they do not appear to bear upon the aforesaid contention.

On the other hand, it was contended on behalf of the Respondents that no consideration of equity could arise between an assignor and an assignee such as might arise between a mortgagor and a mortgagee as was the case in *Ananda Mohan Roy* v. *Pramatha Nath Ganguli* (1). Reference was made on their behalf to the case of *Thakuri Gope* v. *Malik Mokhtar Ahmed* (2) in support of the contention that the transferee under such circum-

(1) 25 C. W. N. 868 (1920).
(2) [1922] Pat. 258.

MATHURAPUR ZEMINDARY CO., LTD. v. BHASARAM MANDAL.

stances could not come in to execute the decree.

At the outset, I may observe that the deeds of assignment upon which the Appellants rely have not been placed before us, nor are they to be found on the record, and the only indication of their contents that can be gathered is from the judgment of the Munsif where he says that "it is contended that the property of the decree-holders with all balances and sums of money due and owing by the ryots and uncollected and unpaid on the day of assignment had been transferred." The relevant provision of the Code is Or. 21, r. 16. It is not pretended in the present case that there was any assignment of the decree in writing and it is well-settled that if it is to be a valid assignment within the meaning of this rule and one not by operation of law it must be in writing and a transferee under an oral assignment has no *locus standi* [*Parvata* v. *Digambar* (3)]. The Judicial Committee in the case of *Jatindra Nath Basu* v. *Peyer Deye Debi* (4) has observed that "such a transfer of the decree could, by reason of sec. 232 of the Code of Civil Procedure, 1882 (which with certain modifications which need not be referred to for our present purposes corresponds to Or. 21, r. 16 of the present Code), be effected only by an assignment in writing."

The contention that there was an assignment by operation of law is mainly based upon the observations of this Court in the case of *Ananda Mohan Roy* v. *Pramatha Nath Ganguli* (1). Transferees by operation of law ordinarily would be legal representatives of the deceased decree-holder, or the Official Assignee in the case of an insolvent debtor, or the purchaser of a decree at a Court sale, or a minor succeeding to the estate which was in the hands of an executor, and other instances where there is a vesting of the interest by operation of statute. It is necessary therefore to analyse the aforesaid decision very carefully in order to see whether it really professes to extend the meaning of that expression: The facts in that case were as follows:—Certain properties together with all rents, issues and profits arising therefrom or appertaining thereto were mortgaged, the mortgagee obtained a decree on the mortgage on the Original Side of this Court, and in execution of the decree the properties hypothecated together with all arrears of rent were sold and were conveyed by the Registrar to the Appellants in the appeal on a certain date. On that day, certain rent suits which the mortgagors had instituted previously for back rents in respect of some *jamas* held under the properties hypothecated were decided and decrees for rent passed in favour of the mortgagors. The Appellants in the appeal applied for execution of the rent decrees and the question arose whether they could do so as there was no assignment of the decrees in writing or by operation of law. The learned Judges in the course of their judgment commented on and distinguished the cases of *Ram Sahai* v. *Gaya* (5) and *Dost Mohamed* v. *Altaf Hossein* (6) as being inapplicable as the facts therein were different from those in the case they were dealing with. No doubt in the judgment of this Court in that case the observations of Sargeant, C. J., in the case of *Parmananda Das* v. *Vallabhdas* (7) were quoted at length, but

(1) 25 C. W. N. 863 (1920).
(3) I. L. R. 15 Bom. 307 (1890)
(4) L. R. 43 I. A. 108 at p. 113. s. c I. L. R. 43 Cal. 990; 20 C. W. N. 866 (1916).
(5) I. L. R. 7 All. 107 (1884).
(6) 17 Ind. Cas. 512 (1912).
(7) I. L. R. 11 Bom. 506 (1887).

MATHURAPUR ZEMINDARY CO., LTD. *v.* BHASARAM MANDAL.

the decision of this Court, as I read it, did not turn upon the meaning of the expression "by operation of law." This Court held that "in the present case, there was no assignment of the decree for arrears of rent in so many words, but not only the properties under which the *jamas* in arrears were included, but also all arrears of rents which were the subject of the rent suits were assigned to the Appellants. The arrears of rent were none the less arrears though suits had been brought for them and decrees were passed for them on the very day the conveyance was executed, and we think that in these circumstances the Appellants may be treated as assignees of the decree under Or. 21. r. 16." Reference was no doubt made to the case of *Parmananda Das* v. *Vallabdas* (7), but as I read the judgment of that case the decision therein really amounted to this that applying same doctrine of equity in the matter of interpretation of a document, the Court as a matter of fact held that "the decree had been transferred by an assignment in writing." Similarly in the case of *Ananda Mohan Roy* v. *Pramatha Nath Ganguli* (1) from the fact that all arrears of rent had been assigned over, and there having been decrees passed in respect of some simultaneously with, if not before, the execution of the conveyance, the construction put upon the conveyance which was in writing was that it also meant to include the decrees.

In the case of *Parmananda Das* v. *Vallabdas* (7), there was an assignment by certain executors who were trustees in respect of certain properties in favour of the *cesti qui trust*, in the most general terms, the words being "all moveable property, debts, claims, things in action whatsoever vested in them as such executors." Sargeant, C. J., observed in his judgment: "But it has been suggested that Parmananda is not a transferee of the decree under sec. 232 of the Civil Procedure Code, because the decree has not been transferred to him by assignment in writing or by operation of law, and therefore he is not entitled to apply for execution. There is no doubt that in a Court of Equity in England, the decree would be regarded as assigned to Parmananda Das and he would be allowed to proceed in execution in the name of the assignors. Here there is no distinction between law and equity, and by the expression 'by the operation of law' must be understood the operation of law as administered in these Courts We think under the circumstances we must hold that this decree has been transferred to Parmananda Das by operation of law. *In the present case the decree has been transferred in writing as construed in these Courts.*" These last words are very important and they appear in the judgment of Sargeant, C. J., himself. In my judgment it is obviously right to invoke the aid of doctrines of equity in the matter of interpretation of a document of this nature executed by a trustee under a Will in favour of the *cesti qui trust*. If, however, the decision purports to lay down broadly that Courts of execution have to look to equity in considering whether there has been an assignment by operation of law, I regret I am unable to assent to the proposition The Madras High Court in the case of *Bansorvittil Bhandari* v. *Ram Chandra* (8) declined to apply the doctrine of equity in somewhat similar proceedings, and observed as follows:—"We are asked to hold that in the event which happened in this case the Appellant is entitled to be treated as the

(1) 25 C. W. N. 863 (1920).

(7) I. L. R. 11 Bom. 506 (1887).

(8) 17 Mad. L. J. 391.

transferee of a decree from the decree-holder for the purpose of sec. 232, C. P. C., notwithstanding that at the time of assignment there was no decree and no decree-holder. It seems to us that we should not be warranted in applying the doctrine of equity on which the Appellant relies, which is stated in *Palainappa* v. *Lakshmanan* (9) for the purpose of construing sec. 232, C. P. C. We think the words decree-holder must be construed as meaning decree-holder in fact and not as including a party who in equity may afterwards become entitled to the rights of the actual decree-holder, and that the words of the section relating to a transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the agreement." The Judicial Committee of the Privy Council had occasion to deal with a somewhat similar provision contained in sec. 208 of VIII of 1859 in the case of *Abidunnisa Khatoon* v. *Amirunnisa Khatoon* (10) and their Lordships condemned the consideration of principles of equity in such proceedings. Their Lordships observed as follows: – "Then we come to sec. 208, which, undoubtedly is a section relating to proceedings for execution, and after judgment and decree. It is to this effect :—'If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred, or his pleader, and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder.' It appears to their Lordships, in the first place, that, assuming Wajed to have the interest asserted, the decree was not, in the terms of this section, transferred to him either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred on which the law could operate to transfer any estate from his mother to him. There had been no death: there had been no devolution: there had been no succession. His mother retained what right she had; that right was not transferred to him; if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferee of a decree within the terms of this section.

"Their Lordships have further to observe that they agree with the Chief Justice in the view which he expressed, that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir. They are further fortified in this view by the consideration that, under sec. 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding under sec. 208, it appears difficult to suppose that such an important question as this should be triable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, sec. 208 does not apply. Even if it did apply, it would appear to their Lordships that inasmuch as proceedings under it are not subject to appeal, probably a suit would lie for the purpose of reversing an order made in pursuance of it."

In my opinion the fact that, under the present law, there is an appeal does not

(9) I. L. R. 16 Mad. 429 (1893).

(10) L. R. 4 I. A. 66; s. c. I. L. R. 2 Cal. 327 (1866).

take away from the weight that should attach to the above observations. In the case before us the outstanding features are that there was no assignment of the decree in fact in writing, that no question of equity arises inasmuch as it was a simple transaction between an assignor and an assignee and that the decree was not in fact in existence on the date of the assignment but came into being long after that date. Under such circumstances can the assignee come in? There was no doubt an assignment of the properties, and I may assume with all its back or future rents, but that is essentially different from the transfer of the decree itself: see the observations of Mahmud, J., in *Ram Sahai* v. *Gaya* (5) and *Hansraj Pal* v. *Mukhraji Kunwar* (11). A person to whom a party agrees to transfer a decree that may be passed in a suit is not a transferee within the meaning of the rule [*Bansorrittil Bhandari* v. *Ram Chandra* (8)]. A transfer of the property during the pendency of the suit does not entitle the purchaser to apply for the execution of the decree unless he has taken steps to have his name substituted in the suit in the place of his vendor, and Or. 21, r. 16, C. P. C. does not apply to such a case [*Dost Mohamed* v. *Altaf Hossein* (6), *Peer Mohamed Rowthen* v. *Ramathan* (12) and *Thakuri Gope* v. *Malik Mokhtar Ahmed* (2)]. There having been no transfer by assignment in writing, the Appellants could not by any application to the Court have kept the decree alive [see the observations of the Judicial Committee in the case of *Jatindra Nath Basu* v. *Peyer Deye Debi* (4)].

The Appellants' contention based on the provisions of sec. 148 of the Bengal Tenancy Act does not really assist them, for, if at all, those provisions impose on the transferee of a rent decree a further disability which must be removed before he can apply for executing the decree as rent decree.

The Appellants' contentions therefore fail, the orders passed by the Courts below are correct and the appeal must be dismissed with costs—hearing fee three gold mohurs.

WALMSLEY, J.—I agree.

J. N. R. *Appeal dismissed.*

(2) [1922] Pat. 256.
(5) I. L. R. 7 All. 107 at p. 111 (1884).
(6) 17 Ind. Cas. 512 (1912).
(8) 17 Mad. L. J. 391.
(11) [1907] All. W. N. 280.
(12) 30 Ind Cas. 831 (1914).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 129 OF 1923.

CHATTERJEA, J. PANTON, J. 1923, Heard, 16 and 17, August. Judgment, 17, August.	PROMODE NATH ROY, Plaintiff, Appellant, v. BASIRUDDIN QUAZI, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 111, scope and effect of—"Entertain any application etc.," meaning of.

Where pending a suit instituted in April 1919 for recovery of rent at an enhanced rate, an order was made by the Government in June 1920 under sec. 101 of the Bengal Tenancy Act directing the preparation of a record-of-rights:

Held—*That the proper course was to adjourn the trial of the suit until after the final publication of the record-of-rights. The expression "shall not entertain etc.," includes cases not only not already instituted but cases where suits have already*

(4) L. R. 43 I. A. 108 at p. 113: s. c. I. L. R. 43 Cal. 990; 20 C. W. N. 866 (1916).

PROMODE NATH ROY *v.* BASIRUDDIN QUAZI.

been instituted but not tried. Sec. 111 means that after an order has been made under sec. 101, Civil Courts shall not try any suit, if such suit has already been instituted, until three months after the final publication of the record-of-rights.

RAM NARAYAN SINGH *v.* LACHMAN NARAYAN DEO (1) *and* MUSST. HIRA KOUR *v.* LACHMAN GOPE (2) *followed.*

This was an appeal preferred on the 13th of March 1923 against the order of Girish Chandra Sen, Esq., District Judge of Zillah Pabna and Bogra, dated the 12th of February 1923, reversing the order of Babu Ganga Bhuson Sen, Officiating Sub-Judge of Bogra, dated the 29th September 1921 and remanding the suit to his Court for trial on certain issues.

The facts were these:- The Plaintiff instituted a suit on the 14th April 1919 for recovery of rent at an enhanced rate under sec. 30 of the Bengal Tenancy Act as well as for additional rent under sec. 52 of the Act against the Defendant who was a tenant. The Defendant in July 1921 raised an objection that the suit could not be proceeded with as an order had been made in June 1920 under sec. 101 directing the preparation of a record-of-rights. The trial Court disallowed the objection and partially decreed the suit. On appeal, the lower Appellate Court set aside that decree and sent back the suit for trial after three months from the final publication of the record-of-rights to be prepared under the notification of 1920. Hence the present appeal to the High Court.

Babus Dwarkanath Chakrabarti and *Bireswar Bagchi* for the Appellant.

Babu Atul Chandra Gupta for the Respondent.

(1) 17 C. W. N 408; S. C. 17 C L J 239 (1912).

(2) 17 C. W. N. 1141 (1913).

The JUDGMENT OF THE COURT was as follows :—

The question raised in this appeal turns upon the construction of sec. 111 of the Bengal Tenancy Act and arises under the following circumstances :—The Plaintiff-Appellant instituted a suit on the 14th of April 1919 for recovery of rent at an enhanced rate under sec. 30 of the Bengal Tenancy Act as well as for additional rent under sec. 52 of that Act against the Defendant who is a tenant.

The Defendant put in his written statement on the 2nd of June 1919. Subsequently on the 4th of July 1921 he raised an objection that the suit could not be proceeded with having regard to the provisions of sec. 111 of the Bengal Tenancy Act as an order had been made in June 1920 under sec. 101 directing the preparation of a record-of-rights.

The Court of first instance disallowed the objection, tried the suit on the merits and partially decreed the suit in favour of the Plaintiff. On appeal the learned District Judge set aside the decree of the Court of first instance and sent back the suit for the trial of the other issues according to law after three months from the final publication of the record-of-rights to be prepared under the notification of 1920.

The Plaintiff has appealed to this Court and it is contended that he was entitled to proceed with the suit notwithstanding the provisions of sec. 111 and that that section did not apply to a suit which had been instituted in a Civil Court prior to the order made under sec. 101 of the Act.

Now sec. 111 lays down that "when an order has been made under sec. 101, directing the preparation of a record-of-rights, then, subject to the provisions of sec. 104H, a Civil Court shall not . . . until three months after the final publi-

PROMODE NATH ROY v. BASIRUDDIN QUAZI.

cation of the record-of-rights entertain any application made under sec. 158 or any suit or application for the alteration of the rent . . .". On the face of it when an order has been made under sec 101, the Civil Courts' power to entertain a suit or application for the alteration of rent is suspended. The expression used is "entertain." That expression has been considered in connection with sec. 91 of the Chota Nagpur Tenancy Act where a similar expression is used and it has been held that the provision that a Civil Court shall not entertain a suit of a particular description does not mean that a suit, if instituted, shall be dismissed. The proper course is to adjourn the trial of the suit until after the final publication of the record-of-rights, see the case of *Ram Narayan Singh* v. *Lachmi Narayan Deo* (1)]. The same view has been adopted in the case of *Mussi. Hira Koer* v. *Lachman Gope* (2) in connection with the provisions of sec 111 of the Bengal Tenancy Act That is not, however, disputed by the learned Vakil for the Appellant. His contention is that that section cannot have retrospective effect so as to affect suits or applications which had already been instituted or filed before the certification by the Government under sec. 101 was made. It is urged that the statute should not be given retrospective operation unless it is so clearly expressed in the statute itself or the intention is apparent by necessary and clear implication and that to give effect to the provisions of the section as being applicable to suits or applications already pending before the order under sec. 101 is made would be to take away vested rights.

This argument appears to us to proceed upon the assumption that an application of the section to such suits or applications is to destroy or take away any right. But the Court below has merely stayed the hearing of the suit until after the expiry of three months from the date of the final publication of the record-of-rights. The stay of the suit under the circumstances cannot result in loss to the parties. In any case we think that the object of the legislature is to avoid conflicting decisions of the Civil and Revenue Courts upon the same matters. That is why the trial of suit or application in Civil Court is prohibited by the section as soon as the order for the preparation of the record-of-rights has been made.

It is to be observed that the expression used is "shall not entertain" which would include the cases not only not already instituted but cases where suits have already been instituted but not tried. That section means that after an order has been made under sec. 101, Civil Courts shall not try any suit, if such suit has already been instituted, until three months after the final publication of the record-of-rights. That is the order which has been passed by the lower Appellate Court. Under the circumstances we cannot interfere with the order.

The appeal is accordingly dismissed.

As, however, the objection was not taken by the Defendant until long after the certification under sec. 101 had been made we direct that each party do bear his own costs both in this Court and in the lower Appellate Court. The costs of the Court of first instance will abide the result.

J. N. R. *Appeal dismissed.*

(1) 17 C. W. N. 408 : s. c. 17 C. L. J. 239 (1912).
(2) 19 C. W. N. 1141 (1913).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 1121 AND 1123 OF 1922.

WALMSLEY, J.
SUHRAWARDY, J.
1923,
21, November.

MAHMUD SHEIKH and anr., Defendants, Appellants,
v.
MESSRS. KANKINARAH CO., LTD., Plaintiffs, Respondents.

Civil Procedure Code (Act V of 1908), Sch. II, secs. 5 (2), 15, 16—Arbitration—Award—Refusal by one of the arbitrators to act—Co-option of arbitrator—Change in personnel amongst arbitrators made by other arbitrators with consent of parties but without intervention of Court, effect of, if vitiates award—Award, appeal against—Second appeal—Revision.

Where the parties to a suit filed a petition of compromise on certain terms and the remaining matter in difference between the parties was referred to the arbitration of three persons named in the petition of compromise and the reference, and one of the arbitrators having refused to act, the other two co-opted another arbitrator, to which course the parties consented, and these three made an award, and upon that award the Court passed a decree:

Held—*That the award could not be set aside though the addition of the co-opted arbitrator was made without the intervention of the Court, and that the decree upon the award was a good decree.*

The foundation of proceedings by arbitration is the consent of the parties to a decision by an extra-judicial tribunal and if there is such consent the omission to move the Court under sec. 5 (2) of Sch. II of the Civil Procedure Code does not render the award a nullity.

Held also—*That no appeal and second appeal lay against the decree passed upon the award, and upon the facts found it was not a case for interference in revision by the High Court.*

These were appeals preferred on the 10th May 1922 and Rules issued against the decrees of P. H. Graham, Esq., District Judge of Zillah 24-Parganas, dated the 24th of April 1922, affirming the decree of Babu Harendra Nath Banerjee, Munsif, 2nd Court at Barasat, dated the 13th of August 1921.

The facts material to this report are as follows :-

These appeals arose out of suits brought by the Plaintiffs for recovery of *khas* possession of certain lands after ejectment of the Defendants therefrom. The Defendants contested the suit. Subsequently, a compromise was made between the parties and *solenamas* embodying the terms of the compromise were filed by both the parties. By the *solenamas*, it was agreed between the parties that the Defendants would give up possession of the lands in favour of the Plaintiffs and that the Plaintiffs would pay the value of the huts, etc., raised by them on the lands as compensation, and in order to ascertain the value of the huts, etc., three persons named in the petition of compromise were appointed arbitrators. The trial Court thereupon referred the question of compensation to the arbitration of the aforesaid three persons. One of these three arbitrators having refused to act, the other two appointed another arbitrator in his place with the consent of both parties, and these three arbitrators submitted their award. The Defendants, thereupon, filed a petition to the trial Court for setting aside the award on the ground of misconduct of the arbitrators. The trial Court overruled all the objections of the Defendants to the validity of the award and passed decrees in terms of the *solenamas* and the award.

The third objection, which is material to this report, was to the effect that the arbitrators improperly added another to

MAHMUD SHEIKH *v.* MESSRS. KANKINARAH CO., LTD.

their number without sanction of the Court, and the trial Court overruled this objection in these terms :—

"As regards the third objection, namely, that the arbitrators improperly added another to their number, it appears from the record of the proceedings before the arbitrators that Babu Ramgopal Bhattacharja, one of the arbitrators, having refused to act, Dr. Brojo Raj Ghose was appointed in his place with the consent of both the parties. In their petition, the Defendants have contended that as Brojo Raj Babu was not appointed an arbitrator by or with the sanction of the Court, he could not validly act as such. In the petition, the Defendants have not stated whether the appointment of Brojo Babu was made with their consent or not. Now at the time of hearing the objections, the Defendants have alleged that they did not give their consent. I cannot believe this allegation of the Defendants. If the Defendants had not approved the appointment of Brojo Raj Babu, why did not they take their objection before the arbitrators or why did not they move the Court in due time and why did they appear before the arbitrators. Their appearance before the arbitrators at least shews that they had implied consent in the appointment of Brojo Babu. As regards the point whether two of the arbitrators could validly appoint another in place of an absent arbitrator, I am of opinion that in view of the express provision of the *solenamas* on this point, the two other arbitrators were entitled to appoint Brojo Babu in place of Ramgopal Babu Accordingly I overrule this objection also."

Against the decrees of the trial Court, the Defendants preferred appeals. The learned Judge of the lower Appellate Court held that no appeals lay, the matters having by consent of the parties been referred to arbitration, so that the Court, having thereafter refused the application to set aside the award, had no alternative but to draw up a decree, and that against the judgment and decree so pronounced no appeal lay.

The Defendants thereupon preferred these second appeals and obtained Rules in the alternative upon applications under sec. 115 of the Civil Procedure Code.

Dr. Sarat Chandra Basak and *Babu Gopal Chandra Das* for the Appellants.

Babus Surendra Chandra Sen and *Dwijendra Nath Mookerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows .—

WALMSLEY, J.—These two appeals arise from two suits for ejectment. After some adjournments the parties came to an agreement that the Defendants should vacate the lands in suit, on compensation being paid to them for building and that the sum to be paid by way of compensation should be fixed by three independent gentlemen mentioned in the petition of compromise. The trial Court thereupon referred the question of compensation to the arbitration of these gentlemen. One of them, however, refused to act and the other two co-opted another member, and these three proceeded to make an award. On receipt of the award, the learned Munsif made a decree in accordance therewith, inspite of objections by the Defendants. The objections were four in number and they have been set out in the Munsif's judgment. Nothing has been said to us about the 1st and 2nd, so I do not refer to them. The third related to the fact that when Babu Ramgopal Bhattacharja refused to act, the

MAHMUD SHEIKH v. MESSRS. KANKINARAH CO., LTD.

other two co-opted Dr. Brojo Raj Ghosh without the intervention of the Court. The fourth was that the arbitrators were to make a valuation for the consideration of the Court along with other evidence.

Against the Munsif's decrees the Defendants preferred appeals, and the learned Judge has held that no appeal lay. The only argument addressed to him on behalf of the Defendants was that the so called arbitrators were merely to submit to the Munsif their estimate of the proper value of the building. The learned Judge overruled this argument, and I think he was right in doing so. The terms of the compromise and of the reference are quite clear.

Before us, emphasis was laid on the third objection. It is admitted that the objection was not specifically set out in the grounds of appeal to the District Court and in this Court, but it is said that the general grounds that the decree was not in accordance with the provisions of the Code is wide enough to cover it. It is also admitted that the objection does not appear to have been pressed before the Judge, but again it is said that the objection raises a pure question of law and can be taken at this stage of the case.

I do not think it necessary to attach weight to technical objections against the consideration of the Defendants' argument.

It is undoubtedly true that one gentleman was in the petition of compromise and the reference, but that another gentleman actually served on the Board of Arbitrators and joined in making the award. From the Munsif's judgment it appears that the Defendants did not at first say that the substitution of Dr. Brojo Raj Ghosh was made without their consent. They confined themselves to the technical ground that the substitution had not been made by the Court. At a later stage they said it had been made without their consent and the Munsif said that he did not believe them. That finding of fact was not challenged in the Court of Appeal and it must stand.

The position then is that a change in the personnel of the arbitrators was made with the approval of the Defendants but without the intervention of the Court. It is urged that this is a defect which strikes at the root of arbitration. I cannot accede to this proposition. The foundation of proceedings by arbitration is the consent of the parties to a decision by an extra-judicial tribunal and I am satisfied that there was such consent. I cannot adopt the view that the omission to move the Court under sec. 5 (2) of the Second Schedule to the Civil Procedure Code rendered the award a nullity. As an award it could be set aside only on one or more of the grounds mentioned in sec. 15 and it is not alleged that any of those grounds exist. I hold therefore that the Munsif's decrees on the award were good decrees and the lower Appellate Court was right in holding that no appeal lay against the decrees. No appeal lies to this Court, and therefore these appeals must be dismissed with costs.

Applications under sec. 115 of the Code were presented by way of alternative and Rules were issued on them. The facts I have mentioned, show that there is no reason for us to make use of our discretionary powers for the benefit of the Defendants. The Rules are also dismissed, but without any order as to costs.

SUHRAWARDY, J.—I agree.

H. C. S. *Appeals dismissed;*
Rules discharged.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 1 OF 1922.

NEWBOULD, J. B. B. GHOSE, J. PAGE, J. 1924. Heard, 28, 29, 30 and 31, January Judgment, 22, February.	SURESH CHANDRA MUKERJEE, Plaintiff, Appellant, v. SHITI KANTA BANERJEE and ors., Defendants, Respondents.

Letters Patent of the Calcutta High Court, cls. 15 and 36, and Civil Procedure Code (Act V of 1908), sec. 98—Appeal from the decision of a Division Bench of the High Court where the Judges differ in opinion—Limitation Act (IX of 1908), Arts. 142 and 144—Land reformed after submergence—Suit by owner to recover—Onus of proof of possession or dispossession, on whom lies—Presumption—When adverse possession of part amounts to adverse possession of whole.

Where the senior of the two Judges of a Division Bench of the High Court was for dismissing an appeal and the other was for allowing the appeal in part and they held that as there was no majority varying or reversing the decree appealed from, the appeal should be dismissed:

Held—*That an appeal preferred under cl. 15 of the Letters Patent from the said decision was clearly competent, though the procedure laid down in sec. 98 of the Civil Procedure Code was wrongly applied, for if the provisions of cl. 36 of the Letters Patent had been followed the result would have been the same since the opinion of the senior Judge would prevail.*

BHAIDAS SHIVDAS *v.* BAI GULAB (9) *referred to.*

Where some lands were diluviated and reformed in situ *and the rightful owner brought a suit for recovery upon allegation of possession until the lands were diluviated and of [illegible] by the Defendants [illegible] before the institution of the suit.*

[illegible] *per* NEWBOULD *and* B. B. GHOSE, JJ. (agreeing with WOODROFFE, J.)—*That Art. 142 of the First Schedule of the Limitation Act applied and the initial burden lay on the Plaintiff to prove possession within 12 years before suit. In order to prove possession within 12 years the Plaintiff might rely on the presumption that possession of the lawful owner continued as long as the land was incapable of actual possession. But in a case like the present where Art. 142 applied the Plaintiff, if he relied on the presumption, must prove not only that he was the real owner but that the land was incapable of actual user within 12 years before suit.*

MAHOMED ALI KHAN *v.* KHAJA ABDUL GUNY (4) *and* BASANTA KUMAR *v.* SECRETARY OF STATE (10) *distinguished.*

Per B. B. GHOSE, J.—*That the Plaintiff may in such a case establish his possession within the disputed period by showing that his possession was either actual or constructive. The Plaintiff cannot by proving possession at any period anterior to 12 years before suit shift the onus on the Defendants to prove their possession.*

NETRESEN SINGH *v.* NUND LAL (11) *referred to.*

MAHOMED ALI *v.* KHAJA ABDUL GUNY (4), BASANTA KUMAR *v.* SECRETARY OF STATE (10), SECRETARY OF STATE *v.* KRISHNOMONI (7) *and* KASTHAH *v.* PERIGANTI (12) *referred to and distinguished.*

(4) I. L. R. 9 Cal. 744 (F. B.) (1883).

(7) L. R. 29 I. A. 104: s. c. I. L. R. 29 Cal. 518; 6 C. W. N. 617 (1902).

(9) I. L. R. 46 Bom. 718; s. c. 26 C. W. N. 605 (1921).

(10) L. R. 44 I. A. 104: s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 642 (1917).

(11) 8 M. I. A. 199 (1860).

(12) L. R. 48 I. A. 395: s. c. I. L. R. 44 Mad. 889, 26 C. W. N. 667 (1921).

SURESH CHANDRA MUKERJEE *v.* SHITI KANTA BANERJEE.

Per NEWBOULD and B. B. GHOSE, JJ.—*Where there was adverse possession by the Defendants over a part of the disputed tract, the fact that they claimed the whole by virtue of possession under settlement from Government and the existence of other circumstances linking together various portions operated in favour of the wrong-doer and possession of a part amounted to possession of the whole.*

MOHINI MOHON *v.* PROMODA (6) *and* BASANTA *v.* SECRETARY OF STATE (10) *followed.*

Per PAGE, J.—*That it was not incumbent upon the Court in this appeal to consider upon whom lay the burden of proving the dispossession of the Plaintiff, because the evidence being sufficient to establish a clear conclusion of fact, it did not matter now by which party it was given.*

BASANTA *v.* SECRETARY OF STATE (10) *relied on.*

That the Plaintiff was not bound to prove that the lands were incapable of user so that his constructive possession continued on account of diluvion within 12 years prior to suit. Acts of possession after the water has subsided are not required to prove possession by the true owner which is presumed. His cause of action accrues only when another person takes possession of the land.

LEIGH *v.* JACK (13), MAHOMED ALI *v.* KHAJA ABDUL GUNY (4) *and* PANDURANG GOBIND *v.* BAL KRISHNA HARI (14) *referred to.*

This was an appeal under cl. 15 of the Letters Patent preferred on the 23rd August 1922 against the decree, dated the 28th July 1922, of Mr. Justice Woodroffe differing in opinion from Mr. Justice Cuming, in appeal from Original Decree No. 233 of 1920, being an appeal from a decree of the Subordinate Judge of Zillah Nadia (Mr. J. K. Mukerji), dated the 30th June 1920.

The facts are briefly as follows:—On the north side of river Bhagirathi there was a *chur* Balliadanga in the District of Nadia and on the south side was a *chur* adjoining Mouza Kabirajpur, in the District of Burdwan. The river moved gradually in a southerly direction causing accretions to *chur* Balliadanga and diluviating first the *chur* adjoining Kabirajpur and part of the Kabirajpur Mouza. The alluvion and diluvion continued until the accretions to *chur* Balliadanga became reformations *in situ* of Kabirajpur land. Government settled some of these lands with the present Defendants, and Plaintiff who had *putni* rights in the Kabirajpur lands, instituted the present suit in 1916, claiming originally 1000 bighas. The trial Court gave the Plaintiff a decree for part of the lands, holding that Plaintiff's title to the other lands was barred by limitation. His appeal to the High Court was heard by a Divisional Bench consisting of Woodroffe and Cuming, JJ., who delivered the following dissentient judgments.

WOODROFFE, J.—This is a suit for declaration of the Plaintiff's title to and for recovery of possession of certain lands covering, it is said, 1,000 bighas in area described in the schedule to the plaint. The facts are fully set forth both in the judgment of the learned Subordinate Judge and of my learned brother. I need not therefore repeat them except so far

(4) I. L. R. 9 Cal. 744 (F. B.) (1883).
(6) I. L. R. 24 Cal. 256, 259 (1896).
(10) L. R. 44 I. A. 104, 114: s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 642 (1917).
(13) L. R. 5 Ex. D. 274 (1879).
(14) 6 Bom. H. C. R. A. C. 125 (1869).

as is necessary for explaining the conclusions at which I have arrived.

Since the date of the plaint, claim to certain lands has been abandoned. The tract on the east within stations m, n, x, v 8, 7, 36, 35m in the Commissioner's map was given up in the trial Court. In this Court so much of the disputed land as lies north of the settlement line of 1901 (which corresponds to the southern banks of the river at the time of the Revenue Survey in 1856) was given up. Out of the lands comprised within the Revenue Survey and the boundary lines of Kabirajpore the Plaintiff's title has been found in respect of 15 *chaks* and the residuary portion of Mouza Kabirajpore. The *chaks* are numbered 5, 7, 15, 17, 61, 64, 69, 70, 73, 99, 100, 101, 102, 103 and 104. The residue does not bear any number. These 15 *chaks* and the residue lie scattered all over the Mouza.

The learned Subordinate Judge has given the Plaintiff a decree for so much of the 15 *chaks* and the residue as lies speaking roughly south of the southern line of the map of 1903 (thick brown line in the Commissioner's map) which is near to the southernmost line of the partition map of 1899. The Plaintiff's title to so much of the 15 *chaks* and the residue as lies north of the above-mentioned line has been held by the learned Subordinate Judge to have been extinguished by the adverse possession of the Defendants. The present appeal relates to so much of the disputed land as lies north of the above-mentioned line of 1903 and is covered by the 15 *chaks* and the residue of Mouza Kabirajpore. The Appellant asks that *khas* possession be given to the Plaintiff of so much of the whole of the disputed land as is covered by these 15 *chaks* and the residuary portion of Mouza Kabirajpore.

The decision of the suit depends upon the questions of limitation and adverse possession. It is conceded that the Plaintiff's suit is governed by Art. 142 of the Limitation Act as also that under that Article it is necessary for the Plaintiff to show possession and dispossession within 12 years before the suit. As to the sort of possession within 12 years before the suit and the mode of showing it I deal later. It is also conceded that whilst the burden of proving his case, namely, possession and dispossession within 12 years lies upon the Plaintiff the burden of proving adverse possession lies upon the Defendants. The Defendants are not, however, called upon to prove anything unless and until the Plaintiff has established his possession and dispossession within 12 years. If the Plaintiff does that then the onus is upon the Defendants to prove then adverse possession for 12 years. It is very important in my opinion to keep this distinction well in sight in order to avoid the confusion which is liable to result in cases of this kind in which a very large number of decisions have been cited. The point is, however, in my opinion, clear, namely, that the Plaintiff must first of all establish possession and dispossession within 12 years of the suit. It has been contended on the Plaintiff's behalf that as his title to the land has been found as also that he had possession of the land before diluvion, his constructive possession must be deemed to have continued until the Defendants show that such possession has come to an end. The argument has been carried to the length of the statement that in a case of this kind it is only necessary for the Plaintiff to establish his title and to allege that he is out of possession in order to obtain relief, it being upon the Defendants to allege and prove when such dispossession took place.

SURESH CHANDRA MUKERJEE v. SHIB KANTA BANERJEE.

This, however, in my opinion, is a wrong view of the law. It will be, however, more convenient to deal with this matter after I have set forth the case which the Plaintiff made in the plaint. This is the case upon which his claim must be judged.

According to the plaint diluvion took place in the year 1890. In 1902 there was a reformation. At the time of the temporary settlement by the Collectorate of Nadia in the year 1901 of *char* Ballidanga the then Collector of Nadia declared the lands to be reformation *in situ* of Mouza Kabirajpore to which the Plaintiff had title and the Collector released them in favour of the Plaintiff as talukdar of Mouza Kabirajpore. The Plaintiff alleges that at that time the land was in the form of an extensive sand bank and unfit for cultivation and possession. It was only after the rainy season of October 1906 that the land became, according to the Plaintiff's case, fit for cultivation. At that time it is alleged that the Defendants proposed to take settlement of the land from the Plaintiff. But owing to their, that is, the former's, delay the Plaintiff with a view of settling the land with others attempted in March 1913, to have it surveyed by an Amin but the Defendants alleging that the lands were comprised within the settlement mehal belonging to them and denying the title of the Plaintiff prevented the Plaintiff from making the survey. This allegation is denied. The plaint then alleges that the Defendants not having a legal title the Plaintiff has brought this suit. He dates his cause of action as having gradually arisen from the date when a portion of the land first became fit for cultivation, that is, from the 18th October 1906. Obviously this is incorrect, as "becoming fit for cultivation" is not a cause of action. But it appears from the evidence of the witnesses for the Plaintiff and is admitted in argument that the Plaintiff was dispossessed in the year 1906 when the land became culturable: for the evidence of his witnesses is that the Defendants have been in adverse possession since the year 1906. The Defendants claim to have been in possession long before that.

Now the position is this: the evidence of the Plaintiff's own witness establishes, as I have said, the adverse possession of the Defendants for a period of 10 years, a period of two years short of the period of limitation under Art. 142. A question then arises as regards the two years prior to 1906, that is a period of 12 years before the suit. On the face of the plaint the Plaintiff is not barred and if it were established as he alleges that the lands only became capable of possession and were possessed from the year 1906 then the Plaintiff's suit would be in time because during the two years prior to 1906 the lands would have been according to the Plaintiff's case, incapable of possession having reformed only in 1902 and in the case of land incapable of possession it would have to be held that the Plaintiff who has title has constructive possession during such period. But it has been shown to a certainty in this case and it has not been contested before us that the story which has been put forward by the Plaintiff is not a true one and the Judge has described it as absurd. For it has been abundantly shown that it is not true that the land for the first time reformed in the year 1902 as alleged in the plaint. As a matter of fact (to go no earlier) the land reformed in 1860. In that year a settlement was made; as also in 1890 another settlement was made. There was a further reformation and fur-

ther settlement more than 12 years before the suit That being so the question then arises whether or not the Plaintiff's allegation having been disproved on this head he must not show that he had possession of the land during the period of 1904 to 1906 For the Appellant it is contended that the Plaintiff has not to show this that we must assume in the absence of any evidence and on the strength of his title that during such period he had constructive possession unless and until the Defendants prove their adverse possession during such time In my opinion however this contention is not sound The Plaintiff sued for possession on the allegation of dispossession He is bound to prove possession within 12 years before the suit This possession may be either actual or constructive His witnesses say that he was not in actual possession from the time the land became submerged as it became incapable of such possession and that he has not had actual possession since the land reformed and became culturable The Plaintiff must therefore prove that the land was incapable of actual possession within 12 years before the suit, that is, during the two years preceding 1906 since which date admittedly there has been adverse possession In other words, he must show that his constructive possession continued on account of diluvion and on account of the land being incapable of possession within 12 years of the suit. He must show that the land became incapable of user by submergence or otherwise and remained in such a state of incapacity for user within the period of limitation

Now the question is whether the Plaintiff has shown this It is in the first place to be observed that there has been admitted adverse possession for 10 years before the suit and having regard to the fact that some of the disputed land reformed so far back as the year 1880, some 26 years before the institution of the suit, it is in my opinion *primâ facie* probable that the two years prior to 1906 the land was capable of possession as it admittedly was during the ten subsequent years. As stated in the judgment the Plaintiff does not claim to have exercised an act of ownership over any part of the reformed land and his witnesses show that possession had been for ten years prior to the suit with the Defendants Of course if the allegation in the plaint be established there would obviously be a distinction between the period of ten years before the suit and the period before that, because the answer to the question why we should not hold that the Defendants' admitted possession of ten years did not extend two years further would, upon the plaint, have been that it could not be extended further because the land was incapable of possession having only been reformed in 1902 But as that case is shown to be untrue that reason can no longer be given The Plaintiff now seeks to establish (if the onus be upon him) that the land was unoccupied and incapable of user during the years preceding 1906 and therefore his constructive possession continued He seeks to do this not by his own evidence of which he has none for that period but by the evidence given on behalf of the Defendants. Some inconsistent arguments have been addressed to us upon this part of the case. Thus the evidence of the Defendants has been attacked as untrue and untrustworthy If that be the fact then the Plaintiff who seeks to use that evidence can gain nothing thereby Again it has been sought to show that the lands of which user has been spoken of by the De-

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

fendants' witnesses have not been sufficiently identified with the lands in dispute. It may be, it has been suggested, that the undisputed portions of the *char* Balliadanga were the subject of some at least of the user of which the witnesses spoke But if this be so then the evidence is irrelevant, because it is only on the assumption that the Defendants' evidence relates to the disputed lands in suit that it can be of any use to the Plaintiff. All that the Plaintiff can consistently do as regards this matter is in my opinion to admit the general trustworthiness of the Defendants evidence as also that such evidence refers to the disputed land but he may at the same time contend that the acts of user which are spoken to are not of such a character as to constitute adverse possession by reason of inadequacy in continuity, extent and so forth. I will discuss shortly the Defendants' evidence when dealing with the question of adverse possession. I am now dealing with the question only whether the Plaintiff has established his case the onus of which lies upon him, namely, possession and dispossession within 12 years of the suit. It is sufficient to say here that in my opinion it is not possible to say that the Defendants' evidence establishes in the Plaintiff's favour the fact that the land in dispute were either not used or were incapable of user and that therefore the Plaintiff had constructive possession within 12 years prior to the suit.

The next question is this: Assuming that the Plaintiff has established his case then the onus is on the Defendants to show that they had adverse possession during period of 1904 to 1906. We must consider whether they have, as the learned Judge has held, discharged that onus.

Before entering into this question it is necessary to advert to an objection by the Respondents, namely, the position of the *chaks* which the Plaintiff claims has not been in some cases delineated and in others the *chaks* have not been numbered. In reply to this objection we were asked by the Plaintiff to direct the Commissioner in this case to appear and to relay and number all the *thak chaks* of Kabirajpur upon the map of the disputed lands prepared and submitted by him. The learned vakil for the Respondents objected to this on the ground that the Appellant should not be allowed to amend his case in appeal. The view, however, which we took with regard to this matter was that the Appellant's case should not fail on such ground if it were possible for the Commissioner to do what the Plaintiff asked without calling any further evidence, in other words, if it was a question of numbering and (if necessary) plotting the *chaks* from the maps already in evidence in the case and without taking further evidence. We accordingly directed the Commissioner to appear and on his appearance and our making the order in terms of the Plaintiff's petition the learned vakil for the Respondents (without prejudice to his contention above-mentioned) asked us also to direct the Commissioner to plot on his map the Government Settlement chittas of 1880, 1890 and the *dags* of the partition Commissioner. This prayer we also acceded to.

The Commissioner's report finds that the *chaks* and residue claimed in the appeal fall within the disputed area. His report, however, raises a question whether only six *chaks* and not 15 form part of the Appellant's *patni*. These statements in the report upon this point are objected to on the ground that they raise a new case, the title to these *chaks* having been found by the first Court to be with the Plaintiff and the only ques-

tion therefore which, it is said, was left open on our order was the identification of the *chaks* and their numbering. It is to be observed that the statements to which exceptions are taken are not statements by the Commissioner himself but are taken from the *thak* statement which was already on the record before the direction was given by the Court to the Commissioner. It is denied on the other hand that it is a new case. Dr. Jadunath Kanjilal for Defendant No. 1 as also the learned vakil who support the same interest state that they argued that the Appellant could not claim all the 15 *chaks* because the Plaintiff's estate only comprised six *chaks*. Accepting this statement of the learned vakil it is not in my view of the case as regards limitation necessary to determine this question because I think that the appeal fails on other grounds than that of title. Relaying of the Government chittas of 1880 and 1890 and the partition plots of 1899 show that whatever be the title the lands are covered in part by these chittas. The report identifies the Plaintiff's lands and the lands covered by the chittas.

Upon the question whether the Defendants have proved adverse possession it is to be remembered in the first place that adverse possession for 10 years prior to the suit is admitted. No doubt if (as the Plaintiff alleges in the plaint) the land only appeared and became culturable ten years before the suit that is an answer to the objection as regards limitation. But when we find that that story is untrue and that in fact the land commenced to re-appear at, to go to no earlier dated 1880, that is, 26 years before the suit, it seems *primâ facie* likely that the adverse possession which is admitted for 10 years existed for the additional 2 years prior to 1906. On the one hand there is nothing to prevent such an inference as that the lands did not reform and become culturable about 1906, and on the other hand we have the fact of the reformation of the land in 1880, 1890 and subsequent years. It is not to be supposed that the land was allowed to remain for so many years without any possession having been taken.

We must distinguish, doubtless, between the question of possession and the nature of possession. It may be that in any particular case acts of possession may be shown which are not adequate to establish adverse possession by reason of continuity, limited extent or other reason. That some possession was exercised over the land in dispute I have no doubt. We have it noted upon the Government map made in the proceedings of 1903 that the Defendants were then in possession. If that statement is correct and the possession amounted to adverse possession then the suit is barred. We also have the fact that settlements have been made with the Defendants from the year 1880 in respect of which revenue has been paid by them. It is to be noted that the Defendants, thus are not in the position of mere trespassers but they are persons who entered into possession under colour of title. As regards this it has been said that where a man enters upon a land claiming title his entry into possession refers to such title. Where he enters without title the seisin is confined to possession by metes and bounds, it being a well-known rule that mere trespassers and squatters must in order to establish adverse possession show actual and not merely a constructive possession. So where there is, as here, an entry into possession of a tract of land under a deed of settlement containing specific boundaries the possession may be referred to the boundaries given in such

SURESH CHANDRA MUKERJEE *v.* SHITI KANTA BANERJEE.

title deed. I do not say that this is anything more than a rule of evidence. As such it must be applied with reference to the facts of each particular case. Thus as I have said during the course of argument if under a deed giving title to a tract of 100 square miles actual possession is taken only of a very small portion of it and nothing further is done, it may be that such possession would be insufficient to constitute adverse possession of the whole tract to which there was a colour of title. I think, however, that as a rule of evidence in judging whether adverse possession has been established or not we may take into account the fact that the party is not a mere trespasser but is acting under a colour of title. But however this be, my conclusion would be the same, namely, that the Appellant has not shown that the decree should be reversed. In this case the Defendants held under a settlement from the Government. In addition to the fact that the Defendants' possession was noted in the map of the settlement proceedings of 1903 we have the fact that the land was partitioned between the Defendants in 1899 under a decree of the High Court and boundary pillars were set up denoting the parties' respective possession. It seems to me under the circumstances of this case unlikely that persons would for years pay Government revenue without making user any of the land.

As to the actual user the learned Judge says that the Defendants have examined certain witnesses whom he names to prove possession of the *char* lands. He says: "I think this part of the Defendants' evidence is not at all satisfactory. Such evidence can be manufactured by a powerful man like the Defendant without much difficulty. But there is no doubt that this evidence coupled with the documentary evidence referred to above, unmistakeably show that the Defendants adversely possessed by far the greater portion of the disputed *char* since 1903." It has been argued that the learned Judge has discredited the oral evidence. But I do not read his judgment in this way. Evidently what the learned Judge meant to say was that without the documentary evidence the oral evidence to which he refers would not have been enough, as it might have been got up. For if it had been in his opinion unreliable in the sense of untrue he could not have said "coupled with the documentary evidence." By so coupling it the Judge in effect says that he does accept it when associated with the documentary evidence in the case. I may observe here that there is no presumption that evidence is manufactured even when given by "a powerful landlord." It must be shown by cross-examination of witnesses or other evidence in the case that there are reasons for disbelieving the evidence on this or on any other ground. It is to be observed in this connection that the Defendants' witnesses are corroborated by the Plaintiff's own witnesses so far as the period of 10 years is concerned extending up to the year 1906. I see no sufficient reason to doubt the evidence given that the Defendants had possession for more than two years before that date. One of the Defendants has given his own evidence which is more than the Plaintiff has done, who on the other hand set up an untrue case and has not appeared to support it.

It is to be observed also in this connection that amongst the witnesses whom the learned Judge mentions the name of the Amin witness Rajani Nath Dey, D. W. No. 7 is not included. *Primâ facie*

SURESH CHANDRA MUKERJEE *v.* SHITI KANTA BANERJEE.

he is a disinterested witness, although the contrary has been suggested on the ground that when he went to test the measurement he put up in the Defendant's house. He says that in 1890 Shiba Das Babu, the father of Defendant Shiti Kanta Banerjee, was in possession of the *char* which he then saw for the first time. He saw it again in 1903. In 1903 he found the major portion of the *char* under cultivation. About 2 to 2½ rashis wide lands above the water was sandy. Above that all lands were culturable. There were some trees and Shiti Kanta grew *kalai* on the culturable portion of the *char*. It has been suggested that the cross-examination establishes that this gentleman refers to the disputed area. But I am unable to read his evidence in this way. Because he refers in cross-examination to certain plots Nos. 11 of Touzi No. 2460 and 26 and 29 of Touzi No. 824 it does not follow that he meant thereby to limit the general statement which he made in his examination-in-chief. Otherwise for what reason was he called?

As regards the documentary evidence to which the learned Judge has referred it consists of partition proceedings of 1899, a note of possession on the map of 1903, rent receipts and chittas as regards four of which at least the Commissioner compared them with the locality. The first mentioned proceedings are of course not binding as a judgment not having been given in proceedings to which the Appellant was a party. But they are evidence to show the origin of the Defendants' possession and relevant in connection with the obtaining of possession and demarcation of lands by metes and bounds under those proceedings. In my opinion the note on the settlement map of 1903 is of great importance.

The learned Judge comes to the conclusion that the tracts of lands which are shown as unculturable in the partition map of 1899 were in the actual occupation of the Defendants in that year and also in 1903. That being so he comes to the conclusion that the Defendants have succeeded in establishing their adverse title to all the reformed lands of Kabirajpur which fall within the settlement map of 1903 and the partition map of 1899.

Doubtless in a case of admitted title one is disposed to regard with strictness evidence of adverse possession and to call for satisfactory proof before deciding against the title. In the present case there was entry under colour of title from the Government and on a fair reading of the evidence, which in my opinion sufficiently establishes both the fact and nature of the possession necessary, I agree with the Subordinate Judge that it does dispose of the Plaintiff's case. In my opinion there is no sufficient ground for disturbing the judgment under appeal and the appeal should be dismissed with costs.

A cross-objection has been made with respect to costs. The lower Court has directed that each of the parties should bear and pay their own costs on account of the Commissioner, and as regards other costs half costs have been disallowed. It has been contended in the cross-objection that these orders are incorrect and that they should be reversed having regard to the small area of the land which has been granted to the Plaintiff. No doubt the Plaintiff has claimed a great deal more than what was given by the Court. But he did succeed in part and I am unable to hold that the question of costs in this case raises such a matter of principle as would justify this Court in interfering in appeal.

SURESH CHANDRA MUKERJEE *v.* SHITI KANTA BANERJEE.

We have already given our order as regards costs of the Commissioner in this Court. But to avoid any further question I may have recorded our order that the costs of the Commissioner in this Court is to be borne by the parties in equal shares. These costs have already been paid to the Commissioner according to the shares stated.

As there is a difference of opinion and there is no majority varying or reversing the decree appealed from the appeal is dismissed with costs.

CUMING, J.—The suit out of which this appeal arises is a suit for declaration of title and recovery of possession. The Plaintiff's case was that he took a *putni* settlement of a certain lot Madhusudanpore and that within the lot was a certain Mouza called Kabirajpore and that by virtue of this *putni* title and also by adverse possession he had acquired a good title and was in possession of the property in suit. In his plaint he does not state when he took the *putni* settlement or when his adverse possession began. His vakil stated that he took the *putni* settlement in 1857 shortly after the Revenue Survey. The superior landlord is the Maharajah of Burdwan. The northern boundary of the Mouza Kabirajpore was the river Bhagirathi. In the year [illegible] the river Bhagirathi began to wash away first the *char* north of Kabirajpore and from the year 1890 it began to wash away the main land of village Kabirajpore and a *char* appeared on the north side of the river adjoining *char* Balliadanga which is a *char* on the Nadia or north side of the river.

From the year 1902 the land of Kabirajpore began to reform on the Nadia side of the river Bhagirathi which is one of the many names for the river Ganges. It may be noted here that at the time the Revenue Survey the river Bhagirathi formed the boundary at this place between the Districts of Burdwan and Nadia.

The Bhagirathi continued to move towards the south and the land of the Mouza Kabirajpore began to be reformed *in situ* from 1902 and the said land began to be fit for cultivation at the end of the rainy season of 1313 (1906).

In 1904 the Collector of Nadia made a temporary settlement of the *char* called Balliadanga in the District of Nadia with Defendants Nos. 1 and 2, which *char* is recorded as Settlement Mehal Nos. 821 and 2460. At the time of the temporary settlement in 1904 a map was prepared and the Collector found that some 665 odd bighas of land which had been measured as forming part of *char* Balliadanga were really a reformation *in situ* of village Kabirajpore and so he excluded them from the settlement. These lands were then unfit for cultivation. The Bhagirathi then moved further south and a further tract of land of village Kabirajpore reformed in extent some 334 bighas odd.

The Plaintiff in 1913 sent his Amin to measure the lands. The Defendants Nos. 1 and 2 resisted him and would not allow the Plaintiff to measure the land. Hence the suit for declaration of title and recovery of possession on the ground that these lands are reformation *in situ* of the land of village Kabirajpore which is included within his *putni* taluk lot 10 Madhusudanpore. The Defendants denied the title of the Plaintiff. They contended that the Plaintiff did not hold a 16 annas share in lot Madhusudanpore, that he had only a fractional interest in Mehal Kabirajpore. They denied that the lands in suit were a reformation *in situ* of the land of Mouza Kabirajpore. They contended that they were accretions of *char* Ballia-

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

danga recorded as belonging to Touzi Mehal 824 and 2460 of the Nadia Collectorate, which had been settled with them. Further that the land in dispute had become fit for cultivation more than 12 years before the date of the suit and the Defendants had themselves possessed the lands for more than 12 years before the date of the suit and so the Plaintiff had lost his title, if any, by adverse possession.

They traversed all the allegations of fact in the plaint. Briefly then their case was that the Plaintiff had no title and that the Defendant had acquired a title by adverse possession. The trial Court found that the land in suit was a reformation *in situ* of the land of Mouza Kabirajpore. The trial Court then dealt with the Plaintiff's two titles to the land in dispute, namely, his claim to so much of the land of Kabirajpore as falls within lot Madhusudanpore under Estate No. 10 and also his title by adverse possession to the other land of the Mouza. He found that the Plaintiff was sole owner of lot Madhusudanpore. Further that Plaintiff had title to Mouza Kabirajpore to the extent of 15 *chaks* and the residuary portion before the lands were diluviated. He found that the Plaintiff had not established his title of adverse possession to the rest of the village. He found, however, that Defendant had acquired a title by adverse possession to all the reformed lands which fall between the boundary line of the *char* as shown in the partition map of 1899 and the settlement map of 1903 and that the Plaintiff was only entitled to so much of the 15 *chaks* and the residuary parts of Mouza Kabirajpore which are bounded on the south by the river Ganges and on the north by the lines 24-24-24-15 (western part of the southern boundary line of the *char* in Ex. D) and the southern boundary line of the settlement map of 1903 up to the point where it runs towards the east and also of the disputed lands which are bounded by the river, the lines Nos. 35 to 36, 36 to 7 and the eastern boundary lines of the settlement map of 1903 up to the point Q and he was further entitled to mesne profits for these lands.

The Plaintiff has appealed with regard to the land to which his title has been declared but of which it has been found that he has lost title by adverse possession. There was also an appeal regarding the land to which the title was found not to have been established, but part of the appeal has not been pressed. The case which he wishes to establish is as follows :—It has been found that he had title to these lands and that these lands were washed away. So long as the lands remained under water and when they again appeared as a reformation his title subsisted and as the lands were not fit for possession or use when they appeared again he must be considered to be in constructive possession. The Defendants have not shown that they have had continuous possession for more than 12 years before the date of suit. The lands were inundated from time to time and even if the Defendant had any possession as soon as the lands were inundated again the title and possession went back to the true owner, for the Defendants as tortfeasors cannot be held to be in constructive possession during the period that the lands in suit went under water for the doctrine of constructive possession does not apply to a tortfeasor Further that to establish their title by adverse possession the Defendants must prove their actual possession of every parcel of land to which they allege they have acquired a title by adverse possession. The doctrine of constructive possession is not available to a tortfeasor and it cannot be held that if

SURESH CHANDRA MUKERJEE *v.* SHITI KANTA BANERJEE.

he is proved to be in actual possession of certain portion that he is in constructive possession of the rest of the land having regard to the nature of the land. *Nawab Bahadur of Murshidabad* v. *Gopi Nath Mandal* (1).

The first question which requires decision is what article of the Limitation Act applies.

Now the Plaintiff sues for recovery of possession on establishment of his title. Clearly therefore Art. 142 applies and the Plaintiff must sue within 12 years of the date of dispossession. This point had been discussed at length in the case of *Rakhal Chandra Ghose* v. *Durga Das Samanta* (2) in which all the authorities on the question have been collected and fully discussed and I entirely agree with the decision arrived at. The Plaintiff in this case dates the commencement of his dispossession from the year 1906 October when he says the land became fit for cultivation and further states that when his men went in 1913 to measure the land they were resisted and turned out.

It is contended that the Plaintiff must show that he is in possession within 12 years of the date of suit. This contention no doubt is correct. The Plaintiff Appellant answers that argument by contending that he has been all along in constructive possession. That the land was sand and incapable of actual possession and that therefore it is sufficient for him to show that he has title and that then the Defendant must show that he had held adverse possession for more than the statutory period. He argued that as the property was not capable of actual occupation the presumption is that legal possession continued with him the rightful owner and it is sufficient for him to prove that the property remained in this state till within 12 years of the suit. [*Mirza Shamsher Bahadur* v. *Kunj Behari Lall* (3).]

Further that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances that that state naturally would and probably did continue till within 12 years of suit it may properly be presumed that it did so continue and that the Plaintiff's possession continued also until the contrary is shown [*Mahomed Ali Khan* v. *Khaja Abdul Guny* (4)].

Now a careful consideration of these cases, *Mirza Shamsher Bahadur* v. *Kunj Behari Lall* (3), *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (4) and *Rakhal Chandra Ghose* v. *Durga Das Samanta* (2) referred to, shows that there is deviation from the rule that in an action in ejectment the onus is on the Plaintiff to show that he was in possession and was dispossessed within the statutory period. This principle the learned Judges re-affirm. What they do however consider and that is of importance in this case is what is necessary looking at the particular circumstances of the case for the Plaintiff to prove in order to establish his possession within 12 years of the suit.

In the present case it has been proved that before diluvion the title and possession of the 15 *chaks* and residuary land was with the Plaintiff and the finding has not been challenged by the Respondent in appeal. An attempt was made after the argument had been concluded and the case

(1) 13 C. L. J. 625 (1910).
(2) 26 C. W. N. 724 (1922).
(3) 7 C. L. J. 414 (1907).
(4) I. L. R. 9 Cal. 744 (F. B.) (1883).

SURESH CHANDRA MUKERJEE *v.* SHITI KANTA BANERJEE.

has been sent to the Commissioner to relay certain plot to argue that the Plaintiff had not established his title to some 9 of these *chaks*. The case was already concluded and it clearly was not open to the Respondent to raise this point at that stage. The material on which he relied was really on the record before the case was sent by us to the Commissioner for he wished to base his argument on Ex. H. We have now to see what was the condition of the land and the manner of possession. If the Plaintiff can show he has title, that the land was washed away and after reformation was unfit for possession and continued so up to or near a time within 12 years of the date of suit the Plaintiffs would be entitled to the benefit of the presumption that they had constructive possession as rightful owners at the time of dispossession in 1906. If the Plaintiffs are entitled to this presumption then the onus will be on the Defendants to show the Plaintiffs lost their title by adverse possession. The period with which we are mainly concerned so far as adverse possession is concerned is the period two or three years immediately before 1906. Admittedly the land is a *char*, a reformation *in situ* of the village Kabirajpore. The Plaintiffs' case was that it was not washed away till 1880. The evidence in the case shows that it was in or before 1880 that the land began to reform and continued the process up to the present time. To this extent obviously the Plaintiff's case is not in accordance with the facts found. How far his case is affected by this will be discussed later on. When the process of diluvion began it is not possible to say but it was apparently some time after 1857 when the Plaintiff purchased.

What has then been the condition of the land after reformation?

To deal with the Defendants' evidence.

In considering all the evidence one fact must be borne in mind that these disputed lands form an accretion to another *chur*, *chur* Balliadanga which admittedly belongs to the Defendants. The importance of this is obvious when we see in what a vague way the witnesses have deposed because it is not easy as a rule to say whether any particular statement refers to the *chur* as a whole or to the land in dispute.

Taking first of all the evidence of Defendant No. 1.

He says that from 1301 to 1305 (1894-98) they possessed the *chur* partly in *khas* and partly through tenants. He also sold *babla* trees growing on the *chur* and fishermen used to catch fishes and spawn

To what extent *kalai* was grown he does not state. He does not produce any of his papers to show that he received any money from any tenant or from any one for the sale of his *kalai* or in case where the *kalai* was grown by himself his expense of growing it.

The fact that fishermen used to catch spawn and fish on the *chur* would show it was liable to inundation. He then goes on to refer to the partition proceedings in 1899 and says 200 bighas were unculturable and the rest culturable. This apparently refers to the land in dispute as he says it was the southern portion of the *chur*. The mere statement by an interested party that the lands were culturable is perhaps of little value.

The only real test is whether they were cultivated. The witness, however, gives us no indication how much of the *chur* was cultivated. Further on he states that sand is now being deposited in culturable lands and that some 400 or 500 bighas

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

have recently been covered with sand and the lands are again being washed away. Carefully examined this witness' evidence would show that the land or portions of it were liable to submergence and had actually been submerged from time to time, otherwise sand would not be deposited on it or fish caught on it. Accepted at its highest it would prove that *kalai* had been grown on the land but it gives no indication how much land was sown with *kalai* and the failure to produce any papers in support of these statements makes the bare statement of little or no value. His next witness is Gobinda Biswas This witness is the Dewan of Defendant No. 2 who has been disputing with Defendant No. 1 for a long time for the possession of *chur* Balliadanga. He visited the *chur* in 1899 He states that the *chur* was fallow from 1899-1901 and that in these years there were no tenants there He states the southern portion of the *chur* was sandy His evidence proved little or nothing as to the state of the *chur* except to show that in 1899 some 275 bighas were sandy His evidence is rather vaguely recorded It is difficult to say whether he refers to the whole *chur* Balliadanga of which the disputed lands form a part only. He however speaks to deposit of silt which would show the *chur* was inundated from time to time.

The next witness relied on is Rajani Kanta Das (page 169) and the statement on which reliance is placed in his statement—"I saw Balliadanga *chur* even after 1903. In 1903 I found the major portion of the *chur* under cultivation." He, however, here refers to the whole *chur* Balliadanga of which admittedly the northern portion belongs to the Defendants and so possibly the major portion under cultivation refers to the northern portion. He states there were here and there *babla* trees. It is not possible to say from his statement that he was referring to the disputed land as being under cultivation and this same remark applies to all his evidence. His statements would apply to the undisputed as well as to the disputed portion of the *chur*.

The next witness to whose evidence our attention has been drawn is Kali Prasanna Chukerbutty (page 172). This witness took an *ijara* lease of the *chur* in 1902-1903 and he cannot say whether any part of the land was tenanted then. He simply grew *kalai* but has no papers to support his statement. Further that at the time of the partition of *chur* Balliadanga (1899) it was partly culturable and partly full of sand He again is speaking of the whole *chur* and not only of the disputed portion So it is not possible to say from his evidence whether any portion of the culturable land was in the disputed land or not. He says north of the sand were *babla* trees and north of the *babla* trees cultivation, but where the cultivation began is not clear and that is the important point in this case. Whether any act he refers to took place on the disputed or undisputed portion of the *chur* it is impossible to say. Lastly we have Alef Sheik (p. 182). His evidence helps very little for it is impossible to say whether he refers to the disputed or undisputed part of *chur* Balliadanga. His evidence would show that a part of the *chur* was sandy and silt was deposited from time to time which would show that the lands were liable to inundation and were inundated from time to time. The evidence of these witnesses would seem to show that the land was sandy and liable to inundations and was inundated from time to time, a condition often found in reformed *chur* lands.

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

The Plaintiff's own evidence would go to show that the land did not become culturable till some 10 or 12 years before the date they were deposing, viz.; 6 or 8 years before the date of suit This evidence really only deals with the condition of the land after 1902 where it is alleged by him the land re-appeared and does not deal with the period between 1880 and 1902. It is his case that before 1902 the land was under water. Although this is not a fact he may well have been grievously mistaken, not realising as apparently no one else did, that the lands accreting to *chur* Balliadanga were really reformation *in situ* of Kabirajpur His evidence as to the time of reformation in view of the documentary evidence on this point is obviously incorrect. The Defendant has further relied on certain documentary evidence. First the two settlements of 1880 and 1890 In these two settlements one for ten years and one for fourteen the disputed land was settled with the Defendant as part of *chur* Balliadanga which admittedly belongs to the Defendants The disputed land which increased at each settlement was treated as an accretion to *chur* Balliadanga which is in the Nadia District and it was not known till the settlement of 1904 that the disputed lands were really a reformation of village Kabirajpore which belongs to the District of Burdwan The mere fact that Defendants took settlement of these accretions does not prove that they were then fit for cultivation and capable of being effectively possessed The zemindar would naturally take settlement of an accretion to his land at a low rate of rent in the hope that it would improve in value and to prevent any rival zemindar taking it. Such settlements are often in the nature of a speculation.

In the settlement map of 1903 when it was discovered that the disputed lands were a reformation *in situ* of Kabirajpore a note is made that they are in possession of the Defendants. But there is nothing to show what the nature of that possession was. Possibly this entry was made because the former settlement had been with the Defendants. It had been contended by the Defendants-Respondents that the Appellant must have known of these settlements with the Defendants. There is no reason why he should. The settlement was made by the Collector of Nadia The Appellant's land is in the District of Burdwan and they are now on the opposite side of the river. The operation of measuring them need attract no attention Neither would settlement be offered to the Appellant as the Collector of Nadia did not know till 1903 that these lands belonged to Kabirajpore in the District of Burdwan. He treated them as being accretion to *chur* Balliadanga in the District of Nadia.

The documentary evidence proved nothing about the state of the lands. No doubt the land has been in existence some 40 years but *char* land may in some cases never become fit for cultivation or possession. It certainly cannot be presumed that it must have. The conclusion to which I have come is that the land in suit after reformation remained incapable of possession in the ordinary way by cultivation until 1906 when Defendants began to cultivate it and that in this case we may fairly presume that constructive possession remained with the true owner up till 1906 *Char* lands are cases to which the doctrine laid down in *Mirza Shamsher Bahadur* v. *Kunj Behari Lall* (3) *Mahomed Ali Khan* v. *Khaja Abdul*

(3) 7 C. L. J. 414 (1907).

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

Guny (4) and *Raj Kumar Roy* v. *Gobind Chander Roy* (5) is applicable. These lands appear often after many years when the whole configuration of the country due to the shifting of a big river is changed the lands appearing sometimes as in the present case in a different district and only a careful survey showed to what district they belonged. In such circumstances every presumption should be made in favour of the true owner. The case may be viewed as from another standpoint. The Plaintiff having shown by the evidence on the record that neither party had exercised any act of possession a presumption can be raised in his favour as to the question of possession of the land prior to his dispossession by the Defendant [*Rakhal Chandra Ghose* v. *Durga Das Samanta* (2)].

The Respondents have contended that the case now set up by the Appellant in appeal differs from the case he made out in his plaint and the case found on the fact. He argues that in the plaint the Plaintiff-Appellant's case was that the lands began to be diluviated in 1880 and the process continued in 1890, that they began to reform from 1902 and began to be fit for cultivation in 1906. Further the Appellant's case in his plaint was that he was dispossessed in 1913 when an Amin went to measure the land whilst his own evidence would show that he was dispossessed in 1906 and onwards.

Now undoubtedly the documentary evidence has shown clearly that the lands had begun to reform in 1880 and obviously therefore the Plaintiff's case is here incorrect. But it cannot be said that Plaintiff has changed in any way the relief he asked for. The relief asked for is the same and it is still his case that the cause of action arose in 1906. He does not seem to date his cause of action from 1913 when the Amin was prevented from going on the land but his plaint states (para. 10) that the cause of action has gradually arisen from the date when a portion of the land became fit for cultivation in 1906.

Then we must bear in mind the peculiar circumstances of the case. It is a case of land reforming after diluviation in a big river which has largely shifted its course. A mere inspection of the land would tell no one whether they were a reformation *in situ* of any particular land. The District authorities until 1901 treated them as belonging to *chur* Balliadanga in Nadia District and it was after the Collector of Nadia had released the lands in 1904 that the Appellant realised they were a reformation *in situ* of his village Kabirajpore. In the particular circumstances of the case I do not think the Plaintiff should be non-suited because he was inaccurate in giving the date when the land reformed. The whole evidence is before the Court, and so it cannot be said that either party has been taken by surprise.

Further the Respondent has contended the case now argued by the Appellant that there was an interruption of the adverse possession of the Respondent by inundation is a new case which was never raised in the lower Court. I do not think there is any substance in this objection.

The Respondent raised the defence of adverse possession and the Appellant is obviously entitled to show that one of the elements necessary for adverse possession, *viz.*, continuity, is absent and this he can show by arguing that the evidence shows

(2) 26 C. W. N. 728 at p. 736 (1922).
(4) I. L. R. 9 Cal. 744 (F. B.) (1883).
(5) L. R. 19 I. A. 140; s. c. I. L. R. 19 Cal. 660 (1892).

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

the land was under water from time to time.

It is then necessary to deal with the question of adverse possession and to consider whether the Respondent has made out a title by adverse possession. It will be seen that the evidence dealing with this point is practically the same as the evidence which has been dealt with in considering what was the state of the land up to 1906 and the finding I have already come to really disposes of this point. I, however, propose to deal with it separately. The Plaintiff's evidence admits that the Defendants began taking possession of their land in 1906. The suit was instituted in 1916 and there would thus remain at least two years during which the Respondent-Defendant must prove that he held the lands in adverse possession.

Now the Respondent to succeed must prove actual continuous possession of the lands to which he alleges he has acquired a right by adverse possession for the statutory period. No doubt acts of possession over a part of immoveable property may in certain cases be evidence of *de facto* possession of the whole. This rule however operates with full force in favour only of the true owner and should be applied with caution, if at all, in favour of the wrong-doer [*Mohini Mohon Ray* v. *Promoda Nath Roy* (6)]. The possession of the wrong-doer should be held to be confined to what he is in actual possession of [see also *Mirza Shamser Bahadur* v. *Kunj Behari Lall* (3) and *Secretary of State for India* v. *Krishnomoni Gupta* (7)].

The same question has been discussed in the case of *Barada Prosad Roy Chowdhury* v. *Annoda Mohan* (8). Mookerjee, J., in delivering the judgment of the Court points out that to establish adverse possession it is not sufficient to show that some adverse act of possession have been done but the possession must be adequate in continuity, in publicity and in extent of area to establish that it is possession adverse to the true owner and further that the doctrine of constructive possession applies only in favour of the rightful owner and cannot as a rule be extended in favour of a wrong-doer whose possession must be confined to the land of which he is in actual occupation. The learned Judge gives as an instance that where the party relies on possession through their tenants evidence must be given to show the tenants were in actual possession and such possession covered the whole of the disputed land. Further it must be proved that with regard to any particular portion that it has been continuously in the possession of the party claiming adverse possession visible, exclusive and hostile for the statutory period.

It is pointed out that as soon as the land became unfit or incapable of use or occupation the title of the true owner revived. The Respondent has argued that he was not a wrong-doer but entered under a *bonâ fide* claim of title and so his position is different from a mere trespasser and that he is in the position of a true owner. I am not aware that what is obviously a dangerous doctrine has ever been accepted by this Court.

Examined in the light of these principles the Defendants have clearly failed to make out any title by adverse possession.

(3) 7 C. L. J. 414 at p. 432 (1907)
(6) I. L. R. 24 Cal. 256 (1896)
(7) L. R. 29 I. A. 104; s. c. I. L. R. 29 Cal. 518; 6 C. W. N. 617 (1902).

(8) 13 C. L. J. 30 (1910).

SURESH CHANDRA MUKERJEE *v.* SHITI KANTA BANERJEE.

In considering the probability or improbability of the Defendants' case we must remember that up to 1899 the two Defendants were fighting each other for the possession of the *char* Balliadanga and this fact might render it highly problematical whether either of them ever had effective possession of the land in dispute. The evidence they rely on is documentary and oral. With regard to the oral evidence the learned Subordinate Judge says it is unsatisfactory and can easily be manufactured but coupling it with the documentary evidence he held that the Defendants adversely possessed the greater portion of the disputed *char* since 1903. The documentary evidence is mainly the evidence of settlement by the Collector and it is not easy to see how this substantiates the oral evidence which is directed to prove actual possession. To deal with the documentary evidence first.

The Respondent rely for this on the three settlements of 1880, 1890, 1904 and the partition proceedings of 1899.

To take first the two settlements of 1880 and 1890.

They prove that so much of the land as was reformed at the time of the settlement was, together with a tract of land which admittedly belongs to the Defendants, settled with the Defendants. But this does not prove that the Defendants actually occupied or used the land or that it was capable of user. It may well have suited the Defendants to take settlement of these *char* lands in the hope they would some day become capable of use. But this does not by itself show that the land was actually used and occupied. Then we have the partition proceedings of 1899 These proceedings show that these lands were partitioned together with other lands which admittedly belong to the Defendants. It has been argued that the Defendants would not fight over lands of which they had not possession and were not in occupation. Here again it is to be remembered that the partition suit also included the rest of *chur* Balliadanga which admittedly belongs to them. That again does not prove that the lands were used or occupied. The settlement map of 1903 has on it the remark that these lands are in the possession of the Defendants but that again does not show what the nature of the possession was. Lastly there are certain chittas which cover a small portion of the disputed land. They are for the years 1306 to 1322 and there are also the counterfoils which it is alleged show receipt of rent from tenants. Their genuineness is very doubtful. They contain the names of some 18 tenants only one of whom is examined, Pachouri, and he says his receipts have been burnt. Of the others it is a remarkable fact that during the space of some 16 years there has been no change in any of the tenants. Exactly the same tenants were holding the holdings in 1322 as in 1306. Some of these tenants must be available. The Commissioner relaid chittas of four of the plots and then using them as a starting point relaid the others on the plan not on the ground. This evidence obviously would not show actual occupation of these plots nor that tenants were ever actually settled there in the absence of the tenants themselves. It would show that when the Commissioner visited the spot in 1916 certain plots were pointed out on the chitta plots and four were identified by him.

Next we have the oral evidence which has already been dealt with in considering the question of the condition of the landlord which it is unnecessary to recapitulate in detail. It shows, even if

believed, though I may say I share the learned Subordinate Judge's doubt as to its genuineness, that at some time or other some kalai was grown and some *babla* trees cut. It is obviously evidence which is not sufficient to prove adverse possession and could be manufactured without difficulty. It does not appear how much *kalai* was grown, whether on one bigha or on the whole of the disputed land, whether the *kalai* was grown always in the same place or on different plots or whether it was grown for the statutory period.

The Defendants are Zemindars who presumably keep accounts. Their account books would have shown the money expended in cultivating *kalai* and the money realised from the sale of it and also the money realised from the sale of *babla* trees. There is no documentary evidence to support the story that *kalai* was grown or *babla* trees cut from the disputed land.

The area in dispute is some 1,000 bighas. Obviously if there had been any real attempt to cultivate any appreciable portion of the land there must have been a considerable expenditure and receipt.

Defendant No. 1 Sib Kanta Banerjee in his examination gives no suggestion how much land was cultivated or for what period, whether it was the same portion or different portions.

Kali Prasanna Chukerbutty took a lease of *char* Balliadanga from Defendant No. 2, the 12 annas proprietor from April 10th 1902 to April 14th 1904. He states that during this period which ends at a date within the statutory period he cannot say if there were any tenants on the land. Obviously if there had been he must have known it as he was the *ijaradar* and so clearly the statement is equivalent to an admission that during the period within 1904 there were no tenants in the 12 annas share. His possession consisted of growing *kalai*; where he grew *kalai* is not proved, whether on the disputed or undisputed portion of *char* Balliadanga. He produced no papers to support the bare statement that he grew *kalai*. It has been argued that he paid Rs. 500 as a yearly rent for the 12 annas share of the *char*. But though he paid rent it does not necessarily follow that he occupied or used any portion of the *char*, still less that he actually occupied the disputed portion of the *char*. After Sib Kanta Banerjee, Defendant No. 1, the 4 as. share-holder took a lease of the 12 annas share. This however was from April 1904 which is within the statutory period the suit being instituted on 25th February 1906. Further the witness does not produce the rent receipt which he alleges he got for the payment of the rent. Then the evidence of Rajani Kanta Dey, witness No. 7 for the Defendant, shows that he measured the land in 1903 on which there were tenants. He states which were the tenanted plots and admitted none of the plots he has described as tenanted fall within the disputed area. Then his evidence goes to show that in 1903 there were no tenants in the disputed area. Further he states that in 1903 there was nothing on the lands in Sib Kanta Babu, the 4 annas Zemindar's *khas* possession. His evidence would show that in 1903 there were no tenants on the disputed portion of the Balliadanga *char*.

Boloram Ghose, Defendant No. 3, for Defendant proves that in 1900 he went to the *char* and that there were then some 25 or 30 bighas of land sown with *kalai*. Whether these 25 or 30 bighas were in the disputed land or not does not appear. Even if they were, the growing of *kalai* on some 25 or 30 bighas out of an

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

area of about 1,000 bighas could not obviously amount to adverse possession of the 1,000 bighas. His evidence at the highest would show the cultivation of some 25 or 30 bighas.

Then there is the evidence of Dolu Gobinda Biswas, the Dewan of Defendant No. 2. He apparently last went to the *char* in 1899 and has not been there since. Then he knows nothing about the period from 1899 up to 1906.

He however states that the disputed *char* remained uncultivated from 1899 to 1901 and that between these years it was not let out to tenant.

Defendants Nos. 1 and 2 were fighting and it is perhaps improbable that either could really effectively possess the land.

Taking all the facts and circumstances of the case into consideration and even accepting for the sake of argument, the oral evidence of the Defendants' witnesses the evidence is not sufficient to establish a title by adverse possession. The Defendants cannot avail themselves of the doctrine of possession of a part being constructive possession of the whole. They are tortfeasors and must prove actual continuous possession of the land for which they seek to establish a title by adverse possession [*Nawab Bahadur of Murshidabad* v. *Gopi Nath Mandal* (1)].

In the present case we have an area of some 1,000 bighas of *char* land which adjoins the Defendants' lands and the only evidence of possession is that some *kalai* has been grown from time to time and some *babla* trees cut. Even if these were proved which I do not think it has, it would amount at the most to isolated acts of trespass. Neither need the true owner necessarily know that such acts were being done when we take into consideration the extent, nature and situation of the property. The taking of settlement from Government cannot be considered as an act of possession. The deputing of an Amin to demarcate the land in the partition suit and the planting of one or two pillars would be an isolated act of trespass.

There is in the present case no possession adequate in continuity, publicity and extent of area to destroy the title of the true owner.

Rejecting, however, as I do the Defendants' evidence of actual possession their case entirely fails for if the oral evidence is disbelieved there is no evidence at all to support a story of adverse possession.

The Defendants have failed to make out any title by adverse possession.

The Respondents have argued that the Appellants have failed to identify the land they claim because the numbers of the *chaks* have been omitted from the Commissioner's map. What however has happened then? The Pliantiff-Appellant has established his title to some 15 *chaks* of which the numbers are given, ..., 5, 7, 15, 17, 61, 64, 69, 70, 73, 99, 100, 101, 102, 103, 104 and the residuary lands. There are other *chaks* to which he had not established his title. The number of these *chaks* are also known.

Under the orders of this Court the same Commissioner who had made the local investigation replotted on his map all the *chaks* putting the correct thak number in each *chak*. It now appears that these 15 *chaks* of which the numbers have been given above actually fall within the disputed land.

No difficulty would be experienced in granting to the Appellant-Plaintiff a decree capable of execution. He is clearly entitled on the findings I have come to to so much of the disputed land as

(1) 13 C. L. J. 625 (1910).

falls within the 15 *chaks* and the residue portion of village Kabirajpore which falls within Estate No. 10.

This residue will be found by deducting the *chaks* of which the title has been found not to be with the Appellant.

A cross-objection has been filed by the Respondent regarding the cost in the lower Court.

In view of the finding to which I have come the cross-objection must fail as I would hold the Appellants are entitled to proportionate costs of the suit throughout. I would decree the appeal so far as the disputed land to which the Plaintiff-Appellant has proved his title, *viz.*, the 15 *chaks* and the residuary portion of Kabirajpore with proportionate costs throughout.

Against this decision the Plaintiff preferred the present appeal under sec 15 of the Letters Patent

Dr. Sarat Chandra Basak and *Babus Pramatha Nath Mitter* and *Hemendra Nath Chatterjee* for the Appellant.

Dr. Jadu Nath Kanjilal and *Babus Panchanan Ghose* and *Apurba Charan Mukherjee* for the Respondents

The JUDGMENT OF THE COURT was as follows :—

NEWBOULD, J.- The Plaintiff brought the suit out of which this appeal arises for declaration of his title and also recovery of possession of about 1,000 bighas of land. He succeeded in obtaining a decree for a part only of the land claimed and appealed to this Court His appeal was heard by a Divisional Bench of this Court consisting of Woodroffe and Cuming, JJ. There was a difference of opinion, Woodroffe, J., holding that the appeal should be dismissed while Cuming, J. was in favour of allowing the appeal in part. They held that as there was a difference of opinion and there was no majority varying or reversing the decree appealed from, the appeal should be dismissed. Against this decision the Plaintiff has preferred an appeal under sec. 15 of the Letters Patent. A preliminary objection has been taken that no appeal lies. This objection we overruled at the commencement of the hearing of the appeal. Though we accept the contention of the learned vakil for the Respondents that the decision of the Judicial Committee in *Bhaidas Shivdas* v. *Bai Gulab* (9) shows that the procedure laid down in sec. 98 of the Civil Procedure Code was wrongly applied in the present case, that is immaterial Had the provisions of cl. 36 of the Letters Patent been followed the result would have been the same since the opinion of Woodroffe, J., who is the senior Judge would prevail. Under cl. 15 of the Letters Patent this appeal is clearly competent.

The present suit is due to events primarily caused by the movements of the river Ganges at a part where under the name of Bhagirathi it flowed between the Nadia District on its north and the Burdwan District on its south. At the time of the Revenue Survey by Government of 1855 there were *chars* on both sides of the river. On the north side was *char* Baliadanga which was temporarily settled with the Defendants' predecessors in two estates bearing Touzi Nos. 824 and 2160 of the Nadia Collectorate. On the south side was a *char* adjoining Mouza Kabirajpur which is a part of the estate bearing Touzi No. 10 of the Burdwan Collectorate and in this village the Plaintiff has *patni* right to certain plots. The river moved gradually in a southerly direction causing accretions to *char* Balia-

(9) I. L. R. 45 Bom 718; s c. 25 C. W. N 605 (1921).

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

danga and diluviating first the char adjoining Kabirajpur and subsequently also part of the Kabirajpur Mouza. This alluvion and diluvion continued until the accretions to *char* Baliadanga became reformations *in situ* of Kabirajpur land. While this was going on Government made three surveys and settlements of the land which accreted to *char* Baliadanga in the years 1880, 1890 and 1903. Even in 1890, some land of Kabirajpur was settled with the Defendants as proprietors of estates Nos. 824 and 2460 and in 1890 still more land of that mouza was settled with the Defendants. During the survey and settlement of 1903 the mistake was discovered and the land found to be reformation *in situ* of Mouza Kabirajpur was excluded from the settlement. The temporarily settled estates Nos. 824 and 2460 were originally undivided—four annas and twelve annas shares of *char* Baliadanga. In 1893 a partition suit was brought which after protracted litigation ended in a division of the land after survey by a Commissioner in 1899. The Plaintiff instituted the suit, out of which the appeal arises, on the 25th February 1916. He originally claimed approximately 1,000 bighas of land. In the trial Court he gave up his claim to a large tract on the east and at the hearing of the first appeal to this Court he no longer claimed the land which had been settled with Defendants after the 1903 survey. He originally based his title both on his *putni* right and adverse possession. The finding that he has no title other than his *putni* right has not been disputed. He is content to rely on the finding of the trial Court that he has established his *putni* title to 15 specific *chaks* and the *abosista chak* or unnumbered residue. The learned Subordinate Judge gave the Plaintiff's decree for the land within these *chaks* that was south of the line of the south boundary of the *char* shown in the settlement map of 1903 and the partition map of 1899. He held that the Plaintiff's title to land north of this line had been barred by limitation.

The case made in the plaint was that diluvion took place in 1890 and reformation in 1902. It was further alleged that the land first began to be fit for cultivation in October 1906 and the Defendant No. 1 then proposed to take a settlement from the Plaintiff. As there was undue delay, the Plaintiff in 1913 attempted to have the lands surveyed and was prevented by Defendant No. 1. This case has admittedly failed. The correctness of the various maps as showing the reformations is not questioned and the map of 1880 shows that reformation *in situ* had commenced before that year. The Plaintiff's case now is that he was in possession of the *chaks* to which he has proved title until they were diluviated and his possession must be presumed to have continued and that he is entitled to succeed unless the Defendants can prove that they have destroyed his title by adverse possession. This contention raises the issue as to the party on whom the burden of proof lies in the present case. On this issue I find myself in entire agreement with the finding of Woodroffe, J. The reasoning in his judgment appears to me clear and logical and in accordance with the principle laid down in previous decisions of this Court and the Judicial Committee of the Privy Council. He points out that the Plaintiff sued for possession on the allegation of dispossession. Art. 142 of the First Schedule of the Indian Limitation Act, 1908, is therefore applicable and he is bound to prove possession within 12 years before suit. Admittedly he has not had any actual pos-

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

session since the lands became submerged and it is also admitted that the Defendants have been in possession since 1906, ten years before the institution of the suit. In order to prove possession within twelve years the Plaintiff may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession. But in a case like the present where Art. 142 applies the Plaintiff, if he relies on this presumption, must prove that the land was incapable of actual possession within twelve years before suit. For the Appellant, it was strongly contended before us that it lay on the Defendants to prove their adverse possession for twelve years before the suit. It was urged that the presumption of possession in favour of the real owner would continue until it is shown that the presumption does not apply by reason of the Defendants having been in adverse possession. It was also urged that the presumption would continue as long as the land continued incapable of ordinary possession, and it is for the Defendants to show when this change took place. These contentions ignore the difficulty in the Appellant's way arising from the fact that he has so framed his suit that the initial burden lies on him to prove dispossession within twelve years. Relying, as he does, on a presumption to discharge this burden he must prove the facts necessary to establish this presumption, that is to say, not only that he was the real owner but also that the land was incapable of possession in the ordinary way. Of the cases cited, the Full Bench decision of this Court in *Mahomed Ali Khan* v. *Khaja Abdul Guny* (4) is the most favourable to the Appellant. The rule laid down at page 752, if read apart from the context, seems to support his contentions: It is as follows:—The true rule appears to be this: "That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would and probably did continue till within twelve years before suit it may properly be presumed that it did so continue, and that the Plaintiff's possession continued also until the contrary is shown." But the rule is qualified by the preceding remarks on page 751 which require the Plaintiff to show such acts of ownership as are natural under the existing condition of the land before he can claim the benefit of the presumption that his possession continued. It is not necessary to discuss all the decisions that have been cited on behalf of the Appellant. Several of them as for instance, *Basanta Kumar* v. *Secretary of State* (10), can be distinguished on the broad ground that they were cases where Art. 144 and not Art. 142 was applicable. The head-note of the Indian Report wrongly states that the High Court decided that case on limitation alone holding that the suit was barred by Art. 142. The English Report of the same case quotes the High Court judgment, which clearly states that the case "must be governed by Art. 144." Other cases that were cited follow the decision in *Mahomed Ali Khan* v. *Khaja Abdul Guny* (4) and give no greater support to the Appellant's contention than that Full Bench decision. I would therefore hold that in the present case it lay on the Plaintiff to prove that the lands were incapable of user within twelve years prior to the suit.

(4) I. L. R. 9 Cal. 744 (F. B.) (1883).

(10) L. R. 44 I. A. 104; s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 642 (1917).

SURESH CHANDRA MUKERJEE *v.* SRITI KANTA BANERJEE.

For the Appellant it was further urged as an alternative plea that if it is necessary for him to prove that the land was incapable of user, he has proved this at any rate as regards the land south of the survey line of 1890. In order to prove this he relies on the Defendants' evidence, oral and documentary. The case made out by the Plaintiff's witnesses was entirely abandoned at the hearing of the appeal and their evidence was not even read to us. The first piece of evidence on which reliance is placed is that of Gunidas Biswas, defence witness No. 2. He was the *gomosta* of the second Defendant in respect of the *char* lands from 1306-8 B. S. In cross-examination he states "I found the sandy tract of the *char* in the same condition during the period of my service. There was no alteration in its area during that period." It is contended that this proves that no extra land became culturable after the survey of 1890. But if his examination-in-chief be also read, it is clear that what he meant was that during this period, as the river receded there remained a fringe about 1½ or 2 *rashis* wide of unculturable sandy land and that though the nature and area of this fringe remained unchanged, its position altered as the *char* extended towards the south. The only other oral evidence to which reference is made in this connection is that of defence witness No. 7 Rajani Kanta Dey. He was a Collectorate Amin and took part in the settlement surveys of 1890 and 1903. His evidence-in-chief is strongly in favour of the Defendants since he says that he saw the *char* after 1903 and found the major portion of the *char* under cultivation. It is contended that this evidence refers to the land which was settled with the Defendants in 1904 and not to the land now in dispute That this cannot be, since he was speaking of the land down to the water's edge and the map of the 1903 survey shows the water edge far south of the land settled with the Defendants as part of their estates Nos. 821 and 2460. A similar argument to that based on the evidence of defence witness No. 2 is based on this witness's statement "about 50 to 60 bigha lands must have accreted to the *char* between 1890 and 1903. In 1903, I found the area of the sandy portion of the *char* to be 60 to 80 bighas." But this does not mean that the only accretion during these years was sandy land. Our attention has also been drawn to a statement in the settlement report of the 8th March 1904, Ex. P. "The estate consists of a low tract of *char* land liable to annual inundation." It is urged that as these remarks refer to the land settled with the Defendants, the disputed land to the south would be still more liable to inundation. But the expression "liable to annual inundation" does not mean that the land was actually inundated every year. The same paragraph of the report shows that though *ous* paddy could not be grown in normal years, *kalai* and *musuri* were extensively grown and this supports the Defendants' case that the land was capable of possession. Another argument is based on the map and report of the Commissioner who executed the partition decree in 1899. It is contended that as the south lines of the Commissioner's map and of the settlement map of 1903 are almost identical, there could have been little alteration in the *char* during the interval between the two surveys. It appears from the Commissioner's report that in 1899 there was practically no culturable land south of the land settled in 1890. But the Commissioner's map does not show the true position of the river in

SURESH CHANDRA MUKERJEE v. SHITI KANTA BANERJEE.

1899. At the wish of the parties to the partition suit, the Defendants in this suit, he included land which was still part of the bed of the river in his map and divided it between them. It follows therefore that there was a considerable accretion of culturable land to the south of the *char* between 1890 and 1903. The Defendants' evidence does not show that any land north of the line, which has been given as the south boundary in the decree, was unfit for cultivation within twelve years of the institution of the suit.

These findings are sufficient for the disposal of the appeal But even if I had held that the burden of proof lay on the Defendants to prove twelve years' adverse possession, I should decide in their favour. That the Defendants did exercise acts of possession on the land as it reformed and became capable of possession, there can be no doubt Further these acts of possession were all done in the assertion of the claim of the Defendants to the land by virtue of the settlements made by Government This case is distinguishable from *Basanta Kumar Roy's* case (10) cited above, since there are circumstances to link together various portions of ground so as to make the possession of a part as it emerged amount constructively to possession of the whole.

We all agree that the appeal fails and it is accordingly dismissed with costs.

B. B. GHOSE, J.—It is unnecessary for me to recapitulate the facts of this case as they have been sufficiently stated in the judgment of my learned brother Newbould which I had the advantage of reading. I agree that there is no substance in the preliminary objection taken on behalf of the Respondents that the appeal is not maintainable.

The only question argued on behalf of the Appellant is one of limitation. The allegation in the plaint is that the Plaintiff was in possession of the land in suit before diluvion, which commenced to reform in 1902 and that he has been dispossessed by the Defendants in 1906. That appears to be the proper meaning of the plaint and this was sought to be established by the evidence led by the Plaintiff. The story, however, that the land began to reform in 1902 is untrue, as it is beyond dispute that it reformed long prior to that date and this has not been contested by the Appellant. The suit then being for possession on the allegation of dispossession falls within Art. 142 of the Limitation Act as has been held by both the learned Judges of this Court who heard the appeal in the first instance. This is also not seriously disputed by the Appellant. The burden of proof in such a case is without doubt on the Plaintiff to show that he had been dispossessed within 12 years of the date of suit. The Plaintiff-Appellant admits that he has been dispossessed for about 10 years, the suit having been brought in 1916. The difference between the admitted possession of the Respondents and the period of limitation is within the narrow limit of about two years, during which Appellant must establish his possession in order to succeed in the suit. In the case of *Netresen Singh* v. *Nund Lal Singh* (11), Turner, L. J., in delivering the judgment of the Privy Council said; "The Appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of Defendants, who insist on a possession of much longer duration as a statutory bar to the suit.

(10) L. R. 44 I. A. 104 s c I L. R 44 Cal 888; 21 C W. N. 842 (1917).

(11) 8 M. I. A. 199, 220 (1860).

It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him . . . . on a dispossession within twelve years next before the commencement of the suit . . No proof of anterior title such as would be involved in the decision of the boundary question in his favour can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession" The law is the same under the present Limitation Act, where the dispossession from which limitation is declared to run should have taken place within twelve years of the suit. The nature and quality of the possession of the Respondents in this case during the period after the admitted dispossession of the Appellant need not require any discussion. The Appellant may establish his possession within the disputed period of two years by showing that his possession was either actual or constructive. There is no evidence of actual possession or the exercise of any act of possession, however trivial, by the Appellant during that period, for the title being in him such acts might have preserved his title. Constructive possession may also be shown by the fact that the land being under water was incapable of possession or although it was capable of being possessed no one had actually taken possession during the period in question. The Appellant cannot by proving possession at any period anterior to twelve years before suit shift the onus on the Respondents to prove their possession.

Much stress was laid by the Appellant on the observations of Wilson, J., who delivered the judgment of the majority of the Full Bench in *Mahomed Ali Khan* v *Khaja Abdul Gunny* (1) and it was contended that as the land in this case did probably continue to have been in such a condition as not to be fit for the usual modes of enjoyment within twelve years before suit, it should be presumed that his possession continued until the contrary is shown. It is urged that it is incumbent on the Respondents to show that they had dispossessed the Appellant during the two intervening years. The meaning of the observations relied on will be clear when read with the preceding remarks in the judgment of that case. What the learned Judge laid down was that so long as the state of the land remained unchanged, the possession of the rightful owner should be presumed to continue unless he is shown to have been dispossessed. Dealing with the case of diluvion by a river, Wilson, J., says (at p. 751): "In such a case, if the Plaintiff shows his possession down to the time of diluvion, his possession is presumed to continue as long as the lands continue to be submerged." It has been established in this case that the condition of the land had changed a considerable number of years prior to the period in dispute, and that is no reason why the ordinary rule that the Plaintiff should prove his possession within the period of limitation should be departed from. The Appellant has not succeeded in proving that the land was incapable of possession on account of its remaining submerged, or that no one else was in possession during the disputed period although the land had emerged from the river.

It is next submitted that the settlement report of 1904 shows that the land was liable to annual inundation and Plaintiff's possession should be held to have constructively revived during such inundation and the suit is therefore n

(1) I. L. R. 9 Cal. 744 at p. 752 (F. B.) (1883)

barred. The Appellant strongly relies on the case of *Basanta Roy* v. *Secretary of State* (10) as bearing a close resemblance to this case. There are, however, distinctions between that case and the present one in important particulars. Their Lordships of the Judicial Committee observe, in following the case of *Secretary of State* v. *Krishnomoni* (7): "No rational distinction can be drawn between that case and the present one, where the reflooding was seasonal and occurred for several months in each year. It was held that when the land was resubmerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner." [*Basanta Roy* v. *Secretary of State* (10).] In that case the Plaintiff did not come to Court on the allegation that he had been dispossessed. It was held that the suit was one to which Art. 141 of the Limitation Act was applicable and it was therefore for the Defendant to show that Plaintiff's title had been extinguished by reason of the adverse possession of the Defendant. In the present case it is for the Plaintiff to establish a subsisting title. There is no evidence that the land was inundated during the two years in question and that there was a cessation of the dispossession by the Defendants by reason of the submergence of the land. The principle on which the cases of *Krishnomoni Gupta* (7) and *Basanta Roy* (10) were decided was that the possession of the Defendant was in fact determined by the submergence of the land, when it became derelict and, as was observed in the former case, on the dispossession of the Defendant (Government) by the *vis major* of the floods the constructive possession of the land was (if anywhere) in the true owners [see *Secretary of State* v. *Krishnomoni* (7)]. In the present case there is no suggestion that the inundation had the effect of dispossessing the Defendants or rendering the land derelict, and in my judgment that principle does not, therefore, apply in the present case. The case of *Kuthali Mosthavir* v. *Periqanti* (12) was also a case following within Art. 144 of the Limitation Act and moreover the Plaintiff there had proved the exercise of various acts of possession during the currency of his title and is therefore different from the present case.

It is next urged that the Respondents only cultivated small areas during the period of their possession and their possession of a part did not amount to possession of the whole. But assuming the fact to be so, in this case there is the connecting link of claim of title and close connection and interdependence between the part and the whole, as the Respondents were in possession by virtue of settlements obtained from Government of the entire land, which was surveyed at intervals and depicted in maps, and on the whole of which revenue was assessed. Then again the Respondents partitioned the entire land among themselves in 1899 when it was again surveyed and masonry pillars erected in order to demarcate the portion of each co-sharer. The circumstances contemplated as operating in favour of a wrong-doer in the case of

(7) L. R. 29 I. A. 104 at p. 115: s. c. I. L. R. 29 Cal. 518; 6 C. W. N. 617 (1902).

(10) L. R. 44 I. A. 104: s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 649 (1917).

(7) L. R. 29 I. A. 104: s. c. I. L. R. 29 Cal. 518; 6 C. W. N. 617 (1902).

(12) L. R. 48 I. A. 395: s. c. I. L. R. 44 Mad. 883; 26 C. W. N. 667 (1921).

Mohini Mohon v. *Promoda* (6) which has been approved by the Privy Council in *Basanta Roy's* case (10) are established in this case. This argument of the Appellant also fails.

Lastly, it is urged that Plaintiff should at any rate be given a decree for that portion of the land which lies south of the settlement boundary line of 1890, as it was found by the partition Commissioner in 1899 to be sandy and almost in the bed of the river and could not therefore be the subject of effective possession by the Defendants. It does not however appear that the portion was in the same condition in 1904. Rajani Kanta Dey, Amin of the Collectorate who is an independent witness, says: "In 1903 I found the major portion of the *char* under cultivation. About 2 to 2½ *rashis* wide land from the water edge was sandy. Above that all lands were culturable." The sandy portion in 1903 would appear to be the portion for which the Appellant was given a decree by the trial Court. In any case the Respondents having erected pillars on this portion during the partition proceedings and included it within the rest of the land, the possession of this portion cannot be distinguished from the rest. Thus all the contentions of the Appellant fail.

In this view it is unnecessary to discuss the question as to what would have been the effect of the possession by the Respondents if the case fell within Art. 144 of the Limitation Act. It is sufficient to say that under the circumstances of the present case, the possession of the Respondents cannot be held to be surreptitious for occasional acts of trespass and that it had not the qualities of adequacy, continuity and exclusiveness. I agree that the appeal should be dismissed with costs.

PAGE, J.—I agree that this appeal should be dismissed. In my opinion, it is not incumbent upon the Court in this appeal to consider upon whom lies the burden of proving the dispossession of the Appellant, because "as their Lordships find the evidence sufficient to establish a clear conclusion of fact, it cannot matter now by which party it was given"—*per* Lord Sumner in *Basanta Kumar Roy* v. *Secretary of State* (10). The only inference which, in my judgment, can reasonably be drawn from the facts proved at the trial, and set out in the judgment of my learned brother Newbould, is that the Appellant was dispossessed of the lands in dispute more than twelve years prior to the institution of the present proceedings. If that be so, this appeal must fail, because it was undoubtedly incumbent upon the Appellant, having regard to the form of his claim, and the provisions of Art. 142 of Sch. V of the Limitation Act, 1908, to establish the fact that he was dispossessed within 12 years prior to the date upon which he launched this suit.

I desire, however, to state that I am unable to concur in the view which has found favour with Woodroffe and Newbould, JJ., as to where the burden of proof lies in circumstances such as those obtaining in this case. While they accept the Appellant's contention that, inasmuch as both the title to, and the possession of, the lands in dispute were vested in the Appellant before the river Bhagirathi changed its course and the lands

(6) I. L. R. 24 Cal. 256, 259 (1896).
(10) L. R. 44 I. A. 104 at p. 113: s. c. I. L. R. 44 Cal. 858 at p. 872; 21 C. W. N. 642 (1917).

(10) L. R. 44 I. A. 104 at p. 113; s. c. I. L. R. 44 Cal. 858 at p. 872; 21 C. W. N. 642 (1917).

became submerged, the said lands are deemed to have remained in the constructive possession of the Appellant so long as they continued to be inundated, these learned Judges were of opinion that "it lay upon the Plaintiff to prove that the lands were incapable of user within 12 years prior to the suit" (*per* Newbould, J.) and that the Plaintiff "must show that his constructive possession continued on account of diluvion, and on account of the land being incapable of possession within 12 years of the suit" (*per* Woodroffe, J.). With great respect, I am unable to agree that the burden which lay upon the Appellant was of this nature. In my opinion, the true rule was laid down by the Judicial Committee of the Privy Council as follows:—"The Limitation Act of 1877 does not define the term 'dispossession,' but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. 'There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment'—*per* Cotton, L. J., in *Leigh* v. *Jack* (13). It seems to follow that there can be no continuance of adverse possession where the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession, of course, continues until there is fresh dispossession, and revives as it ceases." Mr. Justice Wilson intended, I think, to lay down the same rule when he observed: "The true rule appears to us to be this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the Plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in sec. 114 of the Evidence Act." [*Mahomed Ali Khan* v. *Khaja Abdul Gunny* (4).] The rule of constructive possession does not create a new title to, or interest in, the lands: it merely operates to maintain the continuance of an existing right or interest. Further acts of possession after the water has subsided are not required to prove possession by the true owner, for in law such possession is deemed to have been throughout continuous and unbroken. The occasion and the necessity for further acts of possession by the true owner arise when, and only when, his right to possess the lands is challenged. So long as his possession is neither threatened nor disturbed what need is there of further witness? I find myself in agreement with the following observations of Melville, J., on this subject:—"The burden of proof being upon the Plaintiff, what is he required to prove! Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a Plaintiff in an action of ejectment must prove that he has been in possession within 12 years. He may not have been in possession within twelve years,

(13) L. R. 5 Ex. D 264, 274 (1879).

(4) I. L. R. 9 Cal 714 at p. 762 (F. B.) (1883).

and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it or to build upon it, or formally to take possession of it; nor, if he do formally take possession of it, is he bound by subsequent acts to proclaim the continuance of his possession. So long as the land remains unoccupied, his rights are not interfered with, and he is not called upon to assert them. He has no cause of action, and there is no person whom he could sue. His cause of action accrues when another person takes possession of the land." [*Pandurang Govind* v. *Bal Krishna Hari* (14).] Now, while the doctrine of constructive possession, in my opinion, is equally applicable to cases where the Plaintiff seeks to obtain possession of lands in the possession of another, and to cases where the Plaintiff claims to recover possession of lands of which he alleges that he has been dispossessed, a Plaintiff who frames his suit to recover possession of lands of which he has been dispossessed must needs prove that he has been in possession, and that he has been dispossessed within 12 years prior to commencing proceedings to recover possession of the lands. He must further prove unless it is admitted the time when, and the mode in which such dispossession was effected. Having regard to the evidence adduced at the hearing, so far am I from being satisfied that the Plaintiff in this case has proved that he has been dispossessed of the lands in dispute within 12 years prior to the institution of the suit, that, in my judgment, the true conclusion to be drawn from the evidence is that the Respondents have been in possession of the lands in a manner adverse to the Plaintiff's title, for more than 12 years before the present proceedings were commenced. In my opinion, no question of law is involved in this appeal, which depends solely upon the determination of an issue of fact. For these reasons it appears to me to be a matter of indifference whether Art. 142 or Art. 141 of the Limitation Act is applicable in the circumstances of this case, or upon whom the burden of proof lies, for in any event the appeal fails and should be dismissed.

(14) 6 Bom. H. C. R. A. C. 125 (1869).

J. N. R. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SHAW. LORD PHILLIMORE. LORD BLANESBURGH. LORD SALVESEN 1924, Heard, 7, 8 and 11, February. Judgment, 13. March.	KALYANDAPPA BIN AYAPPA DESAI, since deceased (now represented by Ayappa bin Kalyandappa Deshmukh and ors.), Appellants, *v.* CHANBASAPPA BIN DODAPPA DESAI, Respondent.

Limitation Act (IX of 1908), Sch. I, Arts. 118, 141—Hindu reversioner, suit for recovery by—Defendant claiming to be adopted son of previous owner—Plaintiff proved to have been aware of Defendant's claim of title more than six years before suit—Suit, if barred—Interpretation of statute by Court—Statute re-enacted in same terms—Implication that interpretation was accepted by Legislature.

The words "suit to obtain a declaration" in Art. 118 of Sch. I of the Limitation Act are terms of art, and the article was meant to apply to suits of the class referred to in Ill. (f) to sec. 42 of the Specific Relief Act.

A suit by a Hindu reversioner to recover property from a person who claims to hold the same as the adopted son of a previous owner is governed by Art. 141 and will not be barred if brought within

KALYANDAPPA BIN AYAPPA DESAI *v.* CHANBASAPPA BIN DODAPPA DESAI.

the period limited thereby even if the Plaintiff is proved to have become aware of the Defendant's claim more than six years before the suit.

This was an appeal against a decree of the High Court of Judicature at Bombay, dated the 13th April 1917 which set aside a decree of the first class Subordinate Judge of Bijapur and dismissed the Plaintiff's suit with costs.

The property in dispute which consisted chiefly of watan property consisting of Desgat and Gaudki watans belonged to one Dodappa Desai who died in 1878 leaving two widows and a daughter but no son.

Malkamma, the deceased's senior widow, adopted one Madivalappa in 1880 and his name was entered by the Collector as holder of both classes of watans.

In 1886 his name was removed from the Desgat watan register on the ground that he was not a Bhauband of Dodappa in whom under the sanad the Desgat watan would vest.

Madivalappa died in 1895 leaving no issue, but a widow Bishingamma whose name was entered as holder in the Gaudki watan register until it was removed in favour of Malkamma on the 4th October 1899.

In 1901 Malkamma was alleged to have adopted Defendant No. 1, Respondent as son to Dodappa and he had been in possession of the watan property since the date of his adoption. That adoption, however, had not been upheld by the Courts in India.

The Plaintiff instituted the present suit on the 1st of July 1912 in the Court of the Subordinate Judge of Bijapur claiming to be the nearest Bhauband of Madivalappa and as such his heir after his widow's death and prayed for possession of the property in suit and mesne profits.

He pleaded that the adoption of Defendant No. 1 was "not true and not in accordance with the Shastras" and that Dodappa to whom Defendant No. 1 had been adopted was not the last owner but that Madivalappa was the last owner and that the Plaintiff was his heir.

Defendant No. 1 (the Respondent) filed his written statement on the 30th July 1913 and pleaded *inter alia* that he was the legally adopted son of Dodappa and that the Plaintiff's suit was barred by Art. 118 of the Limitation Act. He also pleaded that the suit was barred by Art. 141 of the Limitation Act as the property in suit had been in adverse possession of Malkamma for a period of more than 12 years.

The learned Subordinate Judge delivered judgment on the 25th August 1914 and decreed the Plaintiff's claim with costs. He held that the Respondent had been adopted by Malkamma as a son to Dodappa, but that the said adoption was invalid as her power of adoption had been exhausted by adopting Madivalappa and that the suit was not barred by limitation.

The Respondent appealed against the said decree of the Subordinate Judge to the High Court of Judicature at Bombay which decreed the Respondent's appeal with costs on the 13th April 1917. The learned Judges held that the suit was barred by Art. 118 of the Indian Limitation Act.

The Plaintiff appealed to His Majesty in Council.

Mr. T. B. Raikes for the Appellants.—Art. 118 of the Indian Limitation Act, 1908, is not applicable. The terms of this article which are identical in the 1908 Act and in the earlier Limitation Act of 1877 apply only to a suit to obtain a declaration that an alleged adoption is

KALYANDAPPA BIN AYAPPA DESAI v. CHANBASAPPA BIN DODAPPA DESAI.

invalid, or never in fact took place. It does not apply to a suit for possession.

Thakur Tirbhuwan Bahadur Singh v. *Raja Rameshar Bakhsh Singh* (4) and *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din Khan* (7).

The following reasons also prevent the application of Art. 118 : --

(1) The adoption set up by the Respondent in the present case was a nullity being void on the face of it.

(2) The Respondent does not claim to be adopted to the last holder of the estate.

Jagadamba Chowdhrani v. *Dakhina Mohun* (1) and *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (2) are inapplicable having been decided under the Limitation Act of 1871, Art. 129.

Art. 118 of the later Acts applies only to suits of a particular kind, as for a declaratory decree under sec. 42 of the Specific Relief Act.

The question whether a suit is, or is not, brought within time must be decided having regard to the considerations prevailing at the time of its institution not by a consideration of the issues raised later on by the defence.

In coming to its decision in the present case the High Court has been affected by the decision in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (9) which followed the Full Bench decision in *Shrinivas* v. *Hanmant* (3).

But the latter decision was given in 1899 prior to decisions of the Board already quoted above.

(1) L. R. 13 I. A. 84 (1886).
(2) L. R. 20 I. A. 80 (1892).
(3) I. L. R. 24 Bom. 260 (1899).
(4) L. R. 33 I. A. 156 : s. c. 10 C. W. N. 1065 (1906).
(7) L. R. 39 I. A. 19 : s. c. 16 C. W. N. 458 (1911).
(9) I. L. R. 37 Bom. 513 (1913).

The Appellant contends that the correct view of the law was arrived at by the High Court of Madras in *Velaga Mangamma* v. *Bandlamudi Veerayya* (5).

Mr. Wallach for the Respondent.—The High Court have rightly interpreted the decisions of the Board in *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy* (1) and *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (2) which are not affected by the later decisions in 1906 and 1911.

Moreover these later decisions in no way suggest that different considerations should be given to Art. 118 under the Acts of 1877 and 1908.

An adopted son takes *ipso facto* a vested estate and decisions under Arts. 91, 92, 93 are inapplicable.

Mr. E. B. Raikes replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The suit in this case was brought in the Court of the Subordinate Judge of Bijapur to recover possession of certain watan lands and other lands of ordinary tenure, the Plaintiff making a claim as the nearest agnate to the last male owner, and averring that his title accrued on the death of the latter's widow. The principal Defendant, the now Respondent, being in possession of the property, pleaded various defences of which the one which is important for present consideration, depends upon the Indian Limitation Act.

The Plaintiff recovered judgment before the Subordinate Judge for possession of the watan lands but not of the lands of ordinary tenure. Appeal was taken to the High Court of Judicature at Bombay, which reversed the decision of the Sub-

(1) L. R. 13 I. A. 84 (1886).
(2) L. R. 20 I. A. 80 (1892).
(5) I. L. R. 30 Mad. 309 (1907).

ordinate Judge and gave judgment for the Defendant.

From this decree, the representatives of the original Plaintiff have appealed to His Majesty in Council. As to the non-watan lands the Plaintiff acquiesced in the decision of the Subordinate Judge against him. Of the watan lands there were two kinds, and it was contended for the Defendant that as regards one kind, known as Desgat watans, he was in a more favourable position than with regard to the others and must in any event succeed. But the Subordinate Judge and the High Court agreed, though for somewhat different reasons, that the parties stood in the same position with regard to both kinds of watan lands. Their Lordships do not find it necessary to go into the reasons given by the Subordinate Judge, but they are satisfied upon the ground given in the judgment of the High Court, that the Defendant was in no better position with regard to the Desgat watans than he was with regard to the other watan lands. But as regards both classes of watans, there is, as the High Court observed, a serious defence under Art. 118 of the Indian Limitation Act.

The facts of the case can be stated in a comparatively short compass. The Plaintiff was cousin to the former owner of this property, by name Dodappa. Dodappa married Malkamma, the second but not contesting Defendant in the case, and died long ago. The Plaintiff averred that after Dodappa's death in the year 1880, Malkamma took in adoption to him as his son, one Madivalappa, who was her daughter's son: that Madivalappa married Baslingamma and died himself in 1895: that upon his death Baslingamma took the ordinary Hindu woman's estate and died in 1903: and that upon her death, Plaintiff's title accrued: and that as he brought his suit on 1st July 1912, he had brought it within the period of 12 years allowed to him by Art. 141 in the Second Schedule to the Limitation Act.

He stated in his plaint that the Defendant denied the validity of Madivalappa's adoption and set up that he, on the other hand, was the person validly adopted by Malkamma as son to Dodappa.

The Defendant No. 1 did in substance set up this case. He admitted some show of adoption of Madivalappa, but denied that it was legal or valid; and he set up his own adoption by Malkamma in 1901. In the proceedings in the first Court, the validity of the adoption of Madivalappa was in contest; but the Subordinate Judge decided that it was valid; and this validity was not disputed in the appeal to the High Court. If Madivalappa were validly adopted, the property passed to him at once upon the adoption; and when he, the adopted son, died, his heir should succeed subject to the estates of the two widows. The adoption, therefore, of the first Defendant, if it can be enquired into at all, must be pronounced either invalid or ineffectual, and such as to confer no title upon the first Defendant to the lands in suit.

The point of law as between the two parties can be stated as follows. Plaintiff says: "I deduce a good title. You have no right to possession as against me, and I bring my suit within 12 years, that being the period allowed to me by Art. 141 in the First Schedule of the Limitation Act, which provides that for a suit by a remainderman or a reversioner 'entitled to the possession of immovable property on the death of a Hindu female,' there is a period of 12 years from the time 'when the female dies.'"

The Defendant says: "You can try to put it in that way, but in truth your

suit is one governed by Art. 118, being one "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place,' for which you have only six years from the date when the alleged adoption becomes known to the Plaintiff'; and as regards knowledge, I can show you kn w of my claim (as indeed he could sh more than six years ago."

It is true that the Plaintiff in his plaint as originally framed claimed a declaration that the Defendant had not been validly adopted, which was imprudent. But he wisely asked to amend this plaint by striking out this claim and making the suit a plain one for possession, and this amendment was allowed.

The controversy as to which of the tw principles of limitation should be applied in cases of this nature is an old one and has given occasion to many decisions, some of which are in conflict. Some of these authorities amount to decisions on the exact point, which if they are decisions of this Board, must be accepted as conclusive. Others may be said to consist of dicta rather than actual decisions: and others are again decisions of the High Courts in India, and as such entitled to much respect but in no way binding upon their Lordships.

The earlier of these decisions turned upon the construction of the Act of 1871. The article in the schedule of that Act, which dealt with cases of adoption, was in different language from the article in the schedule to the Acts of 1877 and 1908, the two latter being identical in terms.

The Article in 1871, No 129, is ex
(2) L. R. .
(3) I. L. R. 26 .
(4) L. R. 33 I. A t aside an adoption
(1906) date of the adoption.
(7) L. R. 39 I. A. Plaintiff) the date of
(1911). tive father."
(9) I. L. R. 37 B. hereafter that not only

is the description of the suit different from that contained in Art. 118 of the two later Acts, but that the time from which the limitation begins to run is different.

However, as regards the earlier Act, the decisive authority is a decision of this Board in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1). In that case their Lordships held that the words "to establish or set aside an adoption" "were not technical words and did not describe with accuracy any known form of suit," and that therefore any suit which brought the validity of an adoption into question must considered as a suit to set aside an adoption, even though it might also be looked at as a suit by the man entitled to recover possession; and that therefore Art. 129 and not Art. 112 (as then numbered) applied.

In the course of their judgment their Lordships made a reference to the Act of 1877, which by that time had been some years in force, though the case had been started so long ago that it was governed by the earlier Act of 1871. These observations are as follows:

"It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Art. 118 of the Act of 1877, which corresponds to Art. 129 of the Act of 1871 so far as regards setting aside adoptions, speaks of a suit 'to obtain a declaration that an alleged adoption is invalid or never, in fact, took place,' and assigns a different starting-point to the time that is to run against it. Whether the alteration of language denotes change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set

(1) L. R. 13 I. A. 84 (1886).

KALYANDAPPA BIN AYAPPA DESAI v. CHANBASAPPA BIN

aside an adoption' to be one of a loose kind, and that more precision was desirable."

The next case to be cited is that of *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (2) in which it was endeavoured to argue that the Act of 1877 and not the Act of 1871 applied; but it was held that the Defendant had established his right before ever the Act of 1877 came into force, and was therefore (though his adoption was an invalid one) entitled to insist upon the Limitation Act of 1871 in his favour. In this decision there was again a reference to the Act of 1877, and the words used by their Lordships were as follows:

"It was suggested that, the Act of 1871 having been superseded by the Act of 1877 the question of limitation should be determined with reference to the provisions of the later statute, in which the language used is somewhat different, the suit there referred to as necessary to save the limitation being described as one 'to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place' It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the Plaintiff would thereby take any advantage."

But then their Lordships proceeded to give the reason why the Act of 1877 would not apply.

In neither of these cases did their Lordships intend to pronounce any decision on the construction of the Act of 1877. Perhaps it might be observed that there is a shade of inclination in the passage of the first judgment towards there being a definite change in the law, and a shade of inclination in the opposite direction in the second judgment.

When the Act of 1877 came to be applied, there were differences of opinion in the various High Courts in India. The authorities are somewhat evenly balanced. Their Lordships, however, deem it unnecessary to go into the detail of the cases which preceded the next judgment of this Board, except the important decision of the Full Bench of the Bombay High Court presided over by Sir Lawrence Jenkins, C. J., and decided in the year 1899. The case is reported as *Shrinivas* v. *Hanmant* (3). It was there held, partly on grounds of public policy, partly in supposed obedience to the judgments of this Board, and partly in deference to the supposed indication of opinion by this Board, that the same rule should be applied to the Act of 1877 as to the Act of 1871, and that a suit to recover possession which involved the decision of an issue as to the validity or invalidity of the Defendant's adoption, was a suit to obtain a declaration that an alleged adoption was invalid or never took place, to which Art. 118 of the Act of 1877 applied and which therefore must be brought within a period of years dating from the Plaintiff's knowledge, and was, in the particular instance, time-barred. The limit of time for these declaration suits which was 12 years under the Act of 1871, had become six years under the Act of 1877.

In that suit, as in the present suit before it was amended, the Plaintiff claimed a declaration that the adoption of the Defendant was invalid, and he also claimed possession of the property, and when pressed by Art. 118 he endeavoured as in the present case, to throw aside his claim for declaration and rely only on the claim for possession. But it was held that the real matter for decision was a question for adoption, and that, therefore, Art. 118 applied

As it was put by one of the learned Judges: -

(2) I. L. R. 20 I. A. 30 (1892).

(3) I. L. R. 24 Bom. 260 (1899

KALYANDAPPA BIN AYAPPA DESAI v. CHANBASAPPA BIN DODAPPA DESAI.

"Article 141 applies to the ordinary simple case of a reversioner where the validity of the adoption is not the substantial point in dispute, or where the Plaintiff can succeed without impugning the validity of the Defendant's adoption."

Shortly afterwards the case of *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4) came before this Board. In that case again there was a conflict between the reversioner and a Defendant claiming under an adoption which was held either non-existent or invalid by both Courts in India. Whereupon the Defendant appealed; but his appeal was dismissed. It should be observed parenthetically that in the head note to the report, the important word "not" is unfortunately omitted.

The conclusion arrived at in that case was shortly stated by Lord Macnaghten, who delivered the judgment of the Board, and their Lordships cannot do better than quote the passage in full :—

"On the appeal before their Lordships it was argued that there was at any rate an apparent adoption, and that, on that assumption, it mattered not whether the adoption was valid or invalid, because there was enough to satisfy the provisions of the Limitation Act of 1871, as interpreted by this Board in the case of *Jagadamba Chowdhrani* v *Dakhina Mohun* (1). Mr. Cohen, who argued the case with great ability, relied entirely on the Act of 1871. He contended that the Limitation Act of 1877 did not apply because the Appellant relied on title acquired before the passing of the Act of 1877, and his rights were therefore saved by sec. 2 of that Act. He admitted that if the Act of 1877 applied, his client was out of Court.

"Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba* case (1) and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of sec. 2 of the Act of 1877.

"Their Lordships think that the appeal may be disposed of on this short ground, whether the alleged adoption was or was not an apparent adoption to which the ruling in the *Jagadamba* case (1) would apply if the Act of 1871 were now in force."

This language looks at first sight conclusive in favour of the Plaintiff in the present suit; but it has been thought in subsequent cases in India, and has been argued before their Lordships, that the decision of this point was unnecessary, because the Plaintiff, being a minor, had three years after attaining majority to bring his suit, and that this provision in his favour superseded the protection given to the Defendant by Art. 118 and left the matter open to be decided according to Art. 141. This line of reasoning seems to assume that you cannot impute knowledge to a minor—a view which is certainly not in accordance with the facts of human nature. But it is not necessary to go so deeply into the matter. It is obvious from a perusal of both the arguments and judgment that the minority of the Plaintiff (though mentioned in the argument) was not the reason for the decision, and that the intention was to decide the same point as is contended for in the present appeal.

In consequence of this decision the High Court of Madras in the case of *Velaga Mangamma* v. *Bandlamudi Veerayya* (5) went back upon its previous decision in *Ratnamasari* v. *Akilandamal* (6), and held in obedience to the decision of this Board that Art. 118 only applied to declaratory suits in respect of adoption

(1) L. R. 13 I. A. 84 (1886).
(4) L. R. 33 I. A. 156 : s. c. 10 C. W. N. 1065 (1906)
(5) I. L. R. 30 Mad. 309 (1907).
(6) I. L. R. 26 Mad. 291 (1903).

and not to suits for possession, and that in suits for possession Art. 141 was the proper one to apply.

Next in order comes the decision of this Board in *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din Khan* (7). That was the case of a Mohamedan adoption, in which the District Judge said that Art. 118 was inapplicable, as the adoption was "inherently invalid and *ipso facto* void"; but the Chief Court reversed his decision and held that the adoption was not inherently invalid, and that Art. 118 applied, and the suit was barred by it.

The Chief Court did not, however, mean to hold that the adoption was valid; because, if the Judges had thought that, there would have been no necessity to rely upon the doctrine of limitation. What the learned Judges meant was that it was an adoption with sufficient colour of title to have it treated as one which would have to be got out of the way by a Plaintiff suing for possession, and therefore that the time limit applicable to suits for declaring an adoption invalid applied.

This decree of the Chief Court was affirmed by this Board upon other grounds, it is true; but in affirming it their Lordships expressed themselves upon the point of limitation as follows:—

"Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring within the period prescribed by Art. 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4). Under the general Mahomedan law an adoption cannot be made; an adoption if made in fact by a Mahomedan, could carry with it no right of inheritance.

"It may further be observed that, even if an adoption by a Mahomedan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply."

As against the weight of this authority, it has been observed that, generally speaking, a Mahomedan adoption does not confer any right of succession to property, as, indeed, their Lordships said in the passage just quoted. But, on the other hand, as the passage shows and the general trend of the case shows, there may be a tribal custom among Mahomedans (and this particular case came from the Punjab, which is the home of customs) allowing adoption to carry rights of succession. Indeed it was upon some such idea that the Chief Court had relied when it introduced Art. 118 as fixing the period of limitation.

That Hindu tribes converted in more recent times to Mahomedanism may keep as part of their customary law the old Hindu law in respect of family matters and succession, is shown in the recent case of the Halai Memons in 1922, [*Khatubai* v. *Mahomed Haqi Abu* (8)].

Anyhow, it would seem that their Lordships desired to take this opportunity of elucidating and affirming their decision in the case of *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4). In this connection it should be noted that, though the judgment is stated to have been delivered by Sir John Edge, one of the members of the Board was

(4) L. R. 33 I. A. 156: s. c. 10 C. W. N. 1065 (1906).

(7) L. R. 39 I. A. 19: s. c. 16 C. W. N. 458 (1911).

(8) L. R. 50 I. A. 108: s. c. 27 C. W. N. 774 (1923).

KALYANDAPPA BIN AYAPPA DESAI *v.* CHANBASAPPA BIN DODAPPA DESAI.

Lord Macnaghten, who had delivered the judgment in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4) and must have known well what was intended to have been conveyed by the earlier judgment and by this one.

In 1913 these judgments came under consideration by the High Court of Bombay in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (9); and the learned Judges came to the conclusion that, notwithstanding the passages in the two decisions of this Board which have been last cited, they were still bound by the principle expressed in the decisions on the Act of 1871; and they accordingly held that the period of limitation in a case like the present is that of six years from the knowledge of the adoption, differing on this point from the High Court of Madras. Their decision has been followed by the Court in the present case, the learned Judges observing that "the adoption of the Defendant may be clearly invalid by Hindu law and Malkamma's power of adoption may have been already exhausted; nevertheless, the law of limitation will effectively defeat the Plaintiff's claim."

Their Lordships are of opinion that the High Court of Bombay both in this and in the previous case attached too little weight to the authority of the last two judgments of this Board, and further that the learned Judges seemed not to have noticed that since the decision in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (1), the Limitation Act of 1908 was passed by the Indian Legislature with this article in precisely the same language as that used in 1877 after the construction already put upon it by this Board. This, in the view of their Lordships, is a point of considerable importance.

The matter might almost rest here; but as this question has so often been raised and discussed, their Lordships would wish to put it upon the ground of principle as well as on the ground of authority. In the Act of 1871, as observed in the judgment in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1), the words used had no technical meaning, and they were treated as expressing popular language to which in popular reasoning the meaning which prevailed could attach. In the Acts of 1877 and 1908, the matter is otherwise. The words "a suit to obtain a declaration" are terms of art. They relate back to the Specific Relief Act passed in the same year 1877, being Act No 1 of that year, whereas the Limitation Act is Act No. 15. Sec. 42 of the Specific Relief Act deals with declaratory decrees, and the illustration (Letter F) is much in point:—

"A Hindu widow in possession of property adopts a son to her deceased husband The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid"

It is to this class of suits that this particular limitation applies. The date from which the time begins to run is a subjective or personal date; and the condition of obtaining the particular relief which is sought in a declaratory suit is that the Plaintiff should not be guilty of laches, the measure of laches being fixed by the statute as six years. But if a claimant chooses to run the risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued, and even

(4) L. R. 33 I. A. 156: s. c. 10 C. W. N 1065 (1906).

(9) I. L. R. 37 Bom. 513 (1913).

(1) L. R. 13 I. A. 84 (1886).

KALYANDAPPA BIN AYAPPA DESAI *v.* CHANBASAPPA BIN DODAPPA DESAI.

till the limit (no doubt a very wide limit) of 12 years from that accruer has passed.

Strange consequences would otherwise ensue. It was decided by this Board in *Venkatanarayana Pillai* v. *Subbammal* (10) in the year 1915, that a suit by a presumptive reversioner for a declaration that an adoption was invalid was one brought in a representative capacity and on behalf of all reversioners, and that on the death of a presumptive reversioner the next presumable reversioner would be entitled to continue a suit which his predecessor had begun.

If a suit for possession involving the invalidity of an adoption were to be treated as coming under Art. 118, the first reversioner might have known, and the second might not have known, of the adoption six years before. Or *vice versa*. And the suit for possession might succeed or fail, and the Defendant might be ousted of his property or keep it if the first reversioner died before he brought his suit to a hearing.

Moreover, it seems not to have been noticed by the Judges of the Bombay High Court who decided the case in *Shrinivas Sarjerao* v. *Balwant Venkatesh* (9), that one of the cases cited in *Umar Khan* v. *Muhammad Niaz-ud-din Khan* (7) was *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (11). And this case seems to indicate the true canon of construction. Art. 91 provides a period of limitation for a suit "to cancel or set aside" certain instruments, the period from which the time begins to run, dating again from the Plaintiff's knowledge. The case in *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (11) was a suit for a declaration that a particular form of lease, made by a Hindu widow, had become inoperative against the reversioners, and for possession of the property. The suit was brought more than three years after the Plaintiffs knew of the making of the lease; and the High Court of Calcutta thought that the time limit applied. The Chief Justice put it that, according to the authorities, if the Plaintiffs could recover possession without setting aside the lease, then Art. 141 would apply; but if they had first to set aside the lease, then Art. 91. Their Lordships agreed so far, and agreed further that the particular lease was voidable only and not void. But they held that the reversioner might treat it as a nullity, and showed his election to do so by bringing an action for possession, and that he had 12 years for so doing; and in that case the Plaintiff had not, as in the present case, amended his plaint by striking out the claim for a declaration.

The present case seems *a fortiori*. The adoption of the first Defendant was void, and the Plaintiff is entitled to brush it aside and sue for the possession to which he has a right. His time limit is 12 years from the death of the Hindu widow, and he was in time.

A further point was taken for the Appellant against the judgment of the High Court which seemed to assume that one adopted son could claim to be the brother and heir of another adopted son. But it is not necessary for their Lordships to pronounce upon this contention, which might otherwise have had to be seriously considered.

Their Lordships will humbly advise His Majesty that this appeal should be allow-

(7) L. R. 39 I. A. 19: s. c. 16 C. W. N. 458 (1911).

(9) I. L. R. 37 Bom. 513 (1913).

(10) I. L. R. 38 Mad. 406: s. c. 19 C. W. N. 641 (P. C.) (1915).

(11) L. R. 34 I. A. 87: s. c. 11 C. W. N. 424 (1907).

(11) L. R. 34 I. A. 87: s. c. 11 C. W. N. 424 (1907).

ed, and that the decree of the High Court should be reversed and the decree of the Subordinate Judge restored, and that the Appellants should have their costs here and below.

Solicitor: *Mr. E. Delgado* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 9 OF 1924.

SANDERSON, C. J. RICHARDSON, J. 1924, 25, February.

In the matter of an application of AVIS MARY KATHLEEN GOULDING.

Civil Procedure Code (Act V of 1908), Or 41 r. 10, applicability of—Jurisdiction to order security in appeals from a Judge sitting on Original Side.

Or. 41, r. 10, C. P. C. applies to an appeal from the judgment of a Judge sitting on the Original Side.

Per RICHARDSON, J.—*Even apart from Or. 41, r. 10, C. P. C., the Court has ample jurisdiction to demand in proper cases security from an Appellant for the costs of the appeal.*

SABITRI THAKURAIN v. SAVI (4) *and* IN THE MATTER OF GOBERDHONE SEAL (3) *referred to.*

NAWAB BEHRAM JUNG v. HAJI SULTAN ALI SHUSTRY (2) *explained.*

SESHA AYYAR v. NAGARATHNA LALA (1) *not followed.*

This matter arose out of an appeal preferred against a judgment of a Judge passed on the Original Side.

The facts will appear from the judgment.

Mr. C. Bagram, Counsel appeared for the Appellant.

Mr. A. Avetoom, Counsel appeared for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an application by the Respondent, Avis Mary Kathleen Goulding, who is the wife of the Appellant, that the Appellant do furnish security for the costs of the appeal to the satisfaction of the Registrar of this Court and that until such security is furnished all proceedings in this appeal be stayed.

It appears that an order was made by a learned Judge sitting on the Original Side of this Court that Mrs. Goulding should be the guardian of her infant daughter Lydia Barbara Goulding who is aged about 6½ years. The Appellant, the father of the infant, has appealed to this Court against that decision.

The petition, which has been filed by the Respondent, states that the Appellant resides in England, and is outside the jurisdiction of this Court and that he has no immoveable or other property in British India. No affidavit has been filed in reply and the learned Counsel, who has appeared for the Appellant, has stated that he is not in a position to deny the allegations to which I have referred.

The learned Counsel for the Appellant, however, has taken the point that this Court has no jurisdiction to make the order. His argument was to the effect that Or. 41, r. 10, C. P. C. does not apply in the case of an appeal from a learned Judge sitting on the Original Side of this Court but that its operation is confined to

(1) I. L. R. 27 Mad. 121 (1903).
(2) I. L. R. 37 Bom. 572 (1912).
(3) 20 C. W. N. 140 (1915).
(4) L. R. 48 I. A. 76; s. c. I. L. R. 48 Cal. 481; 25 C. W. N. 557 (1921).

In the matter of AVIS MARY KATHLEEN GOULDING.

appeals from Courts outside Calcutta to this Court in its Appellate Jurisdiction; and, secondly, that even though this Court might have inherent jurisdiction to make the order, which has been asked for, it could not exercise such jurisdiction until a rule somewhat similar to that which appears to obtain in the Bombay High Court has been passed by this Court.

In my judgment Or. 41, r. 10, C. P. C. does apply to an appeal from the judgment of a learned Judge sitting on the Original Civil Side, in the absence of any rule of this Court framed in the exercise of the power to regulate its own procedure in its Original Civil Procedure. The only authority which was cited as being contrary to that view is the case of *Sesha Ayyar* v. *Nagarathna Lala* (1) which was the decision of a learned Judge of the Madras High Court sitting alone.

Our attention was drawn to the case of *Nawab Behram Jung* v *Haji Sultan Ali Shustry* (2) and from that case it appears that the Bombay High Court has a rule which prescribes that in an appeal from the judgment of a learned Judge on the Original Side the Appellant is required to deposit with the memorandum of appeal a sum of Rs. 500 as security for the costs of the Respondent in the appeal or, if more than one, for the costs of each Respondent having different interests. In that case the learned Chief Justice and the other learned Judge, who was sitting with him, came to the conclusion that, inasmuch as the Appellant had complied with the rule as regards the deposit of Rs. 500 and inasmuch as the Respondent had abstained from applying for security of the costs of the original hearing, as he might have done, there was no reason why they should exercise their discretion by ordering that the Appellant should give further security either for the costs of the original hearing and for the costs of the appeal; and the learned Chief Justice concluded his judgment by saying: "We have been referred to no reported case in which such an order has been made, and we do not think (although we do not doubt our power if it were necessary in the interests of justice to make such an order) that a case has been made out for such an order at present."

It seems to me that that case is an authority against the contention which has been put forward by the learned Counsel for the Appellant. That case, as I read it, is not an authority that Or. 41, r. 10, C. P. C. does not apply to such a case as that which we are now considering. It is an authority for the proposition that the rule which was made by the High Court for depositing Rs. 500 was inconsistent with Or. 41 r. 10, but in my judgment, it is not necessary for us to consider the matter at any length, because, in my opinion, there is a decision of this Court which covers this matter.

Our attention was drawn at the end of the argument to the case of *In the matter of Goberdhone Seal*, an Insolvent: *S. M. Lakhypriya Dassi* v. *S. M. Raj Kishori Dassi* (3) which was a decision of Mr. Justice Woodroffe, Mr. Justice Mookerjee and myself and the judgment which was appealed from was delivered by Mr. Justice Chowdhury sitting on the Original Side. The learned Judge held that the sale, which was the subject of the enquiry, by the insolvent to his wife was a fictitious sale and he also held that the transfer by Sorbasundari in the name of Lakhypriya, the Appellant, was a fictitious one; and he held that both the transfers were void as against the Official Assignee. Against

(1) I. L. R. 27 Mad 121 (1903).
(2) I. L. R. 37 Bom. 572 (1913).
(3) 20 C. W. N. 140 (1915).

that Lakhypriya preferred an appeal. My learned brother Mr. Justice Woodroffe delivered the judgment of the Court. An application was made for security for the costs of the appeal and in that case the learned Counsel, who appeared to oppose the application, relied upon the case of the Madras Court on which the learned Counsel in this case relied and Mr. Justice Woodroffe said as follows:- "The application is opposed both on grounds of law and fact. As regards the first question the point is whether Or. 41, r. 10 applies to the case of an appeal from an order passed by a Judge in insolvency under Act III of 1909. Sec. 8 (b) of that Act states that an appeal shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the Ordinary Original Civil Jurisdiction. The question then is, does the order apply to the latter case? No doubt the case of *Sesha Iyyar* v. *Nagarathna* (1) answers this question in the negative. This case was decided prior to the present Code and has not been referred to nor followed so far as we are aware in this Court where the previous practice has been to entertain such applications. Under sec. 117 of the Code its provisions apply to the High Courts save as provided in Parts IX and X. I am of opinion, therefore, that we have power to entertain and adjudicate this application under sec. 117 and Or. 41, r. 10 of the Code. This conclusion is in conformity with the previous practice under which such applications have been adjudicated. It cannot be reasonably held that this Court when sitting in appeal from a decision of the Original Side is deprived of powers necessary to an effective jurisdiction admittedly existent on the Appellate Side of the same Court. For if Or. 41, r. 10 does not apply, there is no other provision applicable and in such a case it would be necessary to invoke the provisions of sec. 151."

The learned Judge concluded by saying that on the facts of that case security should be required.

In view of these decisions, especially in view of the case to which I have referred, *In the matter of Goberdhone Seal*, an Insolvent: *S. M. Lakhypria Dassi* v. *S. M. Raj Kishori Dassi* (3), I have no doubt that this Court has jurisdiction to entertain this application and, if it thinks fit, to make an order in respect of it.

We direct that security to the extent of Rs. 500 for costs of the appeal be furnished by the Appellant on or before the 1st June 1924 to the satisfaction of the Registrar. The appeal will not be heard until the security is furnished; and if the security is not furnished by the 1st June the appeal will stand dismissed with costs.

The Appellant must pay the Respondent's costs of this application.

Since the delivery of judgment, my attention has been drawn to the case of *Sabitri Thakurain* v. *Savi* (4), which is a decision of the Judicial Committee of the Privy Council and which confirms the opinion which I have already expressed.

RICHARDSON, J.—I agree.

The question is, in my opinion, one of procedure; and even if the view were taken that Or. 41, r. 10, C. P. C., does not of its own accord apply to appeals from the Original Side and even in the absence of any rule on the subject made by this Court, under the powers conferred by sec. 129 of the Civil Procedure Code, I should have been disposed to say that a Court having the general powers of this Court

(1) I. L. R. 27 Mad. 121 (1903).

(3) 20 C. W. N. 140 (1915).

(4) L. R. 48 I. A. 76: s. c. I. L. R. 48 Cal. 481; 25 C. W. N. 557 (1921).

In the matter of AVIS MARY KATHLEEN GOULDING.

would have ample jurisdiction to demand in proper cases security from an Appellant for the costs of the appeal. It appears however that it has been decided by this Court in the case to which the learned Chief Justice has just referred that Or. 41, r. 10 does apply to appeals from the Original Side; and, that being so, there is nothing further to be said in the matter. Since judgment was delivered our attention has been called to the decision of their Lordships of the Privy Council in *Sabitri* v. *Savi* (4) which puts the question beyond doubt.

Messrs. Orr, Dignam & Co., Solicitors for the Appellant.

Messrs. Morgan & Co., Solicitors for the Respondent.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 183 OF 1922

WALMSLEY, J. MUKERJI, J. 1924, Heard, 19 and 20, February. Judgment, 26, February

TARAK CHANDRA CHUCKERBUTTY and anr., Defendants, Appellants,

PRASANNA KUMAR SAHA, Plaintiff, Respondent.

Evidence Act (I of 1872), sec 35—Document when not made by a person in performance of official duty or a duty enjoined by law, relevancy of—Return filed by a zemindar to which tenant not a party, probative value of—Bengal Tenancy Act (VIII of 1885), sec. 50 (2).

Where in a proceeding under sec. 105 of the Bengal Tenancy Act, the zemindar filed a certified copy of an entry from a book in the Collectorate made on the footing of a return submitted by his predecessor-in-title in 1242 B. S. under Reg. VIII of 1793, sec. 48, and Reg. VII of 1799, sec. 15, to prove the fact that a certain taluk did not exist at that date:

(4) L. R. 48 I. A. 76: s. c. I. L. R. 48 Cal. 481; 25 C. W. N. 557 (1921).

Held—*That as against the tenant it was of slight evidentiary value to prove the non-existence of the taluk.*

That such a document had no higher legal effect than a statement made by a party and as it did not appear that the tenant or his predecessor-in-title was a party to it or that it was made in his presence or that he was interested to see to its accuracy when it was made, the probative value attaching to such a document, assuming its admissibility, must, if any at all, be of the slightest character. It was not sufficient to rebut the presumption arising under sec. 50 (2) of the Bengal Tenancy Act from proof of payment of an unvarying rent for 20 years.

MUKERJI, J.—*A certified copy of an entry from the books of a Collectorate not shown to have been made by a person in the discharge of an official duty or in the performance of a duty enjoined specially by law does not come under sec. 35 of the Evidence Act.*

This was an appeal preferred on the 22nd December 1921 against a decree of the Special Judge of Zillah Noakhali (Mr. B. Sen), dated the 30th August 1921, reversing a decree of the Assistant Settlement Officer (Babu M. M. Chuckerbutty), dated the 16th September 1919.

The facts of the case will appear from the judgment.

Babu Ramdayal De for the Appellants.

Babu Bhagirath Chunder Das for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—This appeal is preferred by the Defendants. They are the owners of a *sikmi* taluk named Kashi Chandra Chakerbarty, and in the record-of-rights recently published the rent of the taluk was stated to be not liable to

enhancement. The landlord, however, challenged the accuracy of this entry and made an application before the Settlement Officer for enhancement of the rent under the provisions of sec. 7 of the Bengal Tenancy Act. The Settlement Officer found that the landlord had failed to rebut the presumptions arising from the entry in the record-of-rights and from payment of an unvarying rent for 20 years and dismissed the application. The landlord appealed and the learned Judge reversed the decision of the first Court: he based his finding on two pieces of evidence, first, the absence of the taluk in a return submitted by the zemindar in 1242 B. S. and second, the name of the taluk, the name being that of the father of the Appellants.

So far as the zemindar's return is concerned, the position is rather obscure. Returns were prescribed by sec. 48 of Reg. VIII of 1793 and also by sec. 15 of Reg. VII of 1799, and it is possible that the document produced in this case was prepared in accordance with one or other of those sections, though why it should have been prepared in 1242 B. S. is not explained. Assuming, however, that the return was made under one or other of those sections, other questions arise. The first is whether the return can be received in evidence at all, the second is whether the nature of the requirements warrants any inference based on the absence of the *sikmi* in the return, and the third is whether in any event the Defendants can be bound by such an inference.

In the absence of further information about this particular return, I feel unwilling to come to any decision as to whether it could properly be received in evidence; and it is not necessary that I should do so. It is the same with the second objection. Regarding the third objection, however, I feel no doubt. Sanctity may attach to an old document but the return before us was prepared by the landlord alone without any opportunity being given to the tenants of admitting its correctness. It is possible of course that the Defendants' taluk was not in existence then, so that the return could not contain an admission of accuracy by their predecessors, but that explanation cannot be accepted until it is shown that the return contains an exhaustive catalogue of the subordinate interests in the estate, and that the accuracy of the catalogue is admitted by the owners of those interests. It is not suggested that in this case the return can pass such a test. I think therefore that the absence of the taluk in the return certainly cannot bind the Defendants, and that, if it is evidence at all, it is of very slight weight.

The other piece of evidence on which the learned Judge relies is also slight. He says that the taluk bears the name of Kashi Nath Chakerbarty and he assumes that that must be the name of the first holder. That is quite possible. On the other hand the Defendants' case is that their father bought from a Dhupi, and it is quite possible that he at once proceeded to get the tenure known by a more pleasing name.

The learned Judge also explains away three comments made by the first Court. Two of them are of little importance, but the first is cogent. A *kobala* of 1239 B. S. mentioned a taluk which is still existing under the same name; that taluk, however, was not mentioned in the return of 1242 B. S. and the Settlement Officer used the omission to show that the Defendants' taluk might also have been omitted. The learned Judge misses the point of the argument when he dis-

TARAK CHANDRA CHUCKERBUTTY v. PRASANNA KUMAR SAHA.

poses of it by saying that the land described in the *kobala* is not proved to lie within the taluk.

My conclusion is that the learned Judge is in error: it is not a mere matter of appreciating evidence: he has treated as binding on the Defendants what cannot be more than a slender piece of evidence. It is not necessary that there should be a remand, for all the evidence is before us, and it is clear that if the return of 1242 B. S. does not bind the Defendants, the evidence adduced by the Plaintiff is not nearly enough to rebut the presumption arising from the entry in the record-of-rights.

In my opinion therefore this appeal should be allowed, and the decision of the first Court restored with costs in this Court and the lower Appellate Court—the hearing fee in this Court being assessed at two gold mohurs.

MUKERJI, J.—This appeal arises out of a proceeding under sec. 105 of the Bengal Tenancy Act wherein the Plaintiff sought to enhance the rent of the Defendants' taluk which had been recorded as not liable to enhancement in the finally published record-of-rights.

The rent of the taluk admittedly being paid at a uniform rate for upwards of 20 years immediately before the institution of the proceeding, the Defendants relied upon a presumption that arose in their favour under sec. 50, cl. (2) of the Act. The Assistant Settlement Officer held that that presumption had not been rebutted and dismissed the Plaintiff's case. The Special Judge, on appeal, being of a contrary opinion remanded the case for settling a fair and equitable rent.

Against this decision the present appeal has been preferred by the Defendants.

The learned Special Judge has observed in his judgment that the Defendants are entitled to the presumption arising under sec. 50, cl. (2) of the Bengal Tenancy Act and that the presumption afforded by the *khatians* was also in their favour. He, however, thought that the said presumptions were rebutted by the document (Ex. I) which had been filed on behalf of the Plaintiff and by the fact that the Defendant Kashi Chandra Chakerbarty who is said to have purchased the taluk from one Gobinda Dhupi and whose name the taluk bears did not offer himself for examination and the *kobala* by which the purchase was made was not produced.

The Appellants urge that the document Ex. I is not admissible in evidence, that at any rate its evidentiary value is very little as against him, that no adverse inference should have been drawn from the non-examination of Kashi Chandra Chakerbarty who was a very old man at the time of the proceedings and who is now dead, and they have put in an application praying that the *kobala* which they are now in a position to file may be taken as additional evidence in the case.

These contentions are opposed on behalf of the Respondents on whose behalf reliance is placed on sec. 35 of the Evidence Act and the terms of the Regulations under which the document (Ex. I) in question was prepared.

Now, the document Ex. I is a certified copy of a list which describes itself as follows:—"Paper as per details under sec. 48 of Reg. VIII of 1793 and sec. 15, cl. (8) of Reg. VII of 1799 relating to 10 annas, 13 gandas, 1 kara, 1 krant share of Perganah Amarabad, District Bhulua, dated the 15th Pous 1242 B. S. (29th December 1835)." It therefore is a certified copy of an extract from the books of the Collectorate in which the papers filed

under the provisions of the aforesaid regulations used to be kept or copied. We have not been referred to any statute under which the books in question are kept. It has not been shown to us that the public servant, whoever he was, who made the entry in the books purported to state a fact in the entry in the discharge of his official duty. It does not also appear that the person who made the entry did so in the performance of a duty specially enjoined by the law. The paper therefore in my opinion does not come under sec. 35 of the Evidence Act at all. The section is based upon the circumstance that in the case of official documents entries are made in the discharge of public duty by an officer who is authorised and accredited agent appointed for the purpose. The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity. The circumstances relating to this entry do not stand these tests. It is likely that the books were kept for the information of the Collector but that does not make them binding as official records of the facts contained in them. The probative value of this document is to be assessed first of all by the application of the presumption contained in sec. 79 of the Evidence Act which would go to prove that it is a correct copy of the entry in the register of the Collectorate; then by the application of the presumption contained in sec. 114, illustration (*e*) of the Evidence Act it may be held that it is a correct copy of the list filed in the Collectorate. We may perhaps go further and assume that the list was, as a matter of fact, filed by the party by whom it purports to have been filed Even then it remains a statement made by a party, and its legal effect the weight to attach to it would have to be determined by the application of such tests as have to be applied to all other statements. If it is sought to be used as an admission against the party making it, its probative value is considerable. Where it is sought to be used in favour of the party who made it, it must fulfil the requirements of sec. 21, cl. (*1*) read with sec. 32 of the Evidence Act, or it must be relevant otherwise than as an admission. Taking it at its best it is a list filed by a zemindar, independent talukdar or an actual proprietor of land containing a record of engagements made by him with dependent talukdars who would pay revenue to Government through him. The Defendants' taluk does not find mention in this list. We may assume that the Plaintiff's predecessor had entered into engagements with all his dependent talukdars, for the Defendants do not claim to have ever paid revenue direct to Government; but still the question remains as to whether the omission of the Defendants' taluk from that list can be taken as evidence of any value to show that the taluk did not exist at the date when the list was filed. In filing the list the Plaintiff's predecessors were making a statement to which the Defendants' predecessors were not parties: it does not appear that the statement was made in the latter's presence: nor does it appear that the latter were at all interested in seeing that the taluk was entered in the list. Under the circumstances I am of opinion that the probative value attaching to the list must, if any at all, be of the slightest character, assuming that it is admissible in evidence as corroborative evidence of the Plaintiff's denial of the existence of the taluk on the date the list was filed. The Plaintiff did not produce the *kobala* of his purchase or his collection papers.

TARAK CHANDRA CHUCKERBUTTY *v.* PRASANNA KUMAR SAHA.

Then as to the inference arising from the non-examination of the Defendant Kashi Chandra Chackerburtty, I do not think the learned Special Judge was justified in the view that he took that in his old age he felt delicacy to state falsehood and so his son deposed in the case, nor again does the non-production of the *kobala* carry the matter any further.

In my opinion the Plaintiff has failed to rebut the presumption which arises in favour of the Defendants, and it must be given effect to. I therefore agree in the order which my learned brother has passed and reverse the judgment of the Special Judge and restore that of the Assistant Settlement Officer with costs

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 322 OF 1922.

MOOKERJEE, J.
CHOTZNER, J.
1923,
4, July.

TARAPRASONNO CHONGDAR, Plaintiff, Appellant,
v.
NRISINHA MURARI PAL and ors., Defendants, Respondents.

Court Fees Act (VII of 1870), Sch. II, Art. 17, suit to set aside a putni *sale, whether a suit for a declaratory decree without consequential relief—Proper court-fee payable—Bengal Court Fees (Amendment) Act (IV of 1922, B. C.), deficit court-fees on suit instituted before the Act leviable under the old Act—Court Fees Act (VII of 1870), sec. 12—Appeal against order for levy of court-fees, when lies.*

A suit instituted under sec. 14 of the Putni Regulation VIII of 1819 for the reversal of a putni *sale and for temporary injunction and confirmation of possession, is not a suit for a declaratory decree without consequential relief, and as such cannot be instituted with the fixed court-fee payable under Art. 17 of Sch. II of the Court Fees Act, because the sale was not void but voidable and prayers for injunction and for confirmation of possession are prayers for consequential relief.*

RAMSONA CHOWDHURANI *v.* SONAMANI CHOWDHURANI (1), UMATUL *v.* NAUJI (2), *and other cases referred to.*

ARADHAN *v.* GOLAM (3) *distinguished.*

Ad valorem *court-fees were payable under the Court Fees Act of 1870, and not under the Bengal Court Fees (Amendment) Act of 1922, where the plaint was presented before the latter Act came into force.*

An appeal against the order for payment of ad valorem *court-fees under the Amending Act was competent notwithstanding the provision of sec. 12 of the Court Fees Act, because this was not a case of appraisement or fixation of value with a view to determine the amount of fee chargeable, but the dispute involved root questions of principle as to the nature of the suit and the retrospective operation of statutes.*

UPADHAYA THAKUR *v.* PERSIDH SINGH (9) *and other cases referred to.*

This was an appeal preferred on the 12th of August 1922 against the decree of the Subordinate Judge of Zillah Burdwan (Babu Atul Chandra Banerjee), dated the 5th of May 1922.

The facts will fully appear from the judgment.

Babu Bankim Chandra Mookerjee for the Appellant.

Babus Charu Chandra Biswas and *Nikunjabihari Roy* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This is an appeal by

(1) 18 C. L. J. 404 (1911).
(2) 6 C. L. J. 427 (1907).
(3) 7 W. R. 461 (1867).
(9) I. L. R. 23 Cal. 723 (1896).

the Plaintiff in a suit for the reversal of a sale held under the Putni Regulation of 1819. The appeal raises an important question of law, namely, whether a suit instituted under sec. 14 of Reg. VIII of 1819 for the reversal of a *putni* sale is a suit to obtain a declaratory decree where no consequential relief is prayed within the meaning of Art. 17 of Sch. II of the Court Fees Act of 1870.

The *putni* in suit was brought to sale under the provisions of the Regulation on the 15th May 1919 when the third Defendant became the purchaser. He defaulted in the payment of rent, with the result that the *putni* was brought to sale again on the 15th May 1920 when the first two Defendants, the sons of the third Defendant, became the purchasers. The fourth Defendant is the original *putnidar*, and the remaining four Defendants are the zemindars. The Plaintiff, who is the *darputnidar*, instituted this suit on the 16th June 1920 for the reversal of the second sale held on the 15th May 1920. The sale is impeached on a variety of grounds and the plaint contains the following statement of the reliefs sought.

First, a declaration that the auction sale held under Reg. VIII of 1819 on the 15th May 1920 of the *putni* regarding the Mahal Kankora in suit is fit to be set aside, and that the said auction sale is void, inoperative and invalid and is not binding and effectual; and a decree accordingly and confirmation of the Plaintiff's possession thereof in *darputni* right; and

Secondly, a temporary injunction as against Defendants Nos. 1 and 2 restraining them from obtaining or holding possession of the Mahal in suit until the disposal of the suit.

The Defendants contended that this was not a suit for declaratory decree and could not be instituted on a plaint which bore a court-fee of Rs. 10 only under Art. 17 of Sch. II of the Court Fees Act. Thereupon an issue was raised to the following effect, namely, whether proper court-fees had been paid on the plaint. The Subordinate Judge came to the conclusion that proper court-fees had not been paid and he directed that Rs. 740 be recovered from the Plaintiff as deficit court-fees. The Plaintiff failed to comply with this order, and the plaint was consequently rejected with costs.

On the present appeal, the Plaintiff has urged, first, that the suit was of the nature contemplated by Art. 17 of Sch. II of the Court Fees Act and secondly, that in any view the court-fee demanded from him in the trial Court was in excess of what was properly leviable. In our opinion, the first contention must be overruled but the second must prevail.

As regards the first point, it is plain from the provisions of secs. 14 and 15 of Reg. VIII of 1819 that a suit for the reversal of a *putni* sale is not a suit for a declaratory relief within the meaning of Art. 17 of Sch. II of the Court Fees Act. Cl. (*1*) of sec. 14 provides that it shall be competent to any party, desirous of contesting the right of the zeminder to make the sale, whether on the ground of there having been no balance due, or on any other ground, to sue the zemindar, for the reversal of the same, and upon establishing a sufficient plea, to obtain a decree with full costs and damages. The purchaser shall be made a party in such suit and, upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the zeminder or person at whose suit the sale may have been made. It is manifest that the suit thus institu-

ted is not solely for a declaration that the sale is a nullity. It is, on the other hand, a suit for the reversal or cancellation of the sale, on the assumption that if the validity of the sale were not challenged, the sale would remain operative between the parties; *Ramsona Chowdhurani* v. *Sonamala Chowdhurani* (1). The suit further contemplates that the decree of the Court shall indemnify the purchaser against all loss at the charge of the zeminder or the person at whose instance the sale may have been made.

The plaint in the case before us leaves no room for doubt that the Plaintiff treated the sale as one which required to be reversed or cancelled, and the prayer clause embodies a prayer for confirmation of possession as also for an injunction. The reason for these prayers becomes plain when we examine the provision of sec. 15 of the Putni Regulation. The first clause of sec. 15 provides that so soon as the entire amount of the purchase money shall have been paid in by the purchaser, at any sale made under the Regulation, such purchaser shall receive from the officers conducting the sale, a certificate of such payment. The second clause then provides that when a new purchaser shall proceed to take possession of the lands of his purchase, if the late incumbent, himself, or the holders of the tenures or assignments derived from the late incumbent, and intermediate between him and the actual cultivators, shall attempt to offer opposition, or to interfere with the collections of the new purchaser, from the lands composing his purchase, the latter shall be at liberty to apply immediately to the Civil Court for the aid of the public officers in obtaining possession of his rights. There is next a provision for the issue of a proclamation declaring that the new incumbent having, by purchase at a sale for arrears of rent due to the zeminder, acquired the entire rights and privileges attaching to the tenure of the late talukdar in the state in which it was originally derived by him from the zeminder, he alone will be recognised as entitled to make the zeminderi collections in the mofussil and no payments made to any other individual will on any account be credited to the raiyats or others in any suit for rent, or on any other occasion whatever, when the same may be pleaded These provisions make it plain that when the purchaser takes full measures to obtain delivery of possession, the *putnidar* and the persons who have derived title from him are effectively dispossessed, for the tenants are enjoined not to pay rent either to the defaulter or to others who claim derivative title from him. We must take it that it was in view of these provisions that the Plaintiff asked for confirmation of possession and an injunction to restrain the purchaser from obtaining delivery of possession.

It has not been disputed that prayers for injunction and for confirmation of possession are prayers for consequential relief; see the cases of *Umatul* v. *Nauji* (2), *Jhumak Kamti* v. *Debulal Singh* (3) and *Dina Nath Das* v. *Rama Nath Das* (4). The view we take is also supported by the decisions in *Drapu Chaudhury* v. *Ishan Chandra Das* (5) and *Mahammad Takibuddin Buddi* v. *The Collector of 24-Parganas* (6), which are instances of

(1) 13 C. L. J. 404 (1911).

(2) 6 C. L. J. 427 (1907).
(3) 22 C. L. J. 415 (1912).
(4) 23 C. L. J. 561 (1916).
(5) 9 C. L. R. 231 (1879).
(6) 6 C. W. N. 157 (1901).

TARAPRASONNO CHONGDAR *v.* NRISINHA MURARI PAL.

suits to set aside sales for arrears of revenue; they are in no sense suits for mere declaration without consequential relief.

The present case in our opinion illustrates the danger emphasised by Sir Lawrence Jenkins, C. J., in *Deokuli Koer* v. *Kedarnath* (7), where he observed that attempts are frequently made to frame suits for possession or suits for declaration with consequential reliefs, in such a way as to make them bear the appearance of suits for purely declaratory reliefs. We are of opinion that the Subordinate Judge has correctly held that the present suit was not a suit for declaration.

As regards the second point, we are of opinion that the Subordinate Judge fell into an error when he determined the amount of court-fees leviable by reference to the provisions of the Bengal Court Fees (Amendment) Act, 1922, (Act IV of 1922, B. C.), which came into operation on the 1st April 1922. The suit had been instituted on the 16th June 1920 and the amount of court-fees leviable on the plaint must be determined by a reference to the law as it stood on that date. This view receives support from the provisions of sec. 149 of the Code of Civil Procedure, 1908. The decision in *Aradhan* v. *Golam* (8) is clearly distinguishable. In that case, a memorandum of appeal was presented to this Court without a copy of the decree. It was consequently a memorandum which could not be received, as the fundamental document was not annexed. The memorandum was accordingly returned to the Appellant. When he refiled it with the copy of the decree, not only had the period of limitation expired but, in the interval, the Stamp Act of 1867 had come into operation. In these circumstances, Mr. Justice Jackson held that the court-fee to be levied was the court-fee payable when the proper memorandum was brought into Court. In the case before us, there was a proper plaint presented on the 15th June 1920 apart from the question of court-fee payable.

The result follows that the Plaintiff is bound to pay Rs. 465 as additional court-fee due on the plaint and Rs. 735 as additional court-fee leviable on the memorandum of appeal presented to this Court. This makes an aggregate of Rs. 1,200. The Plaintiff-Appellant must deposit this amount in Court within one month from this date. If the deposit is made, the appeal will stand decreed and the suit will be remitted to the Court of first instance for trial on the merits. If the amount is not deposited, the appeal will stand dismissed with costs.

When the court-fees shall have been paid in this Court, there will be an order under sec. 13 of the Court Fees Act to enable the Appellant to obtain a refund of Rs. 755 and the usual certificate will issue.

We may add finally that this appeal is competent notwithstanding the provision of sec. 12 of the Court Fees Act. This is not a case of appraisement of or fixation of value with a view to determine the amount of fee chargeable; the dispute involves root questions of principle as to the nature of the suit and the retrospective operation of statutes: *Upadhaya Thakur* v. *Persidh Singh* (9), *Studd v. Mati Mahto* (10) and *Prokash Chandra Sarkar* v. *Bishambhar Nath Sahi* (11).

The Respondents are entitled to their costs in this Court in any event. We assess the hearing fee at three gold mohurs for each set. The Respondent

(7) I. L. R. 39 Cal. 704 (1912).
(8) 7 W R 461 (1867).
(9) I. L. R. 23 Cal. 723 (1896).
(10) I. L. R. 28 Cal. 334 (1901).
(11) 14 C. W. N. 842 (1909).

who undertook to prepare the paper book will be entitled to the costs incurred in that behalf from the amount deposited by the Appellant.

The Appellant is allowed time till the 11th August next to put in the sum of Rs. 1,200 as directed above.

J. N. R. *Appeal allowed.*

[CIVIL REVISIONAL JURISDICTION.]

REV. NOS 143 TO 146 OF 1923.

NEWBOULD, J.
B. B. GHOSE, J.
1923,
6, August.

KHARARIA MIJAZILA ZEMINDARI SYNDICATE, LTD., Decree-holders, Petitioners.

v.

OMED SHEIKH and ors., Judgment-debtors, Opposite Party.

Civil Procedure Code (Act V of 1908), Or 21, r 11 (1), sub r. (2)—Or 19, r. 2 (1)—Verification of execution petition by person other than decree-holder—Court's permission if necessary before verification—Verification if must be made in Court—Proof that verifier was acquainted with facts.

When an application for execution is signed and verified by a person other than the decree-holder, all that is necessary is that the Court should be satisfied that the person who signed the verified application is acquainted with the facts of the case. It is not necessary, under Or. 21, r. 11 (2), for the verification to be made after permission therefor has been obtained from the Court or that it should be made in the presence of the Court.

As, upon the affidavits, there was no doubt in these cases that the person who verified the applications was acquainted with the facts, there was no ground for rejecting the applications.

These were Rules issued on the 2nd March 1923 against an order of the Munsif of Perojpur (Babu Sasi Kumar Ghose), rejecting certain applications for execution on the ground of the verification of the petitions not having been properly made.

Applications for execution of number of decrees obtained against tenants were filed in the Court of the 2nd Munsif of Perojpur on behalf of the Petitioners who were a zemindari company having their registered office in Calcutta. The applications were signed and verified on 18th December 1922 by one Khettranath Ghose whose duty it was to collect the rents as they fell due from the tenants of the locality in question, to keep accounts of such dues and receipts in payment thereof, to see to the institution of suits for arrears of rent due from the tenants and to the realisation of decrees obtained in such suits by execution, and on the same day made an affidavit to furnish proof to the Court's satisfaction that he was acquainted with the facts of the several execution cases. The applications were then filed and, on the 20th December 1922, the Petitioner's pleader moved the Court by petition to accept the said affidavits of Khettranath Ghose as sufficient proof of his competence to sign and verify the petitions within the meaning of Or. 21, r. 11, sub-r. (2) of the Civil Procedure Code. The order of the Munsif passed on 21st December 1922 on one of these petitions (and similar orders were passed in the others) was as follows :—

"The decree-holders' officer verified the application for execution on 18th December 1922 but he applied for permission to do so on 20th December 1922; hence permission cannot be granted. The petition is rejected. Inform the decree-holders' pleader. Decree-holders may take steps within five days after the re-opening of the Court."

On the 6th January 1923, the decree-holders' pleader made a further applica-

tion pointing out *inter alia* that the verification was in accordance with the law and praying that the applications for execution signed and verified as aforesaid be accepted and duly registered. Upon this petition the Court passed the following order on 9th January 1923 in one of the cases, similar order being passed in the other cases also:—

"Heard pleader. Decree-holders did not produce the person who signed the verification and only filed a petition for registering the petition for execution on the grounds stated therein. As the verification is not properly made, so the application cannot be registered. The petition is rejected and also the application for execution is rejected."

Petitioners thereupon moved the High Court and obtained these Rules.

In his explanation the learned Munsif stated that the practice of the Courts at Perojpur was that "the person intending to verify swears an affidavit and personally appears before the Court and obtains permission from the Court to verify the application and he then signs the verification in the presence of the Court." He added that, so far as he understood, r. 11, cl. (2) of Or. 21, C. P. C., also required that when the verification was to be signed by any person other than the applicant, it should be signed by him in the presence of the Court; "otherwise the Court cannot be satisfied that it is actually signed by the very person who swears the affidavit." "In the present case Khettranath Ghose did not appear before the Court at all and I was not satisfied that the verification had been actually signed by him."

Babu Nagendra Nath Ghose for the Petitioners submitted with reference to the provisions of sub-r. (2) to r. 11 of Or. 21, C. P. C., that it was not a question of the Court granting or refusing "permission." to verify, when the person who verifies is not the decree-holder. All the Court is concerned with is to see whether there is evidence to satisfy it that the person who verifies is acquainted with the facts of the case. The Code nowhere insists on the verifier attending Court to obtain permission to verify and making his verification in Court after such permission has been obtained. The verification may be made before the presentation of the petition and the Court may be satisfied about his knowledge of the facts otherwise than by a personal examination of the verifier. In fact in many instances, it may be practically impossible to produce him in all the Courts in which applications verified by him may have to be presented about the same time. Plaints verified by the same man may have to be filed on *tamadi* day in a number of Courts situated in different districts (cf. Or. 6, r. 15). In these cases the verifier's being acquainted with the facts was sufficiently proved by the affidavit. Or. 19, r. 2 (1), C. P. C. There was no case for insisting on the personal attendance of the deponent to support the statements he made in the affidavit. No advantage is to be gained by complicating the procedure. Or. 21, r. (1), sub-r. (2), read with Or. 19, r. 2 (1), suggests a quite simple procedure which should be followed as a rule, and there were no facts justifying a departure in these cases.

No one appeared for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

These Rules must be made absolute. It is not necessary that the application for execution made by a person other than the decree-holder under Or. 21, r.

KHARARIA MIJAZILLA ZEMINDERI SYNDICATE, LTD. v. OMED SHEIKH.

11 (2) should be verified after the application for permission has been made; nor is it necessary that the verification should be made in the presence of the Court. All that is necessary is that the Court should be satisfied that the person who signed the verified application is acquainted with the facts of the case. In the present case there can be no doubt that the person who signed this application was acquainted with the facts of the case and there was no ground for rejecting the application.

We accordingly set aside the order of the lower Court rejecting these applications and direct that he do admit them and do proceed according to law.

This order will govern Civil Revision Nos. 143 to 146 of 1923.

We make no order as to costs in these Rules.

Let all records be sent down at once.

N. G.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

VISCOUNT FINLAY.	SETH KANHAYA LAL,
LORD DUNEDIN.	since deceased (now
LORD ATKINSON.	represented by Seth
SIR JOHN EDGE.	Hanuman Parshad
MR. AMEER ALI.	and anr.), Appellants,
1923,	v.
Heard, 27, February, 1, 2, 5 and 22, March.	THE NATIONAL BANK OF INDIA, LIMITED,
Judgment, 23, April.	DELHI, Respondents.

Indian Contract Act (IX of 1872), sec. 72—Money paid under coercion, suit to recover—Equitable defences, if available—English mortgage by Limited Company in favour of trustee for debenture-holders with power of sale—Power of sale, if valid—Purchase at sale by debenture-holder, if in breach of fiduciary obligation—Reason of the rule, identity of buyer and seller—Registration Act (III of 1877), secs. 33, 34, 35, 87—Presumption that document purporting to be presented for registration under special power of attorney was duly registered and document duly executed.

In a suit to enforce a statutory right given by sec. 72 of the Contract Act to recover money paid under coercion, no defences arising otherwise than from the actual circumstances which enforced the payment, and which bear only upon the relation of the parties inter se, *are available, the English authorities from* MOSES v. MCFARLANE (1) *downwards not being applicable to the matter.*

A limited Company issued debentures and secured them by a mortgage in the English form in favour of trustees for the debenture-holders with the power of sale, sec. 69 of the Transfer of Property Act being found not to govern this particular transaction:

Held—*That the reasoning in* BHUWANEE CHURN v. JOY KISHUN (2) *and* KESHAVRAV KRISHNA v. BHABANJI BABAJI (3) *(besides that they did not deal with mortgages in English form) did not apply to the case of a limited company issuing debentures and securing the debentures by a mortgage in favour of trustees with power of sale.*

The trustee for the debenture-holders exercises such power of sale not only on behalf of the debenture-holders but also on behalf of the Company, and a purchase at such a sale of the mortgaged property by a holder of the debentures is not invalid, this not being a case where the interest of the seller to get the highest price and of the buyer to get the lowest is centred in the same person, the prohibition of law being against the merging of the two positions.

(1) 2 Bur. 1005 (1760).
(2) 7 S D A. 354; 7 Sel. Rep. 420 (1847).
(3) 8 Bom H C. (A. C. J.) 142 (1871).

SETH KANHAYA LAL *v.* THE NATIONAL BANK OF INDIA, LIMITED, DELHI.

Where the endorsement on the deed as registered stated that the person who presented the document for registration had a special power of attorney authorising him to do so, it must be presumed that the power of attorney was a proper power under sec. 33 of the Registration Act.

Sec. 34 of the Registration Act imposes upon the registering officer the duty of enquiring as to the due execution of the document, and by sec. 35, he registers the document on being satisfied as to the various particulars mentioned, so that when the question of execution is raised the presumption from registration of omnia presumnutur rite et solemniter acta *applies, and further all defects in his procedure are expressly cured by sec. 87 of the Act.*

This was an appeal against a judgment and decree dated the 15th January 1919 of the Chief Court of the Punjab reversing a judgment and decree dated the 15th December 1915 of the Court of the Subordinate Judge, 1st Class, at Delhi.

The suit in which the said decrees were passed was brought by Seth Kanhaya Lal, the Plaintiff-Appellant, against the National Bank of India, Limited, Delhi, the Defendants-Respondents, to recover from the latter a sum of Rs. 83,005, together with Rs. 27-8-3 as interest thereon. On the 15th August 1902 the Defendant Bank which had obtained a decree against the Delhi Cotton Mills Company Limited obtained an attachment against certain mills at Sabzi Mandi and on the 20th August 1902 took possession of them to obtain satisfaction for a sum of Rs. 83,005, the balance then unpaid under such decree. It was found by both Courts in India that the Defendant Bank was aware that at a public auction sale held on the 25th June 1902 the Plaintiff-Appellant had purchased the property attached free of all encumbrances and was on all material dates the proprietor thereof. On thus being ousted from his property the Plaintiff-Appellant paid on the 27th August 1902 under protest the said sum of Rs. 83,005 to the Bank and on the following day brought the present suit against it. The Subordinate Judge decreed the suit but on appeal the Chief Court reversed that decree and dismissed the suit with costs holding that the Plaintiff-Appellant was in a fiduciary position to the Bank within the meaning of sec. 88 of the Indian Trusts Act No. II of 1882 and consequently was not "entitled to a refund of the money which he had paid under protest."

The history of this litigation may be stated as follows:—On the 13th January 1891 the Delhi Cotton Mills Company Limited (hereinafter referred to as "the Mill Company") issued debentures for Rs. 200,000 bearing interest at the rate of 7 per cent. per annum. The debentures were redeemable on the 15th January 1901. The debenture-holders were entitled *pari passu* to the benefit of and subject to the provisions contained in an indenture of the same date made between the Mill Company of the one part and John Alexander Anderson and two others as trustees of the other part, whereby certain properties of the Mill Company were vested in the trustees for securing the payment of the principal moneys and interest payable by virtue of the debentures and the performance of the stipulations and conditions therein contained. By the said deed of indenture the Mill Company conveyed to the said trustees "all and singular the piece or parcel of land hereditaments and premises Cotton Mills and works machinery engines apparatus chattels and effects (with the exceptions hereinafter mentioned) described and referred to in the

first schedule hereto" (which were therein called "the mortgaged premises") on the usual trusts to be found in favour of trustees for debenture-holders. One of the conditions was that if "an execution or attachment be issued out upon or against any of the property of the Company," the trustees were especially and fully empowered to enter upon and take possession of the mortgaged premises and to sell and convert the same at their discretion for the benefit of the debenture-holders. The deed also empowered the trustees to delegate by a general or special power of attorney or otherwise all or any of their powers.

On the 21st March 1891 the Mill Company entered into an agreement with the Defendant-Respondent Bank for a credit for current expenses up to a limit of Rs. 200,000 and as security the Bank was given "a lien and charge on all manufactured goods and on all raw materials now or at any time hereafter belonging to the Company upon their premises at Delhi." It was also provided that the Mill Company should keep manufactured goods and raw materials sufficient to cover the advances made by the Bank and that in case such goods and materials were insufficient to cover such advances the Bank should have a right to take possession of them and dispose of the same by private sale or public auction. The agreement was for a period of one year, but the parties thereto appeared to have acted as if it had not been so limited. By another similar agreement made on the 6th March 1900 between the said parties the cash credit given by the Bank was increased by an additional Rs. 100,000. On or about the 30th June 1900 the Bank took possession of and subsequently sold the manufactured goods and raw materials on the premises of the Mill Company on the allegation that the latter had committed a breach of contract by not keeping such goods and materials in sufficient quantities to cover the amount due to the Bank. After the said sale a sum of Rs. 78,670-8-11 was still owing to the Bank.

Owing to the action of the Bank the Mill Company found itself in very great financial difficulties, and its directors therefore made arrangements with the Plaintiff-Appellant, Seth Kanhaya Lal, who was the proprietor of the firm of Magni Ram Jai Narain, to obtain financial assistance. On 20th August 1900 the Mill Company and the Plaintiff-Appellant entered into an agreement which recited that the former was indebted to various persons on debentures, hundis, cash advance and otherwise to the extent of about Rs. 475,000 and was in need of a further sum of about Rs. 225,000 for working expenses, that the Plaintiff-Appellant had already advanced Rs 250,000 and had agreed to advance or get advanced a further sum of Rs. 2,25,000 for the liquidation of its debts and also to provide or procure for its working expenses a sum of not exceeding Rs. 225,000 on the terms and conditions thereinafter mentioned. By this agreement the Mill Company gave the Plaintiff-Appellant a second mortgage on its property already charged in favour of the holders of the debentures of 1891 as security for the sum of Rs. 250,000 already advanced by him and interest thereon. It was also thereby agreed that on the Plaintiff-Appellant making or procuring another advance of Rs. 225,000 the Mill Company should execute a first mortgage on the same properties in favour of persons advancing the same, and that on the Plaintiff-Appellant making or procuring a further advance for working expenses and for the purchase of cotton and other goods and stores the Mill Company

should execute in favour of persons making the advance a mortgage bond mortgaging all the raw materials, stores and manufactured goods on the usual terms and conditions, and more especially on the terms and conditions contained in the agreement dated the 12th March 1891 and made between the Mill Company and the Bank. The Plaintiff-Appellant was appointed as the managing agent of the Mill Company on the terms and conditions stated in the agreement.

On the 2nd November 1900 the Mill Company executed a deed in favour of the Plaintiff-Appellant hypothecating, as security for Rs. 225,000 to be advanced for working expenses as and when required and interest thereon, the then existing and thereafter acquired raw materials, stores, manufactured goods, and also providing that "in case all such properties not being sufficient to repay such advances and interest" the unrealised balance should form a charge on the property already mortgaged by the deed of 20th August 1900.

On the 19th December 1900 the Bank brought a suit against the Mill Company in the Court of the District Judge, Delhi, for the balance due to it and for a declaration "for a lien on all the Defendant's raw materials and manufactured goods until the Plaintiff's claim was fully satisfied." The Mill Company contested the Bank's claim for the declaration on the ground *inter alia* that "the Bank's security did not extend to the raw materials supplied by a third party over which the latter will have a lien under law in all circumstances."

Early in April 1901 the Plaintiff-Appellant advanced to the Mill Company a further sum of Rs. 225,000 which was applied to discharge the principal and interest due under the debentures of 1891. On 6th April 1901 the Mill Company issued fresh debentures to the Plaintiff-Appellant on the same security for the principal sum advanced and interest thereon, and also executed a fresh trust deed in favour of new trustees, Lachhman Das and Rukma Nand, containing identically the same terms and conditions as those in the trust deed of 1891.

On the 2nd August 1901 the District Judge dismissed the Bank's suit against the Mill Company, but on appeal the Chief Court of the Punjab on the 21st April 1902 decreed its suit and declared that the Bank had a lien on all the raw materials and manufactured goods of the Mill Company until the satisfaction of the decree. On the 16th May 1902 the Bank applied for the execution of the decree by attachment of the Mill Company's movables and premises and factory. But the District Judge passed an order on the same day "that warrant for attachment of the movable property be duly issued for the 6th June 1902." On the 17th May 1902 warrant of attachment of the movable property in possession of the Mill Company was duly issued and the Bailiff of the Court executed the warrant the following day (*i.e.*, 18th May 1902) by attaching certain movables mentioned in his report. The next morning, that is, on 19th May 1902, Mr. Clarence Kirkpatrick, a barrister-at-law and an advocate of the Chief Court of the Punjab, acting under a Power-of-Attorney executed in his favour by the trustees of the deed of the 6th April 1901 entered upon and on their behalf took possession of the property comprised in that deed and informed the Bank in writing of his action. On the same day the Mill Company and the Plaintiff-Appellant objected to the attachment and the District Judge made an order setting aside the attachment. On the 31st May 1902

SETH KANHAYA LAL v. THE NATIONAL BANK OF INDIA, LIMITED, DELHI.

the District Judge affirmed the last-mentioned order. The Bank then appealed to the Chief Court and on the 20th June 1902 that Court passed an interim order prohibiting the Mill Company and the present Plaintiff-Appellant "from dealing in any way with the property attached to the Bailiff on or about the 18th May," and directing the District Judge to warn the said trustees that pending further orders they should take no steps in regard to the property attached.

Both Courts in India concurrently found that the mill premises and machinery of which the said trustees took possession on the 19th May 1902 was not attached on the previous day and that they did not take possession of anything that was under attachment or on which the Bank had a lien by virtue of the declaration made in its favour and against the Mill Company on the 21st April 1902. After advertising in the leading newspapers of India the properties of which the trustees had taken possession were put up for sale at a public auction held on the 25th June 1902 in the presence of the then manager of the Bank and many others, and the same was sold to and purchased for Rs. 5,02,000 by the Plaintiff-Appellant, who was the highest bidder. On 30th June 1902 the Mill Company executed in favour of the Plaintiff-Appellant a registered deed of conveyance in respect of the properties sold to him. Both Courts in India have found that the trustees sold the said properties in the exercise of the powers conferred on them by the trust deed of the 6th April 1901, that they sold what they were entitled to sell, that the sale admittedly realised a good price, that it was regular in all respects and could not be impeached in any way, and that it was a good sale whereby the Plaintiff-Appellant became proprietor to the knowledge of the Bank of the premises and mills at Sabzi Mandi. The sale proceeds were applied to payment of what was due under the debentures (Rs. 22[illegible]9 and odd) what was due on the second mortgage of the 20th August 1900 (Rs. 25[illegible]1) and the expenses of the sale (Rs. [illegible]0,000). After these payments were made there was left a balance of Rs. 10,849 odd annas which amount was deposited in Court and the Bank attached it and realized thereof Rs. 9,999 6-0 towards part satisfaction of its decree against the Mill Company. No portion of the sale proceeds was applied towards any satisfaction of the debt due to the Plaintiff-Appellant under the agreement of 2nd November 1900.

In the Bank's appeal in the proceedings in execution of its decree against the Mill Company the Chief Court delivered judgment on the 4th August 1902 dismissing the appeal against the Plaintiff-Appellant, but allowing it against the Mill Company, setting aside the orders of the District Judge, dated the 19th and 31st May 1902 respectively and directing the District Judge to proceed according to law on the basis of the attachment of 18th May 1902. On 15th August 1902 the Bank applied for execution of its decree against the Mill Company "by attachment of the premises of the Company" and the District Judge accordingly made an order to issue an attachment warrant. It was duly issued and on the 20th August 1902 the mill property already purchased by and conveyed to the Plaintiff-Appellant was attached. On the 27th August 1902 the Plaintiff-Appellant petitioned the Court stating that the properties attached were his and did not belong to the Mill Company tendering under protest the amount still due to the Bank under its decree against the Mill Company and praying for the release of the property attached. On the same day

the District Judge passed an order that the amount tendered be received and paid over to the Bank, which passed a receipt for Rs. 83,000 in favour of the District Judge. The following day a balance of Rs. 5 still due was paid and the Court passed an order releasing the said properties from attachment.

On the 28th August 1902 the Plaintiff-Appellant brought the suit giving rise to this appeal against the Bank in the Court of the District Judge, Delhi. In his plaint the Plaintiff alleged that he was then and had been since the 25th June 1902 to the knowledge of the Bank the sole proprietor of the premises, buildings and the mills situate at Sabzi Mandi and therein described, that on the 15th August 1902 the Bank in execution of its decree against the Mill Company applied for the attachment of such property wrongfully stating that it was the property of the Mill Company and obtained on the 18th August 1902 a warrant of attachment, that on the 20th August 1902 the Bank wrongfully and illegally attached and took possession of the said property, and consequently the Plaintiff was compelled to pay and on the 27th August 1902 paid to the Bank Rs. 83,005, the balance then unpaid under its decree, and that he was entitled to recover that amount together with interest for one day amounting to Rs. 27-8-3. The Plaintiff therefore prayed for a decree for Rs. 83,032-8-3 with interest at 12 per cent. per annum from the date of the suit until realisation. The Plaintiff also made certain allegations and claimed Rs. 10,000 as damages, but he subsequently withdrew the claim for damages.

The Bank filed a written statement pleading that the suit as framed would not lie and that the plaint did not disclose any coercion in respect of the said payment within the meaning of sec. 72 of the Indian Contract Act. The Bank denied that the Plaintiff was the proprietor of the said property or that he was such proprietor to its knowledge.

On those pleadings the District Judge framed five preliminary issues and on the 18th November 1902 he gave judgment to the effect that the payment made by the Plaintiff was voluntary and not under compulsion and consequently so far as the recovery of the money was concerned the plaint disclosed no cause of action. He therefore dismissed with costs the claim for the recovery of the money and directed that the action should proceed on the question of damages for illegal attachment. He then recorded the statements made by the parties and framed further issues. But the Plaintiff having unsuccessfully applied for the drawing up of an order embodying his said decision, decided not to proceed with that part of the case which related to damages and consequently did not appear on the further hearing whereupon the District Judge passed a decree on the 26th May 1903 dismissing the whole case for default under sec. 102 of the Code of Civil Procedure, 1882. The Plaintiff appealed to the Chief Court of the Punjab against that decree and on the 27th March 1907 that Court passed a decree dismissing the appeal on the ground that no appeal lay against an order dismissing a suit under the said sec. 102. From that decision the Plaintiff appealed to His Majesty in Council and on the 9th March 1910 their Lordships of the Privy Council delivered judgment holding that the order of the 18th November 1902 was a final decision on the case as to the recovery of the money paid and that therefore it was not competent to the District Judge to dismiss that part of the case under the powers of sec. 102, and that the case should be remitted to the Chief Court in

order that the appeal to that Court, so far as it related to the recovery of the money paid, might be heard and decided on its merits. The case then went back to the Chief Court and on the 27th January 1911 that Court delivered judgment in favour of the Bank holding that the payment made by the Plaintiff-Appellant was not made under compulsion and passed a decree dismissing the appeal with costs. Thereupon the Plaintiff again appealed to His Majesty in Council and on the 25th February 1913 their Lordships of the Privy Council delivered judgment in favour of the Plaintiff holding that as the case then stood their decision must be based on the assumption that the allegations in the plaint were true in fact, that a wrongful interference with the Plaintiff's lawful enjoyment of his own property was alleged, that the Plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the Bank liable for that which it had thus caused him to do, that the Plaintiff was unquestionably entitled to demand a repayment of the amount paid by him under protest, because it was an involuntary payment produced by coercion, *viz*., the wrongful interference of the Bank, with his full and free enjoyment of his own property, and that the case should be remitted to the Chief Court in order that the case might be sent to the District Judge to hear and determine.

The case then went back to the District Judge, who erroneously granted the Bank's application to permit it to put in fresh pleas. He was of opinion that though it was doubtful whether the Bank was entitled to put in fresh pleas at that stage of the case, it would be advisable in order to avoid a further remand to permit the Bank to do so provided that the fresh pleas were not inconsistent with the pleas raised in its written statement. Thereupon the Bank pleaded that the agreement between the Plaintiff and the Mill Company, dated 20th August 1900, was a good agreement whereby the Plaintiff undertook to pay the debts of the Mill Company, that it was the Plaintiff's duty, as the managing agent of the Mill Company to discharge its decree against the latter but the Plaintiff took advantage of one of the provisions of the said trust deed to defeat the Bank's decree, and acting through persons who were in reality his agents, though acting for the trustees, succeeded in getting possession of the property of the Mill Company, that it would be inequitable "to allow the Plaintiff to take advantage of his trickery and fraud" and to recover from the Bank a sum of money which he was bound in law and equity to pay to the Bank under the said agreement of the 20th August 1900, that the power of attorney executed in favour of Mr. Kirkpatrick was not duly registered and consequently the action taken by him and the trustees had no legal validity, that the Plaintiff had no good title to the property in question, that the sale to the Plaintiff was irregular and that Plaintiff was not entitled to interest and costs.

The Plaintiff in reply denied all allegations of trickery and fraud, disputed the Bank's construction of the agreement of the 20th August 1900, and contended that the Bank having received the balance of the sale proceeds was estopped from challenging the sale and questioning the Plaintiff's title.

The District Judge framed further issues. There were altogether 26 issues, of which five were disposed of as preliminary issues, and five more which related to the claim for damages are not now

SETH KANHAYA LAL *v.* THE NATIONAL BANK OF INDIA, LIMITED, DELHI.

material. The issues now made were as follows:—

(6) Has Plaintiff since the 25th June 1902 been proprietor of the property or any part of it mentioned in para. 1 of the plaint, and if so, under what circumstances did he become so?

(7) Was a portion of the purchase money still unpaid on the date of attachment?

(8) If issue No. 6 be found in the affirmative, was he so to the knowledge of Defendant, and is Defendant estopped from denying Plaintiff's title?

(9) Was the said property owned by the Delhi Cotton Mills, Limited, on and after that date or liable to attachment at the instance of the Defendant?

(10) Did the Defendant on that date know that the said company had no right, title or interest thereon?

(11) Did the Defendant on the 15th August 1902 wrongfully state that the said property belonged to the Delhi Cotton Mills, Limited and thereon obtain an order for attachment thereof?

(12) Was any, and if so, what immovable property of the Delhi Cotton Mills attached on the 16th or 18th May 1902, *i.e.*, before the alleged title of the Plaintiff arose, and if so, what was the effect of that attachment?

(18) Was the sale in the Plaintiff's favour authorised?

(19) Do the facts mentioned by the Defendant in the further pleas amount to fraud in law or collusion?

(20) Is the plea of fraud inconsistent with the previous pleas, and is the Defendant debarred from raising it on that ground?

(21) Is the sale made to Plaintiff void on account of fraud or collusion alleged by Defendant in additional pleas?

(22) Was the Plaintiff bound to discharge the decree of the Defendant Bank under the agreement of 20th August 1900?

(23) Was the attachment of May 1902 a good attachment, and if so, was the Plaintiff's purchase of the property mentioned in para. 1 of the plaint subject so such attachment?

(24) Is the Defendant Bank estopped from denying Plaintiff's title to the property?

(26) In the event of Plaintiff obtaining a decree, ought he to be awarded interest or costs?

The suit was tried by the Subordinate Judge, 1st class, Delhi, who delivered judgment in favour of the Plaintiff on the 15th December 1915. He held that the trustees had power under the deed executed in their favour by the Mill Company to enter upon its premises and to take possession of the same and the factory, that there was nothing wrong in the action of Mr. Kirkpatrick in taking possession of the mills when the attachment of the 16th May 1902 was issued, that the power of attorney executed in his favour was validly registered and in any case its registration was not compulsory, that the attachment made on the 18th May 1902 only affected movable property and the immovable property was not then put under attachment, that when the sale took place on the 25th June 1902 the property then sold to the Plaintiff was not under any attachment, that the Plaintiff had proved payment of full consideration and on the 25th June 1902 became and since then had been the proprietor of the plaint property, that all proceedings in connection with the sale were taken with the full knowledge of the Bank and on the 26th June 1902 the Bank knew that the property had passed away from the hands of the Mill Company and that the Mill Company had no right, title or interest therein and con-

SETH KANHAYA LAL v. THE NATIONAL BANK OF INDIA, LIMITED, DELHI.

sequently it was not capable of being thereafter attached in August 1902, that no property attached on 18th May 1902 was sold to the Plaintiff on the 25th June 1902, that the sale was fully authorised, that the plea of fraud was "purely an after-thought of the Defendant and a mere make-shift made after a lapse of twelve years," that the Bank had failed to establish any fraud, that the agreement of 20th August 1900 did not throw any duty on the Plaintiff to discharge any debt of the Mill Company and he was not thereby bound to pay the Mill Company's debt due to the Bank, that though the Plaintiff was the managing agent of the Mill Company he was also their debenture-holder and secured creditor and in what he did he was acting within his rights, that no exception could be taken with respect to the sale, which was *bonâ fide* and legal, that the Bank having received the balance of the sale proceeds was estopped from questioning its validity and that the Plaintiff had "succeeded by virtue of his own right" and had "done nothing that was illegal or wrong for him to do." In the result the learned Subordinate Judge ordered that the Plaintiff was entitled to recover from the Bank Rs. 83,032-8-3 with interest at 6 per cent. per annum from the date of suit until realisation on Rs. 83,005 and costs. A decree, dated the 15th December 1915, was accordingly drawn up.

Against the said decree of the Subordinate Judge the Defendant Bank appealed to the Chief Court of the Punjab and the Plaintiff filed cross-objections praying for a higher rate of interest. On the 15th January 1919 that Court delivered judgment in favour of the Bank and passed a decree allowing the Bank's appeal, dismissing the Plaintiff's cross-objections, setting aside the decree appealed from, and dismissing the Plaintiff's suit with costs in both Courts. In this Court the Bank relied upon only some of the points urged before the lower Court. The learned Judges who heard the appeal upheld the sale of the 25th June 1902, holding that at the time of the sale the immovable property of the Mill Company was not under any attachment and none of the movables attached on the 18th May 1902 were included in the property sold to the Plaintiff, that the terms of the trust deed itself were clear, that on the issue of any execution or attachment the trustees were empowered to enter upon and take possession of the premises and sell or convert into money the same, that the intended sale was widely advertised and a specially favourable price was obtained thereat, that the Plaintiff, though a mortgagee, debenture-holder and managing agent of the Mill Company, was legally entitled to bid for and buy the property, that the fact that the trustees were close connections of the Plaintiff and ready to follow obediently his behest did not invalidate the legality of the sale, that there was no doubt that the proceedings of Mr. Kirkpatrick were honest throughout, and that no objections could be taken on his part in conducting the sale, and the sale must be upheld. But they said that "the real question arising in the case appears to us to be whether considering the circumstances in which Kanhaya Lal (the Plaintiff) obtained a financial hold over the Company, and thereby secured his own advances thereto, and eventually made irrecoverable the decree of the Bank, he is equitably entitled to demand a refund of the money which he paid under protest." After reciting various circumstances, the learned Judges held that the principles of sec. 88 of the Indian Trusts Act No. II of 1882 applied to the actions of the Plaintiff and

that he was not entitled in equity to any relief."

Against the said decree of the Chief Court of the Punjab the Plaintiff has appealed in the ordinary way to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and *L. M. Parikh* for the Appellants.—The suit was to recover money paid under coercion. In 1913 the Privy Council held that the Plaintiff (whose representatives are now Appellants) was entitled to the return of his money provided he could show that the mills were his property at the time of the attachment and the case was remanded on this issue. The Subordinate Judge has decided in the Plaintiff's favour, and the Chief Court have reversed that decision on the ground that it was not equitable for the money to be paid back.

The latter decision is erroneous, for the Privy Council have already decided that the Plaintiff has a good cause of action under sec. 72 of the Indian Contract Act

Messrs. Tomlin, K. C., Dunne, K C and *E. B. Raikes* for the Respondents — A mortgagee cannot buy from himself and therefore at the date of the attachment the property was the property of the company subject to the charge.

Farrar v. *Farrar, Ltd.* (5) and *Hodgson* v. *Deans* (6). A man cannot contract with himself, *Henderson* v. *Attwood* (7).

[LORD DUNEDIN.—When a mortgagee brings a property to sale has he any fiduciary duty to the mortgagor?]

Mr. Tomlin.—No. *Warner* v. *Jacob* (8).

[LORD DUNEDIN referred to *York Buildings Co.* v. *McKenzie* (4).]

Mr. Tomlin.—*National Bank of Australia* v. *United Hand in Hand and Band of Hope Co. Regd.* (9).

Under Indian law a mortgagee cannot enforce his power of sale except by a sale through the Court. Secs. 58 and 69 of the Transfer of Property Act are declaratory of the existing law in India.

Balkishen Das v. *Legge* (10).

Punjab Laws Act, IV of 1872, sec. 6. The Bengal Regulations were made applicable to the Punjab. Except in Presidency Towns no mortgagee could bring a property to sale except through the Court.

Bhuwanee Churn Mitr v. *Joy Kishun Mitr* (2), *Doncet* v. *Wise* (11) and *Keshavrav Krishna Joshi* v. *Bhabanji Babaji* (3).

In Ghose's Tagore Lectures (1877), there is a reference to a case of 1869 set out in the Appendix, *viz.*, *Sunatun Bysack* v. *Koonjoo Behary Bysack*, but that contains merely an adverse dictum.

Macpherson on Mortgages, 6th Ed., p. 65.

Bhanoomutty Chowdhrain v. *Prem Chand Neogee* (12), *Pitamber Narayan Das* v. *Vanmali Shamji* (13) and *Jagjivhan Nanabhai* v. *Shridhar Balkrishnav Nagarkar* (14).

Ghose on Mortgage (1911 Ed.), pp. 19 and 20.

Moreover the registration was defective. The only power of attorney was in favour of Fitzpatrick, that was a general power. There was no admission of registration by Lachhman Das, one of the transferrors.

(4) [1795] 3 Pat. 378.
(5) 40 Ch. D. 395, 409 (1888).
(6) [1903] 2 Ch. 647.
(7) [1894] A C 150, 158
(8) 20 Ch D. 220 (1882).

(2) 7 S D A 354; 7 Sel. Rep. 429, 431, 436 (1847).
(3) 8 Bom H. C. (A. C. J.) 142, 144 (1871).
(9) 4 A. C. 391, 404 (1879).
(10) L. R. 27 I. A. 58, 67: s. c. I. L. R. 22 All. 149; 4 C. W N. 153 (1899).
(11) 2 Ind. Jur. 280, 292 (1867).
(12) 15 Ben. L. R. (Ap. Civ.) 28 (1875).
(13) I. L. R. 2 Bom. 1 (1875).
(14) I. L. R. 2 Bom. 252 (1877).

SETH KANHAYA LAL *v.* THE NATIONAL BANK OF INDIA, LIMITED, DELHI.

Jambu Pershad v. *Md. Aftab Ali Khan* (15) and *Biswanath Proshad* v. *Chandra Narayan Chowdhuri* (16).

Finally the action was for money had and received where the Plaintiff is only entitled to succeed *ex æquo et bono.*

Moses v. *McFarlane* (1), *Sinclair* v. *Brougham* (17), *Lodge* v. *National Union Investment Co.* (18) and *Baylis* v. *Bishop of London* (19).

The Plaintiff obtained the money by taking advantage of his dual position and if he sold as manager he ought to have paid the money to the Bank. In equity he has no right to recover in his personal capacity.

Mr. DeGruyther, K. C. in reply.—This was not a sale by a mortgagee but a sale by a trustee for the debenture-holders under a power contained in the trust deed. The law in India is the same as the law in England with regard to companies and the trust deed was not a mortgage within the Transfer of Property Act.

Here there were different legal entities and the case is distinguishable from the decisions referred to in *Waghela Rajsanji* v. *Masludin* (20).

The objection to the registration has not been taken in the pleadings nor in the Respondents' case and cannot now be raised.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The present action is to recover a sum of Rs. 83,005 with interest, being a sum paid, as alleged, under coercion and as such recoverable under sec. 72 of the Contract Act. In order to make the matter intelligible it is necessary to give the history of the various transactions which have given rise to the claim.

A limited company called The Delhi Mills Cotton Company was established before 1891 and carried on business. In January 1891, it issued debentures to the extent of two lacs of rupees in favour of a Mr. Anderson and others. The debentures were secured by a mortgage of immoveable property of the company. Later in the same year the company arranged for a cash credit with the Respondents—the National Bank of India—to the extent of two lacs. By a supplementary agreement of the 6th March 1900, this was increased to three lacs. In security of the sums to be advanced under the cash credit, the company gave the bank a lien on all manufactured goods and on all raw materials hereafter belonging to the company. The company came to owe the bank large sums, and on the 30th June 1900, the Respondents put in force their lien and sold off the manufactured goods and stock of raw material of the company. After realisation of the effects sold, the company still owed Rs. 78,000 odd. The company being in need of money to continue business applied to the Appellant, and on the 21st August 1900, entered into an agreement with him. In terms of this agreement the Appellant advanced to the company three separate sums of Rs. 2,25,000 each, the first sums to be applied in paying off the debentures issued in favour of Mr. Anderson and others; the other sums were to be used for the payment of debts and the provision of working capital. By the agreement, the company further agreed to give a mortgage on its whole immoveable property and also to give a lien for its stock and raw material in the same manner as it had given lien

(1) 2 Bur. 1005, 1008, 1010 (1760).
(15) L. R. 42 I. A. 22: s. c. I. L. R. 37 All. 49; 19 C. W. N. 282 (1914).
(16) L. R. 48 I. A. 127 (1921).
(17) [1914] A. C 398.
(18) [1907] 1 Ch. 300, 312.
(19) [1913] 1 Ch. 127
(20) L. R. 14 I. A. 89, 96: s. c. I. L. R. 11 Bom. 551 (1887).

to the Respondents. By another term of the agreement the Appellant was made managing agent of the company and given full and exclusive power as to the management of its business with certain provisions as to his remuneration. The Appellant advanced the money, entered upon the management, and continued the business. He paid up the earlier debentures and a new mortgage was granted in favour of certain persons—Lachhman Das and Rukma Nand—who were to act as trustees for the debentures which were now held by the Appellant. The provisions of this mortgage were the same as the provisions in the original mortgage to Mr. Anderson and others; and allowed the mortgagees, if any attachment was put in force against the company's immovable property, to enter into possession and effect a sale. On the 20th December 1900, the Respondents raised an action against the company for the sum of Rs. 79,000 odd still due to them. This action was unsuccessful before the first Judge, but on appeal judgment was given as craved, and on the 21st April 1902, it was declared that the bank had a lien on raw material and manufactured goods. On the 16th May 1902, an application was made for attachment of all the property—both movable and immovable—of the company. On the same day an order for an attachment was made, but the order only referred to attachment of the movable property. Certain of the goods of the company were, on the 18th May, attached in virtue of this order. An objection was taken on the 19th May, and the attachment was set aside on the same day. A Mr. Clarence Kirkpatrick, who had obtained a power of attorney from Lachhman Das and Rukma Nand, entered into possession of the immovable property in virtue of the mortgage. Notwithstanding the order of the 19th May, the Respondents brought up the matter again and asked that the movables attached should be sold. On the 31st May, the District Judge refused to give any such order in respect of his previous order of the 19th May. Appeal was taken against this, and on the 20th June the Chief Court set aside the orders of the 19th and the 31st May, and an interlocutory order was pronounced against the company dealing with the articles attached and a warning issued against the trustees (who had entered into possession of the premises) from interfering with the articles attached. On the 25th June, Mr. Clarence Kirkpatrick, after all due advertisement, exposed the mills for sale and they were, on that date, bought by the Appellant for Rs. 502,000. After deducting the expenses and paying the sum due to the Appellant as debenture-holder and as mortgagee there remained a sum of Rs. 10,000 odd which was sent by cheque to the company. This cheque was attached by the Respondents and paid to them.

The proceedings as to the attachment came up for final disposal on the 4th August, when the District Judge was directed to proceed on the basis of the attachment of the 18th May. Inasmuch, however, as the attachment was admittedly only of movable property, the Respondents on the 15th August put in a further application for attachment of the premises. Following up this the mills themselves were attached on the 20th August. On the 27th August the Appellant, who, in virtue of the sale, had become the owner of the mills, put in a petition for removal of the attachment on the ground that it was his own property which was being attached for a debt of the company. To remove the attachment he paid the debt under protest. The next day he raised the present suit to recover the money so paid

SETH KANHAYA LAL v. THE NATIONAL BANK OF INDIA, LIMITED, DELHI.

under coercion in terms of sec. 72 of the Contract Act. There was originally added a claim for damages. The suit has had a most unfortunate history and been protracted for a very long period, different claims having been already twice before the Board. What happened may be best stated in the words of Lord Moulton in the judgment of the Board upon the second appeal :—

"In his plaint the Plaintiff states that he was the sole proprietor of such mills and of their contents . On thus being ousted from his property he took the course of paying under protest the sum claimed Having thus freed his property from the attachment, he at once brought the present action claiming a return of the money so paid and damages for the alleged illegal acts of the Defendants.

In reply to the above plaint, the Respondent bank filed certain preliminary pleas relating to the claim for the return of the money paid under protest of which it is only necessary to cite the first, which was that 'the suit as framed will not lie.' It is admitted that the plea is in substance identical with the more usual form of plea, *viz.*, that the plaint discloses no cause of action.

The District Judge no doubt with the laudable intention of shortening the proceedings and thereby lessening the costs, heard an argument on these preliminary pleas before requiring anything further to be done by the Defendants, and on the 18th November 1902, he gave judgment to the effect that so far as the recovery of the money was concerned, the plaint disclosed no cause of action. He therefore dismissed with costs the claim for the recovery of the money and directed that the action should proceed on the question of damages for illegal attachment. The Plaintiff, having, in vain, applied for the drawing up of an order embodying this decision, decided not to proceed with that part of the case which related to damages and consequently did not appear on the further hearing, whereupon the District Judge dismissed the whole case for default under sec. 102 of the Civil Procedure Act. The Plaintiff appealed to the Chief Court against this decision, and that Court dismissed the appeal on the ground that no appeal lay against an order dismissing a suit under sec. 102. From this decision the Plaintiff appealed to His Majesty in Council, and their Lordships held that the order of the 18th November 1902, was a final decision on the case as to the recovery of the money paid and that therefore it was not competent to the Judge to dismiss that part of the case under the powers of sec. 102. They therefore remitted the case to the Chief Court in order that the appeal to that Court, so far as it related to the recovery of the money paid, might be heard and decided on its merits."

Their Lordships go on to find that the payment under the circumstances described was a payment under coercion and remitted the case that the defences, other than that rested on the words of the statute, might be disposed of.

The Subordinate Judge gave judgment in favour of the Appellant, but on appeal that judgment was reversed and the suit dismissed, and it is from that judgment that the present appeal lies. The judgment of the Appeal Court proceeded on one ground alone—namely, that on consideration of the whole circumstances it was not equitable that the money should be paid back. That view was supported before their Lordships by a very lengthy and careful argument examining all the English decisions, from *Moses* v. *McFarlane* (1) downwards, as to what defences were available to the action for money had and received. In their Lordships' opinion all these authorities are beside the question. The right here sought to be enforced is a statutory right expressed in terms of sec. 72 of the Contract Act, and this Board has already held that the circumstances gave rise to that statutory right. To append a consideration (as the Court of Appeal has done) of the relation of parties *inter se*—apart from the actual circumstances which

(1) 2 Bur. 1005 (1760).

enforced the payment—is simply to allow counter-claim under another name, and counter-claim in the Punjab is not admissible.

While this disposes of the ground on which the Appellate Court reversed the judgment of the Subordinate Judge it does not dispose of all the grounds of defence The Respondents assert that the mills did not belong to the Appellant, and if that were so then necessarily the Appellant could not complain of the attachment. As regards the sale itself there is no ground of challenge. Mr. Kirkpatrick was duly authorised by the deed under which he acted, due notice was given of the sale and no fault is found with the procedure at the sale itself. The Respondents attack the sale on other grounds. First they say that it is not possible in India to put a clause into a mortgage deed allowing of sale except through the medium of the Court, and second, they say as the Appellant was the debenture-holder in whose interests the sale was brought on, he was incapable of purchasing. As to the first point, there is no positive enactment prohibiting such a stipulation being annexed to a mortgage, for sec. 69 of the Transfer of Property Act does not apply, the Act not having been extended, at least at the time of these transactions, to the Punjab Their Lordships' attention was, however, directed to the cases of *Bhuwanee Churn* v. *Joy Kishun* (2) and *Keshavrav Krishna* v. *Bhabanji Babaji* (3). Their Lordships do not question these authorities, but they consider they have no application to the case of a limited company issuing debentures and securing the debentures by charge in favour of trustees with the into poss of sale. The whole reasoning in virtue to the judgments cited was the standing necessity of protecting persons who from their circumstances needed protection entering into transactions of loan, and the class of mortgages there dealt with did not include mortgages in the English form. To say that a limited company—a creature of statute—requires protection or that the trustees for the debenture-holders are the persons who might take advantage of the scanty knowledge of the mortgaging company—the kind of argument which led to the decision in those cases and which was applicable in terms to transactions between the persons aforesaid—is really to consider the situation in a light almost absurd.

As regards the second point, there are numberless authorities to the effect that when anyone is in a fiduciary position he cannot sell to himself. Thus an ordinary trustee cannot buy trust property nor can an official appointed to conduct a sale for creditors be himself the purchaser. See *York Buildings Company* v. *McKenzie* (4). But no such position arose here. Mr. Kirkpatrick, who was the seller, sold not on behalf of the debenture-holder alone but on behalf of the company. It was his duty and interest to secure as high a price as possible so that the balance—after meeting secured debts—should go to the company. Such a balance was in fact received. The fact, therefore, that the buyer was himself a holder of the debentures became irrelevant. There was no merging of the two positions which is what is prohibited—namely, that the interest of the seller to get the highest price and of the buyer to get the lowest price, is centred in the same person. This point accordingly fails. The only remaining point was this—the Respondents urged that the conveyance in favour of the Appellant was bad because the registration was not in order in respect that the registration does

(2) ... A. 354; 7 Sel. Rep. 429 (1847).
(3) ... O. (A. C. J.) 142 (1871).
(4) (1795) 8 Pat. 378.

SETH KANHAYA LAL v. THE NATIONAL BANK OF INDIA, LIMITED, DELHI.

not bear that a proper power of attorney was possessed by the person asking for the registration and in respect that it does not afford proper evidence of the execution by Lachhman Das—one of the signatories to the deed of transfer.

These points were admittedly not taken before the Courts below and their Lordships would be slow to admit their validity in such circumstances. But further they think they are unsustainable on their merits. The deed was presented by Mr. Kirkpatrick and the endorsement of the deed as registered bears that he held a special power of attorney authorising him to appear. It must therefore be presumed that the power of attorney was a proper power under the terms of sec. 33 of the Registration Act.

Then as regards the execution of Lachhman Das—a witness was examined who deponed to the fact. Now, by sec. 34, the duty of enquiring as to execution is put upon the registering officer, and by sec. 35 it is provided that if he is satisfied as to various particulars he shall register the documents. Here again, the presumption from registration of *omnia presumuntur rite et solemniter acta* would apply; but the matter is finally set at rest by sec. 87, which provides that "nothing done in good faith pursuant to the Act by any registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure."

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside with costs and the decree of the Subordinate Court restored.

The Respondents will pay the costs of the appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Sanderson & Orr Dignams* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1358 OF 1919

MOOKERJEE, J.
WALMSLEY, J.
1923,
16, January.

DINO NATH SIKDAR and ors., Defendants, Appellants,
v.
ANADI KRISHNA DUTT and ors, Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 109—Suit under sec. 106 withdrawn with liberty to sue again—Suit for same relief if lies in Civil Court.

The landlord who had instituted a suit under sec. 106 of the Bengal Tenancy Act for the correction of an entry in the record-of-rights as to the status of his tenant withdrew it with liberty to institute a fresh suit if not barred. He did not institute a fresh suit under sec. 106 of the Bengal Tenancy Act, but sued in the Civil Court for the same relief:

Held—*That the suit was not maintainable in view of the provision of sec. 109 of the Bengal Tenancy Act.*

This was an appeal preferred from the decision, dated the 5th April 1919, passed by P. C. De, Esq., Additional District Judge, Pabna, reversing on appeal the decision, dated the 31st May 1918, passed by Mr. T. K. Chowdhury, First Subordinate Judge, Pabna.

The facts of the case will appear from the judgment.

Babus Sarat Chandra Roy Chowdhury and *Mohini Mohon Bhattacharyya* for the Appellants.

Babus Surenda Chandra Sen and *Dwijendra Krishna Datt* for the Respondents.

Babu Biraj Mohon Majumder for the Deputy Registrar.

DINO NATH SIKDAR v. ANADI KRISHNA DUTT.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in a suit instituted by their landlords for the correction of an entry made in a record-of-rights regarding their status. The record-of-rights was finally published on the 29th May 1914. On the 27th August 1914, the landlords instituted a suit under sec. 106 for the correction of the entry. On the 9th March 1915 they were permitted to withdraw the suit under sec. 106 with liberty reserved to them to institute a fresh suit if not barred. They did not institute a fresh suit under sec. 106; on the other hand on the 27th March 1915 they instituted the present suit in the Court of the Subordinate Judge for precisely the same relief as that claimed by them in the suit under sec. 106. We have compared the claim as set out in the present plaint with that in the suit under sec. 106, and we have found that they are expressed in identical language. The prayer is for correction of an entry in the record-of-rights regarding the status of the Defendants. In these circumstances the question arises whether the suit is or is not barred under the provisions of sec. 109.

Sec. 109 provides that subject to the provisions of sec. 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under secs. 105 to 108, both inclusive. There can be no controversy that the present suit concerns a matter which formed the subject of the suit previously instituted under sec. 106. *Primâ facie* therefore according to the plain language of sec. 109 the suit is barred. The Plaintiffs contend, however, that sec. 109 is not applicable, because as they were permitted to withdraw the previous suit the position is exactly the same as it would have been if the previous suit had never been instituted. This is contrary to the language of sec. 109 and is opposed to the decision in *Sreemati Abeda Khatun* v. *Majubali Chowdhury* (1), where the earlier authorities will be found reviewed. We are of opinion that the salutary provisions of sec. 109 should be strictly enforced and not whittled down. In the case before us the Plaintiffs could and should have availed themselves of the liberty reserved under the order of the 29th March 1915 to institute a fresh suit under sec. 106. This they have not done, and they cannot be permitted to evade the provisions of sec. 109.

The result is that this appeal is allowed, the decree of the Court below set aside and the suit dismissed with costs in all the Courts, on the ground that it is barred under the provisions of sec. 109.

A. G.

[CIVIL REVISIONAL JURISDICTION.]

M. A. No. 101 OF 1923

AND

REV. No 298 OF 1923.

WALMSLEY, J.
MUKERJI, J.
1924,
Heard,
14, February.
Judgment,
26, February.

DWARIKA DAS MARWARI and anr., Decree-holders. Appellants,
v.
JADAB CHANDRA GANGULY and ors., Opposite Party, Respondents.

Civil Procedure Code (Act V of 1908), sec. 73, order under, when appealable—Application for rateable distribution, maintainability of—Partnership property—Attachment of the share of a partner in execution of a personal decree Consent to attachment of other partners, effect of—Indian Contract Act (IX of 1872), sec 262

Two decrees, one against A for his personal debts and the other against A and his

(1) 24 C. W. N. 1020 (1920).

DWARIKA DAS MARWARI *v.* JADAB CHANDRA GANGULY.

partner in respect of dues in the partnership business were obtained, and in execution of the decree personally against A, his half-share in the movables belonging to the partnership was attached and the other partner J consented to the attachment; subsequently the moveables, including A's share already attached, of the partnership were attached for the decree obtained against the partnership; on an objection by J against an order, to which both sets of decree-holders consented, for rateable distribution amongst them of the money from the sale proceeds of A's share in the movables.

Held—*That the provisions of sec. 262 of the Indian Contract Act no longer applied, the consent of J to the attachment operating as a declaration that the partnership was at an end and the movables thereupon ceased to be partnership property and as such liable to rateable distribution for the debts of A*

Held (WALMSLEY, J, dissenting) *That an order overruling the objection of J to the rateable distribution was one under sec. 47, C. P. C. and an appeal by J lay from that order.*

BALMER LAWRIE & CO. *v.* JADUNATH BANERJEE (1) *and* JAGADISH CHANDRA SAHA *v.* KRIPANATH SAHA (2) *explained.*

VENKATAPERUMAL *v.* VENKATA REDDI (3) *and* SORABJI COOVARJI *v.* KALA RAGHUNATH (4) *followed.*

KASHIRAM *v.* MANI RAM (5) *referred to.*

Held—*That an application for rateable distribution was maintainable though the two judgment-debtors of the two decrees were not precisely the same, under the principle enunciated in the Full Bench case of* GONESH DAS BAGRIA *v.* SHIVA LAKSHMAN BHAKAT (7), *which has not been affected by the amendment of the law due to the insertion of the word "passed" in sec. 295 of the Code of Civil Procedure, 1882.*

BITHAL DAS *v.* NAND KISHORE (6) *approved.*

This was an appeal preferred on the 19th of February 1923 against the order of the District Judge of Zillah Burdwan (P. E. Cammiade, Esq.), dated the 25th of November 1922, reversing the order of the Subordinate Judge of Asansole (Babu H. K. Neogi), dated the 22nd of December 1921.

The facts of the case appear from the judgment.

Babu Bankim Chandra Mukherjee for the Appellants.

Dr. Dwarka Nath Mitter and *Babu Bejoy Kumar Bhattacharjee* for the Respondents

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J —I have had the advantage of reading the judgment which my learned brother is about to deliver, and I agree in the substance of the order that he proposes to make If there is a right of appeal to this Court, that is, if the learned Judge was right in thinking that an appeal lay to him, I agree that his decision on the merits was wrong and should be reversed.

Personally however I do not think that an appeal lay and consequently I hold that we should interfere under the provisions of sec. 115, C. P. C. My reasons for thinking that no appeal lay are as follows :—The view that the matter comes

(1) I. L. R. 42 Cal. 1: s. c. 19 C. W. N. 1208 (1914).
(2) I. L. R. 36 Cal. 130 (1908).
(3) I. L. R. 39 Mad. 570 (1916).
(4) I. L. R. 36 Bom. 156 (1911).
(5) I. L. R. 14 All. 210 (1892).
(6) I. L. R. 23 All. 106 (1900).
(7) I. L. R. 30 Cal. 583 (F. B.) (1903).

within the scope of sec. 47, C. P. C., rests on the footing that the question has arisen between the parties to the suit brought by Sitaram. It must be that suit, because Jadab was not a party to the other.

The parties to that suit are Sitaram on the one side and Jadab and Anil on the other side, and the order for rateable distribution can be treated as an order falling within the scope of sec. 47, C. P. C., only if it raised a question between the parties to that suit relating to the execution, discharge or satisfaction of the decree. We have to see whether there was such a question. On behalf of Jadab it is argued that there was such a question: on the ground that but for the order of rateable destribution 2,932-15-0 would have been credited towards the satisfaction of Sitaram's decree, instead of 2,631-15-0 It is urged that in respect of the sum of Rs. 301 there is a question between Jadab and Sitaram relating to the discharge of Sitaram's decree. I agree that there is a question relating to the discharge of the decree but I cannot regard it as one between Jadab and Sitaram. The question is not whether Sitaram should relax his hold on any portion of the sale proceeds, but whether Dwarika should be allowed by order of the Court to lay hands on that portion. If however it be conceded that the question has arisen between Sitaram and Jadab, it is obvious that it cannot be decided in the absence of Dwarika and Ram Kumar. That means that an outsider to the suit must be brought into the proceedings, and this addition destroys the element of identity which appears to be a necessary ingredient in proceedings under sec. 47, C. P. C.

As however I think that the Judge's order should be reversed, I see no reason to differ from the order proposed by my learned brother, and the appeal will be disposed of in accordance with his judgment.

MUKERJI, J.—Jadab Chandra Ganguly and Pashupati Hazra were two partners in a certain business. Dwarika Das Marwari and Ram Kumar Marwari instituted a suit in the Small Cause Court at Asansole against Pashupati Hazra and one Umananda Hazra, and Pashupati Hazra having died during the pendency thereof, obtained a decree against Umananda Hazra and the heir of Pashupati Hazra, a minor named Anil Kumar Hazra. The decree was for money due from Pashupati Hazra and Umananda Hazra in their personal capacities and had nothing to do with the partnership. The decree was put into execution against Anil Kumar Hazra in execution case No. 327 of 1920 of the Small Cause Court and certain movable properties belonging to the partnership were attached, upon which Jadab Chandra Ganguly preferred a claim alleging that he had a half share therein and prayed for a release of the said half share from attachment in claim case No. 23 of 1920. To this Anil Kumar Hazra agreed on the understanding that his half share should be allowed to be sold in execution of the decree in the aforesaid execution case No. 327 of 1920. Orders to the said effect were passed on the 24th December 1920 and the sale was fixed for the 7th January 1921.

On the 7th January 1921 Jadab Chandra Ganguly preferred another claim in claim case No. 1 of 1921 objecting to the sale on the ground that the half share of Anil Kumar Hazra in the movables, that is to say, the share that had been attached and was about to be sold was not saleable. The sale was accordingly put off, Jadab was called upon to submit accounts of the partnership business which he never did, and eventually the claim was dismissed.

DWARIKA DAS MARWARI v. JADAB CHANDRA GANGULY.

In the meantime on the 3rd January 1921 one Sitaram Marwari obtained a decree against Jadab Chandra Ganguly and Anil Kumar Hazra in respect of moneys due from the partnership, and on the 14th January 1921 in execution case No. 18 of 1921 of the Subordinate Judge's Court at Asansole attached all the movables, a half share of which had already been attached in execution case No. 327 of 1920 and the said movables were sold on the 9th March 1921 for Rs. 3,025.

By petitions filed on the 1st March 1921 and 3rd March 1921 Dwarika Das Marwari and Ram Kumar Marwari tried to put off the sale impugning the *bona fides* of the decree obtained by Sitaram Marwari and also the conduct of Jadab Chandra Ganguly in at first consenting to the half share of Anil Kumar Hazra being attached and then getting the sale of that share put off by filing a further claim as aforesaid, and they prayed that that claim should be disposed of and the sale in execution of their decree might take place first. Eventually on the 5th March 1921 they prayed for rateable distribution of the sale proceeds of the share of Anil Kumar Hazra as between themselves and Sitaram Marwari. On the 19th March 1921 Sitaram Marwari put in a petition objecting to the rateable distribution on the ground that his decree was against the partnership and therefore the sale proceeds must go to satisfy his decree but thereafter on the 9th April 1921 he put in a further petition agreeing to the rateable distribution.

On the 30th July 1921 and again on the 7th December 1921 Jadab Chandra Ganguly put in petitions objecting to the rateable distribution mainly on the grounds that the sale proceeds should go to satisfy the decree of Sitaram as their decree was for money due from the partnership, that the judgment-debtors in the two execution cases were different and therefore the prayer for rateable distribution was not maintainable.

The learned Subordinate Judge by orders passed on the 22nd December 1921 held that the objection of Jadab Chandra Ganguly should be overruled on the ground of waiver and estoppel and he ordered rateable distribution in the following way, that is to say, Sitaram Marwari was to get the costs Rs. 51-9 and poundage fee Rs. 40-8 and out of the balance, that is to say, Rs. 3,025 less Rs. 92-1, a half, *viz* Rs. 1,466-7-6 representing the share of Jadab Chandra Ganguly, and that the other half share, *viz.*, Rs. 1,466-7-6 representing the share of Anil Kumar Hazra was to be divided rateably between the two sets of decree-holders, that is to say, Sitaram Marwari was to get Rs 1,165-7-6 and Dwarika Das Marwari and Ram Kumar Marwari were to get Rs. 301.

Against this order Jadab Chandra Ganguly appealed to the District Judge of Burdwan and the learned District Judge overruling an objection as to the competency of the appeal before him, allowed the appeal and ordered the whole of the sale proceeds to be paid to Sitaram Marwari.

The present appeal and application in revision have been preferred by Dwarika Das Marwari and Ram Kumar Marwari against the aforesaid order of the learned District Judge.

Of the contentions put forward on behalf of the Appellant it is necessary to notice only two, *viz.*, that no appeal lay against the order of the learned Subordinate Judge and that Jadab Chandra having expressly consented to the attachment of the half-share of Anil Kumar Hazra must be taken to have waived all objections to the rateable distribution of the sale proceeds on the footing that they represented the pro-

DWARIKA DAS MARWARI v. JADAB CHANDRA GANGULY.

ceeds of partnership property and must be availed of first to satisfy the debts of the partnership.

On behalf of the Respondent it has been urged that the question decided by the learned Subordinate Judge was one between the parties to the suit and related to the execution, discharge or satisfaction of the decree passed therein and therefore came within the purview of sec. 47, C. P. C. and was appealable; that the whole of the sale proceeds must, in view of sec. 262 of the Contract Act, go towards the payment of the partnership debts and further that the application for rateable distribution was not maintainable inasmuch as the judgment-debtors of the two decrees are not precisely the same. The Respondent also supports the view which found favour with the learned District Judge that he was not precluded from objecting to the rateable distribution by reason of his petition of consent releasing the half share of Anil Kumar Hazra in the movables.

The first point for consideration therefore is whether an appeal lay to the District Judge against the order of the Subordinate Judge. Now, an order under sec. 73, C. P. C. is not appealable unless it also comes under sec. 47, C. P. C. and satisfies all the requirements thereof [*Balmer Lawrie & Co.* v. *Jadunath Banerjee* (1)]. In order to be appealable the order must therefore decide a question arising between the decree-holder Sitaram Marwari on the one hand and the judgment-debtors Jadab Chandra Ganguly and Anil Kumar Hazra on the other. In determining whether the order passed by the learned Subordinate Judge fulfilled these tests, the cases cited at the Bar do not afford us any real assistance. In *Jagadish Chandra Saha* v. *Kripanath Saha* (2), the Petitioners had a decree against certain judgment-debtors, the Opposite Party had a decree against certain judgment-debtors who were not exactly identical with the former set of judgment-debtors, the Opposite Party applied for rateable distribution, the application was refused by the Court of first instance; the Opposite Party appealed and an order for rateable distribution was passed by the Appellate Court. The Petitioners then appealed to this Court and it was held that the order of the Court of first instance refusing rateable distributions did not come under sec. 244 of the old Code of Civil Procedure and therefore no appeal lay from it. This presumably was on the ground that this was no determination on any question relating to the execution, satisfaction or discharge of the decree which was under execution as between the parties to the suit in which it had been passed and the order only purported to decide a contest between two rival decree-holders. In *Balmer Lawrie & Co.* v. *Jadunath Banerjee* (1), the Petitioners had obtained a decree against a firm, while the Opposite Party had obtained a decree against one of the partners of the firm. During the pendency of a proceeding for rateable distribution as between the Opposite Party and certain other execution creditors of the said partner, the Petitioner had made an application for rateable distribution which was refused. That order was held as being one between two rival decree-holders which did not affect the interest of the judgment-debtor and so did not come under sec. 47, C. P. C. so as to confer a right of appeal. In cases where as between the parties to the suit a question relating to the execution, satisfaction or discharge of the decree passed therein has

(1) I. L. R. 42 Cal. 1: s. c. 19 C. W. N. 1202 (1914)
(2) I. L. R. 36 Cal 130 (1908)

(1) I. L. R. 42 Cal. 1: s. c. 19 C. W. N. 1202 (1914).

DWARIKA DAS MARWARI v. JADAB CHANDRA GANGULY.

been decided by the order for rateable distribution, it has always been held that an appeal lies. [*Venkataperumal* v. *Venkata Reddi* (3) and *Sorabji Coovarji* v. *Kala Raghunath* (4)]. In the case of *Kashiram* v. *Mani Ram* (5), the Court held that the order which was passed in that case and by which rateable distribution was refused did not decide a question which arose between the parties to the suit in which the decree was passed or their representatives within the meaning of sec. 244 of the old Code of Civil Procedure. In the case before us the order passed by the learned Subordinate Judge determined, as between Sitaram Marwari on the one hand and the judgment-debtors Jadab Chandra Ganguly and Anil Kumar Hazra on the other, a question, on the application of Dwarika Das Marwari and Ram Kumar Marwari, as to what extent the decree under execution was to be satisfied and therefore, in my judgment, the order came under the purview of sec. 47, C. P. C. and the learned District Judge was in my judgment, right in his view of the competency of the appeal before him

Coming now to the merits, the whole basis of the order of the learned District Judge is that the decree being for recovery of moneys due from the partnership no rateable distribution could be made and the whole of the sale proceeds should be available for its satisfaction. In my judgment the petition of the Respondent preferring a claim to a half share and consenting to a release of his half share only and agreeing to the sale of the half share of Anil Kumar Hazra in execution of the decree for the personal debts of the latter's father amounted to a declaration that the partnership had ceased and had the effect of divesting the said half share of the movables of its character as partnership property, and to such property the provisions of sec. 262, C. P. C. relating to partnership property would no longer apply. The Subordinate Judge was perhaps not right in the view that this conduct of Jadab Chandra Ganguly amounted to waiver or estoppel and it may be that the principle that where a party has elected to adopt a certain course of action he will be confined to that course which he has deliberately adopted may not apply in the present case. It is clear, however, that neither Sitaram Marwari nor Jadab Chandra Ganguly, until he applied on the ground that the said half share was not saleable in execution of the decree of Dwarika Das Marwari and Ram Kumar Marwari treated this half share as still clothed with the incidents of partnership assets. In my opinion the learned District Judge was wrong in the view that he took of the matter and the principle underlying the decision of the learned Subordinate Judge is the correct one to apply to the case.

As for the maintainability of the application for rateable distribution the contention of the Respondent is based upon the amendment of the law due to the insertion of the word "passed" in sec. 295 of the Code of Civil Procedure (Act X of 1882). As observed by Strachey, C. J., in *Bithal Das* v. *Nand Kishore* (6) · "The object of the section is two-fold The first object is to prevent unnecessary multiplicity of execution proceeding, to obviate in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property the necessity of each and every one separately attaching and separately getting the pro-

(3) I. L. R. 39 Mad. 570 (1916)
(4) I. L. R. 36 Bom. 156 (1911).
(5) I. L. R. 14 All. 210 (1892).
(6) I. L. R. 23 All. 106 (1900).

DWARIKA DAS MARWARI *v.* JADAB CHANDRA GANGULY.

perty. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position as I have described upon the same footing and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property." These objects would not be furthered but rather defeated by putting upon the rule the interpretation which the Respondent asked us to adopt. In *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (1) this Court declined to express any opinion on the question as to whether principle enunciated in the Full Bench decision in the case of *Ganesh Das Bagria* v. *Shiva Lakshman Bhakat* (7) was affected by the alteration of the law. In my opinion if the legislature intended to effect any such alteration, it would have expressed it in terms more clear and specific. This contention put forward on behalf of the Respondent must fail.

I therefore agree with my learned brother in reversing the order of the learned District Judge and restoring that of the learned Subordinate Judge with costs in all Courts—the hearing fee in this Court being assessed at three gold mohurs.

The Rule is discharged.

S. N. B.

(1) I. L. R. 42 Cal. 1: s. c. 19 C. W. N. 1202 (1914).

(7) I. L. R. 30 Cal. 583 (F. B.) (1903).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 29 OF 1924.

SUHRAWARDY, J. CHOTZNER, J. 1924, Heard, 8, February. Judgment, 18, February.	SARODA SUNDARI BOSU and ors., Defendants, Petitioners, *v.* AKRAMANESSA KHATUN and ors., Plaintiffs, Opposite Party.

Redemption suit—Jurisdiction, valuation for—Civil Procedure Code (Act V of 1908), sec. 15, Or. 34, rr. 7, 8—Court Fees Act (X of 1870), sec. 7, para. IX- Suits Valuation Act (VII of 1887), sec. 8.

Jurisdiction in suits for redemption of mortgage depends not on the amount of the principal money due on the bond, but on the amount ultimately found to be due to the Defendant mortgagee. Valuation for the purpose of jurisdiction in such suits does not follow that for the purpose of court-fees, redemption suits being expressly excluded from the operation of sec. 8 of the Suits Valuation Act.

Competency of a Court depends on the nature of the suit and also the pecuniary jurisdiction of Court.

KEDAR SINGH *v.* MATABADAL SINGH (1) and M. JALLALDEEN MARAKAYAR v. VIYAYASWAMI (2) *dissented from.*

RAMESWAR MAHTON *v.* DILU MAHTON (3), GOLAP SINGH *v.* INDRA KUMAR (4) *and* LATULLA BHUIYAN *v.* CHANDRA MOHAN BANERJEE (5) *referred to.*

This was a Rule granted on the 7th January 1924 against the order of the Subordinate Judge, Second Court, Barisal (Babu Hem Chandra Das Gupta), dated

(1) I. L. R. 31 All 44 (1908).

(2) I. L. R. 39 Mad. 447 (1915).

(3) I. L. R. 21 Cal. 550 (1894).

(4) 9 C. L. J. 367 (1909).

(5) I. L. R. 34 Cal. 954: s. c. 12 C. W. N. 285 (F. B.) (1907).

SARODA SUNDARI BOSU *v.* AKRAMANESSA KHATUN.

the 17th September 1920, passed in appeal from the decision of the Munsif, 7th Court, Barisal (Babu Bishnupada Roy), dated the 25th April 1922.

This was a suit for redemption instituted in the 7th Court of the Munsif at Barisal. The trial Court held that the debt due by the Plaintiff to the Defendant on the bond being over Rs. 1,000, the suit was beyond the limits of his pecuniary jurisdiction; and he therefore returned the plaint to the Plaintiff [Or. 7, r. 10 (1)] for presentation to the proper Court. The lower Appellate Court held that the jurisdiction of the primary Court to entertain that suit, depended on the amount of the principal mortgage money secured by the mortgage bond and remitted the case to the learned Munsif for trial on the merits. This rule was obtained for setting aside the said order of the lower Appellate Court.

Babu Suresh Chandra Taluqdar for the Petitioners.

Babu Abinash Chandra Guha for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

This Rule was obtained on grounds Nos. 4 and 6 of the petition which are as follows :—

4. For that on a valid and correct construction of law on the subject the learned Subordinate Judge ought to have held that the suit was beyond the pecuniary jurisdiction of the learned Munsif

6. For that the learned Munsif having heard also the evidence and arrived at his own findings thereon, the learned Subordinate Judge has erred in law and acted without jurisdiction in not expressing his definite conclusions thereupon

The suit was one for redemption and the Munsif before whom it was instituted proceeded by way of a preliminary issue to decide the question whether he had the pecuniary jurisdiction to try it. Evidence was led on both sides and upon it he came to the conclusion that the debt due by Plaintiff to Defendant was over Rs. 1,000 and that consequently the suit was beyond his jurisdiction. He accordingly returned the plaint for presentation to the proper Court. Plaintiffs appealed and the learned Subordinate Judge reversed the order and remitted the case to the lower Court for trial on the merits.

He pointed out that a redemption suit comes under sec. 7, cl. ix of the Court Fees Act and the plaint has to be stamped with court-fees payable on the principal sum assured. But sec. 8 of the Suits Valuation Act does not cover redemption suits so that valuation for the purpose of jurisdiction does not necessarily follow valuation for the purpose of court-fees. The Allahabad and Madras High Courts say that sec. 8 does not lay down either that the valuation for the purposes of jurisdiction must necessarily be different from that for the purpose of court-fees.

The learned Judge further observed that he saw no practical difficulty from Or. 34, rr. 7 and 8 of the Code of Civil Procedure because the Court would not direct the Plaintiffs to pay a certain sum but only direct that if a certain sum was paid within a certain time Plaintiffs would have a certain relief in respect of the mortgaged property and if they failed they would be debarred from getting it in future If no payment were made the mortgagee would be entitled to ask for the sale of the property but that would be no part of the decree though it could follow from the decree incidentally

The learned Judge then proceeded to make some observations on the evidence recorded by the Munsif, adversely criti-

SARODA SUNDARI BOSU *v.* AKRAMANESSA KHATUN.

cising his findings though not definitely disagreeing with them.

The learned vakil who has appeared in support of the rule urges that the procedure adopted by the Court of appeal below was erroneous and that the learned Judge should have come to a definite finding on the evidence.

As regards the second contention we are of opinion that though the learned Judge may possibly have carried his criticisms a little too far, it was not his intention to consider the evidence except from the point of view of the Munsif's jurisdiction and he was careful to guard against the imputation of having prejudged the case by saying: "It is not my intention to thrust my views upon the Court which would have to try the case and the Court should try it uninfluenced by my observations."

We think, however, that as the facts stand, the learned Judge was in error in remitting the case to the Munsif for trial on the merits.

He has relied on the case of *Kedar Singh* v. *Matabadal Singh* (1) which follows earlier cases of that Court as an authority for the proposition that the value for purposes of jurisdiction of a suit for redemption of a mortgage is the amount of the principal mortgage money and not the value of the property mortgaged and that the law has not been affected by the passing of Act VII of 1887, sec. 8.

That view was also taken by the Madras High Court in the case of *Jallaldeen* v *Viyayaswami* (2).

It is said in these cases that sec. 8 of the Suits Valuation Act does not cover redemption suits so that valuation for the purposes of jurisdiction does not necessarily follow valuation for the purpose of court-fees nor will valuation for the purpose of jurisdiction necessarily be different from that for the purpose of court-fees. Therefore the law as laid down in the earlier cases is unaffected by the Suits Valuation Act.

With great respect to the learned Judges who decided these cases we cannot but feel considerable doubt as to the correctness of these decisions If the legislature had not contemplated a change in the law it is not easy to understand why redemption suits should have been expressly excluded from the operation of sec. 8 of the Suits Valuation Act. The section does not say that the value determinable for the purposes of jurisdiction is the value determinable for the purpose of the initial payment of court-fees. We are therefore inclined to the view that jurisdiction will depend not on the amount assured but on the amount ultimately found to be due.

Our attention was drawn to the case of *Rameswar Mahton* v. *Dilu Mahton* (3), where it was held that in a suit for possession with mesne profits the Munsif had jurisdiction to ascertain the mesne profits and to give effect to the order made in the decree notwithstanding that the amount of such mesne profits when added to the value of the suit might come to a sum in excess of the hearing jurisdiction of his Court.

That case was considered and distinguished in *Golap Singh* v. *Indra Kumar* (4), where it was pointed out that "the amount of mesne profits for which the Munsif made a decree had accrued entirely after the institution of the suit and depended upon the length of time during which the Defendant might manage to keep the Plaintiff out of possession, inspite of the decree in his favour."

The decision on principle too which had

(1) I. L. R. 31 All. 44 (1908).
(2) I. L. R. 39 Mad. 447 (1916).
(3) I. L. R. 21 Cal. 550 (1894).
(4) 9 C. L. J. 367 at p. 377 (1909).

SARODA SUNDARI BOSU v. AKRAMANESSA KHATUN.

been doubted in *Ijatulla Bhuiyan* v. *Chandra Mohan* (5) was disapproved.

It is also pointed out (at p. 374) that the provision of the Suits Valuation Act only shows that for purposes of jurisdiction the value of the suit must be taken to be determined by the value determinable for the computation of court-fees. But this does not conclude the question whether a Court of restricted pecuniary jurisdiction is competent to make a decree in a suit for accounts, valued at less than Rs. 1,000 for an amount in excess of Rs. 1,000 which is the pecuniary limit of its jurisdiction.

It may be conceded that a suit should be instituted in the Court of the lowest grade competent to try it (sec. 15, Code of Civil Procedure). Competency means jurisdiction and the competency of a Court depends upon the nature of the suit and upon its own pecuniary jurisdiction. That jurisdiction must be determined with reference to the various Acts constituting the Courts and the question of valuation by reference to the Court Fees and Valuation Acts.

The jurisdiction of the Munsif here is limited to the trial of suits, the value of which does not exceed Rs. 1,000. Now *primâ facie* it is the Plaintiffs' claim which determines jurisdiction and the jurisdiction continues whatever the event unless a different principle comes into operation to prevent such a result as to make the proceedings from the first abortive. It is precisely such a contingency which has arisen in the present case. The evidence recorded by the learned Munsif satisfied him that the debt due by the Plaintiffs on the bond was more than Rs. 1,000. He therefore held that the suit was beyond his pecuniary jurisdiction. In our judgment that view was correct both in law and on principle.

We are further of opinion that the learned Judge has failed to appreciate the mandatory effect of Or. 34, rr. 7 and 8. The Court must declare the amount due at the date of the decree and direct its payment within a certain time. If the money is not paid, the Court must on Defendants' application under r. 8 (4) pass a decree for the sale of the property. It is difficult to understand therefore how such an order would "be no part of the decree, though it would follow from the decree incidentally."

The substance of the matter is that if the Court has no jurisdiction to try the suit, it has no jurisdiction to make the decree. As explained in *Golap Singh's* case (4) cited above at p. 375 "if a Court of limited pecuniary jurisdiction took cognizance of a suit in which the sum claimed was larger than the amount over which the Court had jurisdiction any judgment it might give would be void."

The result therefore is that the Rule is made absolute with costs 2 gold mohurs and the order of the lower Appellate Court discharged; the plaint will be returned to the Plaintiffs for presentation to a Court of competent jurisdiction.

H. D. C.

(5) I. L. R. 34 Cal 954; s. c. 12 C. W. N. 285 (F. B.) (1907).

(4) 9 C. L. J. 367 (1909).

PRIVY COUNCIL

[APPEAL FROM BENGAL.]

LORD SUMNER.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

1922,
Heard, 4, June.
1923,
Judgment, 4, June.

ANNADA MOHAN ROY, Appellant,
v.
GOUR MOHAN MULLICK, Respondent.

Contract to sell the future expectancy of Hindu

ANNADA MOHAN ROY v. GOUR MOHAN MULLICK.

reversioner upon the death of the widow of last owner, if enforceable—Transfer of Property Act (IV of 1882), sec. 6 (a).

A contract to sell property to which the reversionary heir of a deceased Hindu expects to succeed upon the death of his widow is void in law

HARNATH KUAR v. INDAR BAHADUR SINGH (1) *and* SRI JAGANNADA RAJU v. SRI RAJAH PRASADA RAO (2) *referred to*

These were appeals (consolidated by the order of the High Court, dated 22nd April 1921) against one judgment and three decrees of the High Court at Calcutta, dated 23rd August 1920, on appeal from the judgment, dated 20th August 1919, and three decrees, dated 5th December 1919, of the same High Court in its Ordinary Original Civil Jurisdiction.

The principal points for determination were :—

(1) Whether the Appellant was entitled to specific performance of the contracts entered into by the Respondents? And in the alternative

(2) Whether the Appellant could recover the amounts paid to the Respondents and damages?

On or about the 25th August 1902 one Gopal Lal Seal, a wealthy Hindu inhabitant of Calcutta governed by the Dayabhaga School of Hindu law died childless, possessed of considerable properties both movable and immovable, leaving surviving him two widows Srimati Kumudini Dasi and Srimati Nayanmunjari Dasi and five nephews (sister's sons) *viz.*, Gouri Mohan Mullick, Giri Mohan Mullick, Panchanan Mullick (Respondent), Kanta Mohan Mullick and Jogendra Nath Mullick.

A Will purporting to have been made by the said Gopal Lal Seal was propounded by Babu Nagendra Nath Mitra, pleader, and Srimati Kadambini Dasi, Gopal Lal's mother, as executors, by which *inter alia* three-quarter share of the entire property was to go to Panchanan whereas 1 anna (1/16) share was to go to other nephews whom the said Gopal Lal had treated as his sons during his life-time. The said Will was disputed by the said widows of Gopal Lal and probate of the said Will was on 3rd August 1902 refused by the High Court at Calcutta. An appeal to His Majesty in Council was preferred against the said refusal of the grant of probate.

The Respondents were in great difficulties in the matter of financing. The Appellant, on the representation made by the Respondents that the said Will was genuine and that they were entitled to their respective shares, came to their assistance and lent them large sums of money. Separate agreements which were supported by an affidavit were executed by the Respondents on the 7th May 1908 in favour of the Appellant. By the said agreements the Respondents agreed to sell to the Appellant their respective shares for a sum of Rs. 300 per month given to each of them, their heirs and representatives in perpetuity. The terms of some of the said agreements were in brief as follows :—

"Consequently we are helpless in this world. It is very hard for us to meet the expenses of our food and clothing or household (expenses) or to find relief from distress or danger. Moreover, in consequence of numerous expenses legitimate and otherwise in carrying on litigation in the High Court regarding the Will of Gopal Seal, whatever funds we had had or whatever moneys we had received from our maternal grandmother, Kadambini

(1) L. R. 50 I. A. 69 : s. c. 27 C. W. N. 949 (1922).

(2) I. L. R. 39 Mad 554 (1915).

ANNADA MOHAN ROY v. GOUR MOHAN MULLICK.

Dasi deceased, having all been exhausted, we have become involved in debts. Consequently, for purposes of (the expenses for) our food and clothing and for keeping the house and for other expenses and for repayment of petty debts and for relief from distress and danger and for other expenses we have been and we are, for the period of about 1½ one and a half years obtaining monies from you (Appellant) under verbal arrangement. I, Sri Gouri Mohan Mullick, shall convey in your favour whatever rights I have to the estate of Gopal Seal deceased (that is to say, rights under the Will or reversionary rights) immediately upon the same being established. On this understanding I have taken and have been taking from you (money) at the rate of Rs. 300 three hundred rupees per month (and shall do so) in perpetuity through my heirs and representatives."

"God forbid, but if in case, the Privy Council appeal be dismissed, that is to say, should the Will of Gopal Lal Seal deceased be held untenable, even in that eventuality you shall, in pursuance of this arrangement, continue to give me (money) at the rate of Rs. 300 three hundred rupees per month in perpetuity through my heirs and representatives. And I make this promise, too, that I shall sell to you the right by inheritance (that is to say, reversionary right) to the whole of such portion of the said estate as I shall get by reason of being his future heir, on one week's notice, within three months of the date of my getting the said share (and) for the consideration as stated above (namely it being fixed that I, Giri Mohan Mullick, shall consider as due to me from you in perpetuity through my heirs and representatives Rs. 300 three hundred rupees per month) and that I shall give you possession of the property."

"If by right of inheritance I get more than one anna share, then I shall execute the conveyance in respect of same too, for the said consideration, namely, upon Rs. 300 three hundred rupees per month being fixed as due (to me). Although I am making this agreement for the sale of the aforesaid consideration of the 0-1-0 one anna share receivable by me under the Will, if in case, I get less than 0-1-0 anna, one anna share by right of inheritance (that is to say, by reversionary rights) then I shall sell even the same for the afore-mentioned consideration. For the said reason you shall not be competent to fix a lower amount less than Rs. 300 three hundred rupees per month."

"If the Will is held untenable by the Privy Council then so long as our maternal aunts (mother's brother's wives) Srimati Kumudini and Srimati Nayanmunjari Dasi shall remain alive until then we shall have no possession in the said estate. For this reason I am giving this undertaking too, that if our maternal aunts relinquish their life-interest either jointly or severally or sell (the same) to you, then from the date of such relinquishment or sale, we shall become the owners of the estate by right of inheritance; and then the very share of which we shall become the owners, shall be counted as the share received by us by right of inheritance and (I) shall execute a conveyance for the same within three months from the date of the said relinquishment or the said sale to you; and (I) shall give you possession (of the said share)."

On 18th March 1909 the said appeal preferred by the present Respondents re the Will of Gopal Seal was dismissed by His Majesty in Council. The widows of Gopal Seal were held entitled to life

estates while the Respondents became declared reversioners to succeed after the decease of the said widows.

On or about 28th November 1909 the Respondents executed other agreements in favour of the Appellant confirming the one executed prior to the said decision of the Privy Council on 7th May 1908, the material portion of which runs as follows:—

"I made one registered agreement with you in the past English year 1908 on date the 7th May. You have performed all the acts in pursuance of that agreement. I too am prepared to perform all the acts so far as it has been in my power to do so, but owing to the unpropitiousness of the stars the suit for the probate of the Will of Gopal Lal Seal deceased having been lost in the Most Honourable Privy Council the receipt of the consideration by you is delayed for the present. You will have to wait till the death of or relinquishment or transfer to you of the estate by the two wives of maternal uncle, upon their death taking place or in the ordinary course of events when the estate of Gopal Lal Seal deceased will change hands from them and I shall get the said estate, I shall convey to you the said estate immediately after getting it and it will be then that in accordance with the above mentioned agreement I shall be competent to receive the monthly allowance of rupees five hundred a month but not before that, this is certain. And you on the strength of both the agreements may and shall be competent to compel me to convey the estate at your pleasure either through the protection of the Court or however you may desire."

The Respondents also received further large sums of money from the Appellant.

The said Kumudini Dasi having died on 21st November 1917 the Respondent Gur Mohan Mullick brought a suit against Navanmunjari Dasi the surviving widow, on 28th November 1917 for possession of the properties held of the said Kumudini. The said suit was however compromised on 28th March 1918. The said Navanmunjari relinquished her rights in the said properties held by the deceased widow in favour of the Respondents, their brothers and cousin.

The Respondents having obtained possession of their respective shares on 25th November 1918 the Appellant brought the present suits (Nos. 1389, 1390 and 1391 of 1918) in the High Court of Calcutta Original Side against the Respondents. He relied upon the said agreements of 7th May 1908 and 28th November 1909 and stated that he had all along been fulfilling his side of the contract and making large payments to the Respondents as set forth in schedule to the plaint. He prayed *inter alia* for the following reliefs:—

(c) That it be declared that in the events that have happened the Plaintiff is entitled to have a conveyance duly executed and registered by the Respondents in respect of his equal one-fifth share as aforesaid and to be put in quiet and peaceful possession of the same.

(d) That the Defendant may be directed to duly execute and register a conveyance of the said share to the Plaintiff and in default a proper conveyance may be directed to be executed and registered by the Registrar of this Honourable Court.

(e) That the Respondent may be directed to make over possession of such properties as are now in his possession or which may thereafter come into his possession with mesne profit, if any.

(f) Or in the alternative the Defendant may be decreed to pay to the Plaintiff Rs. 3,36,000 for damages and for the

ANNADA MOHAN ROY *v.* GOUR MOHAN MULLICK.

amounts advanced by the Plaintiff with interest.

The Respondents duly filed their written statements by which they denied the Plaintiff's claim and *inter alia* pleaded that the said two agreements are for the transfer of an expectancy and are therefore void, and inoperative in law.

On the aforesaid pleadings the following issues were framed :—

(1) Does the plaint disclose any cause of action?

(2) Are the agreements of the 7th May 1908 and the 28th November 1909 or either of them illegal or void on the ground that they deal with an expectancy?

(3) Is the suit for specific performance of the two agreements maintainable?

(4) Is the Defendant estopped from raising issues Nos. 2 and 3 assuming the facts alleged in paras. 3A and 10A of the plaint and the particulars thereof to be true?

(5) Are such facts true?

(6) Have the events mentioned in the agreements happened to enable the Plaintiff to sue for specific performance?

(7) Are the circumstances under which the agreements were executed stated in para. 3 of the plaint true, and if so, are the agreements void and inoperative?

(8) Were the agreements treated as cancelled and inoperative?

(9) Is the Plaintiff entitled to a refund of the amounts (if any) paid by him on the basis of the said agreements or either of them, with interest, and if so, at what rate?

(10) Is the claim for the alleged advances mentioned in paras. 3A and 4A of the plaint and in the particulars thereof or any portion thereof barred by limitation?

(11) Is the Plaintiff in any event entitled to damages?

The said suits were heard by Mr. Justice Greaves who delivered his judgment on the first four issues, the rest having been reserved for evidence to be taken thereon. His findings were as follows :—

"I accordingly as regards issues Nos. 1 to 4 hold that (1) the plaint discloses no cause of action so far as the agreements are concerned; (2) that the agreements are void in so far as they deal with the expectancy; (3) that the suit for specific performance of the agreements is not maintainable; (4) that no question of estoppel arises as regards issues Nos. 2 and 3. This issue was not really pressed on behalf of the Plaintiff, nor indeed could it, I think, be contended that there could be estoppel against the provisions of a statute."

He dismissed the suit with costs on 20th August 1919.

Dissatisfied with the said judgment, dated 20th August 1919, the Plaintiff appealed to Appellate Side of the High Court of Calcutta. The appeal was heard by a bench composed of Mookerjee and Fletcher, JJ., who delivered their judgment on 23rd August 1920 dismissing the Plaintiff's appeal.

Hence this appeal to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and *Abdul Majid* for the Appellant.—There is nothing inherently impossible in a contract for the future sale of future expectations nor is it forbidden by Hindu law. *Sri Jagannada Raju* v. *Sri Rajah Prasada Rao* (2) was wrongly decided.

Even if the agreement is void the Appellant is entitled to recover the money he had advanced.

Sec. 65, Indian Contract Act, IX of 1872.

The Indian Limitation Act provides

(2) I. L. R. 39 Mad. 554 (1915).

ANNADA MOHAN ROY v. GOUR MOHAN MULLICK.

that an action of that kind should be brought within three years. The three years should run from the date when the agreement was discovered to be void.

Harnath Kuar v. *Indar Bahadur Singh* (1).

Reference was also made to secs. 6, 32, Transfer of Property Act.

Colebrooke's Digest, Book II, Ch. 2, sec. 1 (25), (27).

Ram Wirunjun Singh v. *Prayag Singh* (3), *P. Sooraparaja* v. *P. Veerabhadrudu* (4) and *Baldeo Prasad Sahu* v. *Miller* (5)

Sir G. Lowndes, *K. C.* and *Mr. E. B. Raikes* for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—Three points have been argued on these appeals, one by Mr. De-Gruyther, the leading Counsel for the Appellant, and two others by Dr. Abdul Majid, the junior Counsel.

The Plaintiff, the present Appellant, had agreements with three persons, who are the Respondents, only two of whom, however, appear, by Counsel, under which he purported with great elaboration to purchase from them their expectations under the Will of their uncle, or alternatively their rights as his nephews expectant upon the termination of the surviving widows' rights in the property of the uncle, and among many other purposes, which are recited in this agreement, for which advances are agreed to be made, one, and apparently the principal one, was that an appeal might be prosecuted ultimately to His Majesty in Council for the purpose of establishing a Will which the deceased was said to have made. Unfortunately their Lordships, affirming the decision in the Court below, found that that Will was a forgery. That therefore reduced the expectations of the three Respondents to their interest in the property after the widows' rights should come to an end, and as a matter of fact after a time one widow died and a compromise was entered into with the approbation of the Court in respect of the rights of the other widow, the effect of which was to accelerate the time when the nephews became entitled to the inheritance.

In the present suits in India the trial Judge stated ten issues. The first four of those issues were argued and dealt with by him. The point in substance upon which those four issues turned was whether or not the agreements were illegal or void on the ground that they dealt with an expectancy. There were a number of others—as a matter of fact, eleven in all—but the remaining seven were not dealt with by the learned Judge. An application was made to him that he should pronounce a decree giving effect to his determination of the first four issues, which he declined to do upon the ground that there remained some issues in the case which had not been dealt with, one of them, for example, being an issue whether the Plaintiff was entitled to a refund of the amounts which he had in fact paid or any of them, and another whether his rights were barred by limitation.

The present Appellant was advised that his best course was to obtain an immediate decree upon the four issues, which had been dealt with and appeared at that time to be the only substantial ones, in order that he might prosecute his appeal to the High Court, and ultimately to His

(1) L. R. 50 I. A. 69: s. c. 27 C. W. N. 949 (1922).

(3) I. L. R. 8 Cal 138, 145 (1881).

(4) I. L. R. 30 Mad. 486, 492 (1907).

(5) I. L. R. 31 Cal. 667, 674 (1904).

ANNADA MOHAN ROY *v.* GOUR MOHAN MULLICK.

Majesty in Council, and he therefore elected to abandon all the other issues, whatever they might be; in fact, he never called any evidence in support of them, and a formal order was made upon his petition disposing of them all in that way. We are told, and very likely it may be so, that at that time the advice was largely influenced by the consideration that it was still thought to be an open question before their Lordships whether, apart from the Transfer of Property Act, it might be held competent to these heirs, according to the ordinary Hindu law, to contract to transfer, and ultimately to transfer their expectation, such as it was and no doubt, if that was the real point of the litigation, it was worth while to abandon minor points in order to get that issue determined. Between the time when the decree was asked for and obtained and the present time there has been a decision of their Lordships' Board in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (1) and although, as it appears to their Lordships, it simply restates what had frequently been stated before, the Appellant now recognises that the last word has been said, so far as he is concerned, about the possibility under Hindu law of such an interest being transferred.

Under these circumstances an application was made to their Lordships by Mr. DeGruyther to allow the petition which had been presented to the High Court to be recalled, and the decree that was made upon that petition to be set aside and so to allow in some shape or form discussion, if not proof, of the remaining issues in the case, the object being to show that there were, or might be, circumstances in which it possibly could be held that the time of the discovery of the illegality of the contracts was not the time when the contracts were made and the parties knew the law or must be presumed to have known it, but at a later date (what date their Lordships are not exactly told). It was urged that, if such circumstances could be suggested here, a view similar to that which the Board took in the case above mentioned might be taken in favour of the present Appellant also. In that case, however, there were special circumstances, wholly different from those in the present case, circumstances which were proved in evidence and were sufficient for their Lordships to act upon and to enable them to say that the discovery in the case was later than the date of the contract itself. There has been no suggestion anywhere in the course of the present proceedings that any such facts occurred as could alter the view which must normally be taken of the meaning of the word "discovery" and of the time at which that discovery must be held to have occurred. Not only so, but it was by the deliberate act of the Appellant himself, for considerations which at the time were very likely wise considerations, that he closed the door to any investigation of that issue at all. Their Lordships are content to dispose of the first point by saying that the additional issues cannot be gone into now and that upon the face of the matter the appeal must be dealt with upon the question whether, either under the Transfer of Property Act or under the Hindu law applying to purchases of expectations of inheritances, there is any ground upon which these contracts can be supported.

Dr. Abdul Majid has developed these points, and his points appear to be two, setting aside for the moment the Transfer of Property Act, upon the ground that it deals with an actual transfer or con-

(1) L. R. 50 I. A. 69: s. c. 27 C. W. N. 949 (1922).

ANNADA MOHAN ROY v. GOUR MOHAN MULLICK.

veyance and not with a contract to transfer. It is contended that there is nothing in the reason of the thing to prevent two parties, who are concerned in the way in which these parties were concerned, from entering into a contract for the future sale of future expectations. It is admitted that there is no authority to be found anywhere which supports the view that such a contract is possible, and it is admitted that there is authority in India to the contrary, the authority in question being the case of *Sri Jagannada Raju* v. *Sri Rajah Prasada Rao* (2), which so satisfied the learned Judge at the trial that he expressed his assent to the reasoning, without further discussion, and the High Court in its turn was satisfied also. The reasoning of that decision may well be summed up first in a quotation from the judgment of Chief Justice Wallis, and secondly, in a quotation from that of his colleague, Mr. Justice Tyabji.

The learned Chief Justice says, at page 558:—

"On this question, looked at apart from authority, I should not entertain any doubt, as it seems futile to forbid such transfers of expectancies if contracts to transfers them are to be enforced as soon as the estate falls into possession. In these circumstances it seems to me that it is our duty to give effect to what we consider plain provisions of our statute law instead of following a course of English decisions which would appear to have been based, from the very first, on a regard for long established practice rather than on principle, and to have failed to commend themselves to Lord Eldon."

Then Mr. Justice Tyabji, at page 559, says:—

"The Transfer of Property Act does not permit a person having expectations of succeeding to an estate as an heir to transfer the expectant benefits; when such a transfer is purported to be made an attempt is in effect made by the two persons to change with each other their legal positions; and an attempt by the one to clothe the other with what the Legislature refuses to recognise as rights, but styles as a mere chance incapable of being transferred. It would be defeating the provisions of the Act to hold that though such hopes or expectations cannot be transferred in present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer not the expectations but the fruits of the expectations, by saying that what he has purported to do may be described in different language from that which the Legislature has chosen to apply to it for the purpose of condemning it. When the Legislature refuses the transaction as an attempt to transfer a chance, it indicates the true aspect in which it requires the transaction to be viewed."

Their Lordships think that they are only following out numerous other passages which have been referred to in earlier judgments of this Board when they accept that reasoning and that conclusion. It is impossible for them to admit the common sense of maintaining an enactment which would prevent the purpose of the contract, while permitting the contract to stand as a contract, or to see how by appealing to sec. 65 of the Indian Contract Act, or to the nature of the bargain as a mere bargain *de futuro*, they could uphold it as a contract when it is a contract as to which, not only must specific performance be refused under the Transfer of Property Act, but as to which damages can never be recovered, because the contract is not a performable contract until the realisation of the expectation occurs.

There is another way in which the learned Counsel for the Appellant puts the point, namely, that there is here a

(2) I. L. R. 39 Mad. 554 (1916).

ANNADA MOHAN ROY *v.* GOUR MOHAN MULLICK.

contract wholly distinguishable from any contract as to *spes successione*, because, after carefully providing for all eventualities, the documents deal with the possibility of the widows, or one of them, relinquishing their life interests either jointly or severally, or selling them to the reversionary heirs, in which event from the date of the relinquishment or sale, the heirs would become the present owners of the estate by right of inheritance. It is suggested that this provision ought to be read as relating to a transaction with strangers, embedded in the middle of a much longer contract with the parties to this appeal and relating to their hopes of inheritance; in other words, that it should be treated as though it read: "Further, if we can obtain by purchase from total strangers to the family a portion of our late uncle's property, then we undertake to sell it to you on the same terms as those upon which we have undertaken to sell our *spes successione*." It is not necessary to discuss how far such a contract might be supportable, because it is quite plain upon the documents that this is not such a contract, and therefore the point, ingenious though it is, is sufficiently dealt with by dismissing it.

The result, therefore, is that on all the points the appeals fail. As they have been consolidated in India and before their Lordships there will be one set of costs only, and the two successful Respondents who appear by Counsel will get that set of costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Chapman, Walker & Shephard* for the Appellant.

Solicitors: *Messrs. Watkins & Hunter* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 162 OF 1923.

SANDERSON, C. J.
RICHARDSON, J.
1924,
15, February.

Re: ALLIANCE BANK OF SIMLA, LTD.: PETER DONALD MACPHERSON, Appellant, *v.* DUGALD McKECHNIE and ors., Respondents.

Provident Fund, members of, if and when entitled to priority over the unsecured creditors and shareholders of a Company in liquidation—Fiduciary relationship, if any, between the Company and the members of the Provident Fund—Moneys belonging to the Provident Fund mixed with other monies of the Company, if specific Payment of interest by trustee, if consistent with the existence of a fiduciary relationship.

The Alliance Bank of Simla, Ltd., having gone into voluntary liquidation, the question arose, whether the members of a provident fund established by the Company for the benefit of its employees were entitled to receive payment in full of the amounts of the balances standing to their respective credit in the books of the Company in priority to the unsecured creditors and the share-holders or whether they were only entitled to rank pari passu *with the unsecured creditors. It appeared that according to the rules of the Provident Fund made by the Company each member thereof subscribed a sum equal to 5 per cent. of the amount of his monthly salary; that on every 31st of December and 30th of June the Company contributed to the fund a sum equal to the aggregate amount of the subscriptions paid by the members; that the sums from time to time subscribed by each member were credited to his account in the Company's books and all sums contributed by the Company divided among the members in proportion to the amount*

Re: ALLIANCE BANK OF SIMLA, LTD.

of their respective subscriptions and the share of each member in the Company's contribution was thereupon credited to his account; and that the Company paid interest on every 31st of December upon the capital amount standing to the credit of each member at a certain rate; and that the account of the fund was kept in the general books of the Company where a subsidiary ledger was also maintained showing the amount from time to time standing to the credit of each member and a pass book was issued to each member.

R. 9 of the Provident Fund Rules provided that the Company should have a lien on the amount standing to the credit of each member in respect of all losses, etc., which it might have to pay or be put to by reason of any act, embezzlement, etc., of such member and that the amount standing to the credit of each member in respect of his subscriptions to the fund and the interest thereon should be deemed and treated as a deposit made by him with the Company as security for his fidelity and might be disposed of accordingly and that in the event of any claim arising by the Company, the member against whom such claim should arise, should absolutely forfeit to the Company all right and interest to and in the moneys standing to his credit in respect of contributions made by the Company. Rr. 9 and 10 provided that in certain contingencies a member of the Provident Fund should be paid only the amount standing to his credit in respect of his own contributions (with or without interest) and all moneys standing to his credit in respect of contributions made by the Company and the interest thereon should revert to and become the property of the Company:

Held—*That having regard to the rules of the Provident Fund and the method according to which the Company dealt with the contributions of the members of the Fund and its own contributions and interest thereon, there was a fiduciary relationship between the Company and the members of the Provident Fund.*

Held also—*That the contributions of the members of the Provident Fund as also the contributions of the Company and the interest paid by the latter were specific moneys in the hands of the Company, although they were at all times mixed up with other moneys of the Company: and the Company having had at all times much larger sums than the amount standing to the credit of the Provident Fund, must be assumed to have used their own moneys rather than the money it held in trust for the Provident Fund.*

JAMES ROSCOE (BOLTON) LTD. *v.* WINDER (5) *referred to.*

Held therefore—*That the members of the Provident Fund were entitled to priority over the unsecured creditors and share-holders in respect of the contributions made by them to the fund as also in respect of the contributions made by the Company and the interest paid by it.*

IN RE HALLETT'S ESTATE (2) *followed.*

SINCLAIR *v.* BROUGHAM (4) *referred to.*

IN RE HALLETT & CO., EX PARTE BLANE (3) *distinguished.*

That the provision as to payment of interest by the Company on the Provident Fund monies was not inconsistent with the existence of a fiduciary relationship between the Company and the members of the Provident Fund.

GEE *v.* LIDDELL (1) *referred to.*

(1) 35 Beav. 629; L. R. 2 Eq. 341 (1866).
(2) L. R. 13 Ch. Div. 696 (1880).
(3) [1894] 2 Q. B. 237 at p. 244.
(4) [1914] A. C. 398.
(5) [1915] 1 Ch. 62 (1914).

Re: ALLIANCE BANK OF SIMLA, LTD.

This was an appeal preferred on the 29th November 1923 from the judgment of Mr. Justice Greaves, dated the 28th of August 1923, passed in the exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Mr. Langford James and *Mr. T. Ameer Ali* for the Appellant.

Mr. H. R. Pankridge for the ordinary creditors of the Bank.

Mr. J. C. Hazra (for *Mr. C. Bagram*) for the Liquidators.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves which was given in respect of an application made by the Liquidators of the Alliance Bank of Simla, Ltd., which was filed on the 20th of August 1923.

It appears that on the 27th of April 1923 the Bank had suspended payment. It subsequently went into voluntary liquidation, and the Petitioners were appointed Liquidators.

The question in this case arises in connection with a claim of the employees of the Bank, who were members of a Provident Fund, established by the Bank in 1892 for the benefit of its employees. The Petitioners asked for the direction of the Court as to "the manner in which they were to deal with claims made by such members, that is to say, whether such members were entitled to receive payment in full of the amounts of the said credit balances in priority to the unsecured creditors and the share-holders of the said Bank or whether such members were entitled only to rank *pari passu* with the said unsecured creditors."

The learned Judge's decision was given on the 28th of August 1923 and was as follows :—"The result is that I hold that the members of the Provident Fund have no priority over the unsecured creditors and they are only entitled to rank *pari passu* with them."

The appeal was filed on the 29th November 1923, and the Appellant is Mr. P. D. Macpherson who was manager of the Calcutta Branch of the Bank and who was a member of the Provident Fund.

The first point raised by the learned Counsel for the Appellant was that the Bank was trustee of the amounts standing to the credit of the Provident Fund for the employees who were members of the Provident Fund or that, at any rate, the Bank occupied a fiduciary relation towards the members. He relied upon the terms of the Rules and Regulations of the Provident Fund and upon the method of dealing with the fund by the Bank.

Speaking generally, there is no doubt that a fiduciary relationship may be established without the use of the word "trust" and that a person may constitute himself a trustee and, without any actual transfer of the legal estate, he may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it in trust.

The question in this case, in the first instance, must be considered with reference to the rules and regulations and they must be read as a whole in order to obtain their true effect and meaning.

The material rules are :—

"*N. B.*—Membership of the firm is required by the Company of all their employees who are eligible for membership."

R. 1 states the persons who are eligible for membership.

Re: ALLIANCE BANK OF SIMLA, LTD.

R. 3 deals with old employees and it is not necessary to consider that clause in detail.

4. "Each member shall subscribe monthly a sum equal to five per cent. on the amount of the monthly salary, paid to him by the Company, and shall pay to the Company the amount of his subscription immediately on the receipt by him of his salary for the month preceding, and the Company may from time to time deduct from any sum payable by the Company to any member for salary such sum as may be required to pay any subscription due by him to the fund."

5. "The Company shall, on every 31st December and 30th June, contribute to the fund a sum equal to the aggregate amount of the subscriptions of the members during the preceding half year under r. 4."

6. "The sums from time to time subscribed by each member under rr. 3 and 4 shall forthwith on payment thereof be credited to his account in the books of the Company and all sums contributed by the Company under r. 3 shall forthwith and all sums from time to time contributed by the Company under r. 5 shall, as soon as may be after each 31st December and 30th June, be divided (by book entry) among the members in proportion to the amount of their respective subscriptions, and the Company shall thereupon credit the account of each member in the books of the Company with his share of such contribution."

7. "The Company shall also contribute to the fund on every 31st December and 30th June interest upon the capital amount from time to time standing to the credit of each member, at the same rate (but not exceeding 5 per cent. per annum) as shall be from time to time paid by the Company on fixed deposits for periods of one year and upwards and such interest shall, as soon as may be after each 31st December and 30th June, be credited to the account of each member in the books of the Company."

8. "The account of the fund shall be kept in the general books of the Company at their Head Office, where a subsidiary ledger shall also be maintained showing the amount from time to time standing to the credit of each member, and a pass book shall be supplied to each member which shall be made up and balanced half-yearly."

It will be convenient to state now how the scheme contained in these clauses was carried out. By the consent of both parties certain books and documents, which were not before the learned Judge, were put in before the hearing of the appeal. We were shown an account of the Provident Fund in the general ledger, in which the amounts subscribed by the employees were credited to the fund. Each half-year the Bank's contribution was credited to the account of the fund. I take, as an instance, the end of the half-year in December 1922. Rs. 51,472-13-8 was credited to the Provident Fund's account as the Bank's contribution. This amount was made up of two sums—Rs. 35,272-2-1 and Rs. 16,200-11-7. The first was the Bank's contribution under r. 5 and was the equivalent of the aggregate amount of the subscriptions of the members during the preceding half-year. This amount was debited in the Bank's books to the "charges account." The second sum was the interest contributed by the Bank under r. 7 and this sum was debited in the Bank's books to the "interest account."

A rough balance-sheet, which was produced to us, showed the total amount standing to the credit of the Provident Fund as a liability of the Bank under the

Re: ALLIANCE BANK OF SIMLA, LTD.

heading of "deposits." The sum was not specifically stated in the published balance-sheet, but was included with other sums on the liability side of the account. There was a "subsidiary ledger" kept in pursuance of r. 8 which showed the amounts credited to the account of each member in respect of his own contribution, the Bank's contribution, and the interest as provided by rr. 6 and 7.

The remaining clauses to which reference should be made are :—

9. "The Company shall have a first and paramount lien upon the amount from time to time standing to the credit of each member in respect of all losses, damages, costs, and expenses which the Company may at any time pay, sustain, or be put to, by reason of any act, embezzlement, mismanagement, neglect or default of or by such member and the amount from time to time standing to the credit of each member in respect of his subscriptions to the fund and the interest thereon shall be deemed and treated as a deposit made by him with the Company as security, for his fidelity, and may be disposed of accordingly, and in the event of any claim arising by the Company under this rule the member against whom such claim shall arise shall absolutely forfeit to the Company all right and interest to and in the moneys standing to his credit in respect of contributions made by the Company under rr. 3 and 5 and the interest thereon."

10. "If any member shall be dismissed from the service of the Company for misconduct or incompetence, he shall (subject to any claim by the Company under r. 9) be paid only the amount then standing to his credit in the books of the Company in respect of his own subscriptions to the fund and without any interest thereon, and the interest thereon and all moneys standing to his credit in respect of contributions made by the Company under rr. 3 and 5 and the interest thereon shall revert to and become the property of the Company."

11. "On the retirement of any member from the service of the Company without the consent of the Directors, he shall (subject to any claim of the Company under r. 9) be paid only the amount then standing to his credit in the books of the Company in respect of his own subscriptions to the fund and the interest thereon, and all moneys standing to his credit in respect of contributions made by the Company under rr. 3 and 5 and the interest thereon shall revert to and become the property of the Company."

12. "On the retirement of any member from the service of the Company with the consent of the Directors he shall (subject to any claim by the Company under r. 9) be paid,"

"(*a*) if he shall have been in the service of the Company for less than 15 years, the amount then standing to his credit in the books of the Company in respect of his subscriptions to the fund and the interest thereon, and such portion of the moneys then standing to his credit in respect of contributions made by the Company under rr. 3 and 5 and the interest thereon as the Directors may, in their absolute discretion think fit, and the balance of such last mentioned moneys and interest thereon shall revert to and become the property of the Company;

(*b*) if he shall have been in the service of the Company for 15 years and upwards, the sum standing to his credit in the books of the Company on the 30th June or 31st December on which he shall retire if his retirement take place on either of the said days (including his share of the contribution by the Company and interest to be

Re: ALLIANCE BANK OF SIMLA, LTD.

credited on that day) and otherwise the sum standing to his credit on the 30th June or 31st December immediately preceding his retirement, together with the amount of his paid up subscriptions for the then current half-year."

The learned Counsel for the Appellant placed much reliance upon the provision contained in r. 9 that the Bank should have a lien upon the amount standing to the credit of each member in respect of the matters mentioned in cl. 9 and argued that this showed that the amounts thus standing to the credit of the members were their property; otherwise, he urged, the provision that the Bank should have a lien upon such amounts would be meaningless as the Bank could not have a lien upon its own property.

Reliance was also placed by the learned Counsel upon the words occurring in rr. 10, 11 and 12 "shall revert to and become the property of the Company," the argument being that these words showed that the moneys therein referred to were the property of the members and would only revert to and become a property of the Bank when the contingencies therein referred to arose.

The learned Judge came to the conclusion that, in respect of the sums contributed by them, the employees were depositors with the Bank in the same manner as a customer who had opened an account with the Bank, and were merely creditors of the Bank ranking with those who had a current or deposit account with the Bank.

With much respect to the learned Judge, in my opinion, the provisions to which I have drawn attention are inconsistent with that position. When a customer in the ordinary course of business opens a deposit or current account with the Bank and deposits money, the relation of creditor and debtor arises and the money so deposited becomes the money of the Bank. The provision that the Bank was to have a lien upon the amount standing to the credit of the members, which represented the contributions of the members, seems to me inconsistent with the moneys belonging to the Bank as in the case of an ordinary deposit by a customer with the Bank.

In the same way, the provisions that in certain contingencies certain portions of the moneys standing to the credit of the members shall revert to and become the property of the Bank are, in my opinion, inconsistent with the position occupied by a customer who has deposited money with the Bank in the ordinary course.

The learned Counsel who appeared for the unsecured creditors relied on certain rules as being inconsistent with the existence of fiduciary relationship and, in particular, he referred to rr. 7 and 12 (*a*).

R. 7 deals with the liability of the Bank to contribute interest upon the amount standing to the credit of each member. The learned Counsel argued that it was inconsistent with the position of a trustee that the Bank should be allowed to use the funds for the purpose of the Bank and should yearly have to pay interest at a specified rate which would mean that the Bank might thereby make a profit out of the fund.

This clause, taken by itself, might seem to be inconsistent with the existence of a fiduciary relationship between the Bank and the members; but the rules and regulations must be read as a whole.

Apart from this, the provision as to interest is not, in my opinion, wholly inconsistent with the existence of a fiduciary relationship. In *Gee* v. *Liddell* (1),

(1) 35 Beav. 629; L. R. 2 Eq. 341 (1866).

Re: ALLIANCE BANK OF SIMLA, LTD.

the testator directed his executor to stand possessed of £2,000 upon trust to retain the same in his own hands at interest of 4 per cent. or to invest it and to pay the interest to his daughter for her separate use during her life. This provision permitted the trustee to retain the money in his own hands and pay interest at a specified rate to the beneficiary, the trustee presumably being entitled to make such use of the capital by way of investment or otherwise as he thought fit. Yet no question arose as to the direction creating a trust. I am not, therefore, convinced that the provision as to interest in the rules is so inconsistent with the existence of a fiduciary relationship that the Court should disregard the other provisions in the rules which, in my opinion, point to the existence of such a relationship. The other clause upon which the learned Counsel for the creditors mainly relied was cl. 12 (*a*). This clause deals with the retirement with the consent of the Directors of a member, who has been in the service of the Bank for less than 15 years. It provides that he should be paid the moneys therein specified and the interest thereon "as the Directors may, in their absolute discretion, think fit." The learned Counsel argued that the discretion thus vested in the Directors was inconsistent with the existence of a fiduciary relationship. That taken by itself may be so; but this clause concludes by saying that "the balance of such last mentioned moneys and the interest thereon shall revert to and become the property of the Company." This points to the conclusion that until such discretion was exercised the moneys were not the property of the Bank but of the individual members.

This clause was no doubt inserted to discourage the employees from leaving the

the Bank and the members was merely that of debtor and creditor. On the con- ..I hold in accordance with the con

Re..bmitted by learned Counsel for gulations . that the amount standing the method in ..h member was his pro- the contributions . and under the con- contributions of the . confirmation of est thereon, in my judg- provide that a fiduciary relationship betw.. amount and the employees who were m.. own the Provident Fund.

The question still remains whether . Appellant is entitled to payment in full of the balance standing to his credit in priority to the unsecured creditors.

The learned Counsel for the unsecured creditors admitted that, if there was a fiduciary relationship between the Bank and the members of the Provident Fund, the Appellant would be entitled to priority in respect of the contributions made by him which were credited to his account. This admission, in my judgment, was rightly made in view of the decision of *In re Hallett's Estate* (2).

The learned Counsel, however, argued that the Appellant would not be entitled to priority in respect of the contributions made by the Bank and the interest provided by the Bank.

Reference was made to the case, which I have cited, in *Ex parte Blane* (3); and at p. 244 Davey, L. J., says as follows :—"There is nothing in our decision in the present case which is in conflict with the decision in *In re Hallett's Estate* (2). In order to follow trust money, there must be a specific property capable of being identified, into which the money has been converted, and in that case this doctrine was applied in this way; it was said that, where a trustee pays his own money and also trust money into his banking account,

(2) L. R. 13 Ch. Div. 696 (1880).
(3) [1894] 2 Q. B. 237 at p. 244.

credited on that day) and otherwise the sum standing to his credit on the 30th June or 31st December immediately preceding his retirement, together with [the] amount of his paid up subscripti[ons ...]d to the then current half-year." [...] decision

The learned Counsel for [...] that there placed much reliance [...] capable of being contained in r. 9 t[...] have a lien upon [...] do, that not only the the credit of of the employees but also the the matt[...]ons of the Bank in respect of that t[...] and interest were trust moneys, I sta[...] no reason for drawing any distinction between the two classes of contributions.

It is true that the Bank did not allocate any particular monies or notes to the fund, but the two classes of contributions formed one trust fund, and, if the moneys constituting this fund were mixed with the other moneys of the Bank, it was the same as if the moneys had been placed in a box as Lord Davey pointed out in the case to which I have referred.

There is no doubt that at all material times the Bank had much larger sums at their disposal than the amount standing to the credit of the Provident Fund and the Bank must be assumed to have used their own unfettered funds for their own purposes rather than the trust fund.

In addition to this, it is difficult to see how, from the point of view of business, the Bank could have made a more effectual allocation of their contributions to the trust fund than, in fact, they did.

The contributions were, in the first place, credited to the fund in the general ledger. The amounts, to which each member was entitled, were then credited to the accounts of the individual members. The Bank could not operate upon or alter the accounts of the individual members except in the manner and under the conditions specified in the rules and regulations and when the contingencies therein mentioned arose.

and [...]

pc[...]

In my judgment, therefore, the Appellant is entitled to priority not only in respect of the contributions made by him but also in respect of the contributions made by the Bank, which contributions will include the sums equivalent to the aggregate amounts subscribed by the Appellant and the interest provided by the Bank.

In my judgment, therefore, the appeal must be allowed and the learned Judge's order set aside, with the exception of his direction as to costs, which will stand.

The direction of the Court will be that members of the Provident Fund are entitled to receive payment in full of the amounts standing to their credit in respect of the Fund in priority to the unsecured creditors and share-holders of the Bank.

The costs of the parties appearing in this appeal will be paid by the Liquidators out of the assets, when taxed as between attorney and client, and the Liquidators' costs will be taxed as between attorney and client.

RICHARDSON, J.—The Provident Fund to which the case relates is of a type which is now common enough. The nature of a fund must no doubt depend on its rules, but as I conceive, the burden of proving that such a fund as this is a trust fund should not be unduly heavy.

The fund was created and controlled by the Alliance Bank of Simla, Ltd., which is now in course of liquidation. When the Bank suspended payment on the 27th April 1923 there stood to the credit of the fund the sum of Rs. 6,79,401.

Under the rules those of the Bank's employees who fulfilled the conditions required for membership of the fund were compelled to subscribe thereto, and every half-year the Bank contributed a sum equal to the aggregate amount of the subscriptions of the members during the pre-

Re: Alliance Bank of Simla, Ltd.

ceding half-year. Every half-year the Bank also contributed interest at a rate not exceeding the rate at which interest was paid in fixed deposits and not exceeding 5 per cent. per annum. The half-yearly contributions of capital were divided (by book entry) among the members in proportion to the amount of their subscriptions and the half-yearly interest was paid upon the capital amount from time to time standing to the credit of each member.

The account of the fund was kept in the general books of the Company at their head office where a subsidiary ledger was also maintained showing the amount from time to time standing to the credit of each member. Each member was supplied with a pass book which was made up and balanced half-yearly.

In the case of a member who was also a customer of the Bank in the ordinary sense, his Provident Fund account was wholly distinct from his personal account.

As to the mode in which the subscriptions of members were collected, it appears that those who had no personal accounts received their salaries in full and returned their subscriptions to an officer of the Bank whose duty it was to collect them. Members with personal accounts were credited in those accounts with their salaries in full and debited with their subscriptions. In the latter case, it is not correct, in my opinion, to say that the Bank never received the money. What the Bank did was to retain in their own possession moneys which would otherwise have been paid by way of salary.

I come then to the first point in the case, namely, that as it appears to me the money in this fund so constituted never became the property of the Bank in the sense that the relationship between the Bank and the members was merely that of debtor and creditor. On the contrary, I hold in accordance with the contention submitted by learned Counsel for the Appellant, that the amount standing to the credit of each member was his property in the possession and under the control of the Bank. I find confirmation of this view in those rules which provide that in certain events, the whole amount standing to a member's credit less his own subscriptions or the whole amount less his subscriptions and the interest thereon or the whole amount less his own subscriptions (with interest) and such portion of the Bank's contributions with interest as the Directors might in their absolute discretion think fit, should "revert to and become the property" of the Bank. These words necessarily imply that before such reversion the money was the property of the individual member whose title was to cease in favour of the Bank for a larger or a smaller proportion—as the case might be—of the amount at his credit.

A still larger power was given to the Bank by r. 9 under which the Bank had a paramount lien on the amount from time to time at credit of each member in respect of any losses due to embezzlement, neglect or default on his part. For this purpose a member's subscriptions with interest were to be treated as a deposit made by him as security for his fidelity with a liability on his part in the event of his default to forfeit all benefit in the total amount at his credit. This condition does not, in my opinion, subtract from the force of the words to which I have already referred. The subject-matter of the lien was the property, not of the Bank, but of the member and it did not cease to be his property so long as he discharged his duties faithfully. The

rule says that the moneys shall be treated as security deposits—that is, deposits belonging to the members. It does not say that the moneys shall be treated as fixed deposits made by the members as if they were ordinary customers of the Bank. Nor does it appear to me to be material that the Provident Fund was included in the half-yearly balance-sheets of the Bank under the heading of fixed deposits. There is no evidence in my opinion on which it can be successfully contended that the members acquiesced in their fund balances being treated as fixed deposits. I might perhaps, if it were necessary, go further and say that it was a breach of duty on the part of the Directors not to treat the fund as entirely separate and distinct from the fixed deposits made by ordinary customers.

Nor am I impressed by the argument founded on the duty imposed on the Bank of paying interest on the capital amount at the credit of each member at a rate which might be less than the rate at which interest was earned by the Bank on their investments. The Bank or its Directors were substantial contributors to the fund and it was open to them to fix the conditions on which their contributions should be made. The fact, if it be a fact, that the Directors derived a profit for the Bank by investing the fund does not alter the nature of the fund or convert it into a loan made to the Bank by the members. The rule would not have been inconsistent with the investment of the fund as a separate fund.

It would doubtless have been more regular if the fund had been placed under the control of trustees expressly appointed to administer it, but once the conclusion is arrived at that the moneys in the fund were the moneys of the members and not of the Bank, I think it follows that the Bank or the Directors occupied a fiduciary position in regard to it.

If I am right so far, the next question, the question perhaps on which the controversy has mainly centered, is whether there was ever any concrete sum of money which the members are entitled to follow. It is at this point I think that I part company with the learned Judge who tried the case. He says (p. 47) that the members are not entitled "to claim priority over the unsecured creditors as *cestui que trusts* as there is no specific property in respect of which they can claim this position." With great respect it appears to me incorrect to say that the fund consisted merely of book entries and that book entries cannot be followed. The book entries were intended to represent and in my view of the matter did represent moneys in the actual possession and custody of the Bank. What the Bank did was to mix these moneys with their general balances but it is not disputed that the general balances always exceeded, and no doubt considerably exceeded, the whole amount at credit of the fund. The fund was therefore a continuous fund. The total was always there in the possession of the Bank. If proper steps had been taken, the fund so far as I can see might at any time had been invested. In fact the Directors by a resolution of 1st November 1915 did allocate certain investments to cover the whole amount at credit—though this resolution, for reasons which are not fully explained, was subsequently cancelled at a meeting held on 1st August 1916.

This view leads naturally to the conclusion that the members are now entitled to follow the fund on the principle laid down in the case of *In re Hallett's Estate* (2).

(2) L. R. 13 Ch. Div. 696 (1880).

Re: Alliance Bank of Simla, Ltd.

The present case appears to me to be distinguishable from the case of *In re Hallett & Co., Ex parte Blane* (3) where no trust money was actually received by the trustee and none therefore was paid by him into his own account at the Bank. In the present case, if I am right, the moneys were received by the Bank and mixed with the general balances.

There remains the subsidiary question whether any distinction is to be drawn between the members' subscriptions on the one hand and on the other the Bank's contributions and the credits in respect of interest. It appears to me that this question should be answered in the negative. The contributions and interest may have been paid out of deposits received from customers, but as I see the matter the money was effectually transferred to the Provident Fund and was lost to the depositors just as much as if it had been spent on making bad investment. If A borrows money from B to pay C and does pay C, B has no claim against C. He has only a debt against A. There seems no reason why the Bank's customers or depositors as creditors of the Bank should be paid out of moneys belonging not to the Bank but to the members of the Provident Fund, though they happen to have been mixed up with the Bank's general balances.

In concluding I desire to add that *In re Hallett's Estate* (2) was discussed by Lord Haldane in *Sinclair* v. *Brougham* (4). I refer particularly to the passage at pp. 420 and 421 of the report, where Lord Haldane says this :—"But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrong-doer into his account with his Banker, who simply owes him a debt, so that no money was or could be, in the contemplation of a Court of law, ear-marked. Here equity, which had so far exercised a concurrent jurisdiction based upon trust, gave a further remedy. The Court of Chancery could and would declare, even as against the general creditors of the wrong-doer, that there was what it called a charge on the Banker's debt to the person whose money had been paid into the latter's Bank account in favour of the person whose money it really was. And, as Jessel, M. R., pointed out in *Hallett's* case (3) this equity was not confined to cases of trust in the strict sense, but applied at all events to every case where there was a fiduciary relationship. It was, as I think, merely an additional right, which could be enforced by the Court of Chancery in the exercise of its auxiliary jurisdiction, wherever money was held to belong in equity to the Plaintiff."

So far as I can see, there is no difference between the case in which a trustee pays trust moneys into his account with a Bank and the claim is made upon his balance and the case in which the Bank themselves mix trust moneys with the general mass of the moneys which they hold. In the one case, the charge is on the balance at credit of the trustee or person in a fiduciary capacity who has paid trust moneys into his own account. In the other the charge is on the general balances of the Bank.

The importance of the fact that the Bank's general balances at all times exceeded the amount standing to the credit of the Provident Fund is brought out by the decision of Sergeant, J., in *James Roscoe (Bolton) Ltd.* v. *Winder* (5)

(2) L. R. 13 Ch. Div. 696 (1880).
(3) [1894] 2 Q. B. 237 at p. 244.
(4) [1914] A. C. 398.

(3) [1894] 2 Q. B. 237 at p. 244
(5) [1915] 1 Ch. 62 (1914).

Re: ALLIANCE BANK OF SIMLA, LTD.

These cases were not cited at the Bar yesterday, but I have ventured to refer to them as they appear to me to confirm the conclusion at which I had arrived.

For these reasons I agree with the learned Chief Justice that the appeal should be allowed.

Messrs. Morgan & Co., Solicitors for the Appellant.

Messrs. Orr, Dignam, Solicitors for the Respondents.

P. K. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 931 OF 1923.

GREAVES, J.
PANTON, J.
1924,
Heard, 6 and 7, February.
Judgment, 19, February.

ABDUL JALIL and ors., Petitioners,
v.
THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec 144, Collector, if may pass order as District Magistrate forbidding interference with cutting of a bundh *ordered by Civil Court to be maintained—Indian Penal Code (Act XLV of 1860), sec. 147, resistance to cutting of the* bundh, *if an offence under, when there is no order in express terms to cut the* bundh*—Civil Court injunction, how far may be interfered with by Magistrate*

A compromise decree provided inter alia *that if the* bundhing *of the eastern bank of a certain river was not completed within a specified time, the permanent injunction, which the decree granted for the maintenance of the* bundh *on the western bank, would be cancelled and the Plaintiffs would raise no objection to the cutting of the western* bundh *and* bundhing *the eastern bank. After the expiry of the specified time one of the Defendants applied to the Collector for permission to remove the western* bundh *and the Collector, in his capacity as District Magistrate, issued an order under sec 144, Cr. P. C., stating that the conditions had arisen which authorised the Defendants without opposition to cut the western* bundh *and forbidding the public to interfere when the western* bundh *was cut. At the cutting of the* bundh *a riot ensued and some of the villagers who tried to prevent the cutting of the* bundh *were convicted under sec. 147, I. P. C.:*

Held—*That the order of the District Magistrate was not in terms an order directing the* bundh *to be cut. If it was in effect so, the District Magistrate had no right to usurp the functions of the Civil Court to construe the consent decree of the Civil Court and to say that the circumstances had arisen which justified the dissolving of the injunction of the Civil Court and the cutting of the western* bundh. *The Civil Court injunction was still subsisting and could only be dissolved by the Court which granted it. There being, however, no order in express terms to cut the* bundh, *no one was entitled to cut the* bundh *in view of the Civil Court's injunction which was still subsisting, and so far as the efforts of the assailants were directed to the saving of the* bundh *from destruction, these persons were not an unlawful assembly and there was no illegal common object.*

This was a Rule against an order of the District Magistrate of Chittagong (Mr. L. Birley), dated the 6th June 1923, convicting the Petitioners under sec. 147, I. P. C. and sentencing them to various terms of imprisonment and further binding them down under sec. 106, Cr. P. C., an appeal from which order was dismissed by the Sessions Judge of Chittagong (Mr. S. C. Ghatak) on the 5th September 1923.

The facts will fully appear from the judgment.

Mr Camell, Counsel and *Babu Deben-*

ABDUL JALIL *v.* THE KING-EMPEROR.

dra Narain Bhattacharjee for the Petitioners.

Mr. Khondkar, Deputy Legal Remembrancer for the Crown.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—The Petitioners were convicted on the 6th June 1923 by the District Magistrate of Chittagong under the provisions of sec. 147, I. P. Code and sentenced to varying terms of imprisonment and they were all bound down under the provisions of sec. 106, Cr. P. Code. They appealed to the District Judge but their appeals were dismissed on the 5th September 1923. This Rule was granted against their conviction and sentence on the 27th September 1923.

The facts are as follows :— In thana Fatikchari in the District of Chittagong there is a hill stream called Dhurung *khal* which flows from the range of hills to the north of Chittagong passing in its course through or near to the villages of Dhurung, Sundarpur and Ekkolia. The villagers of these villages had been accustomed to use the water of this stream for drinking purposes, for domestic purposes and for cultivation and also for floating down timber from the hills. The stream in the rainy season often overflowed its banks breaking through its western bank despite the erection of *bundhs* from time to time. As a result the villagers on the lower reaches of the stream suffered from scarcity of water. Proposals for the erection of a strong *bundh* to prevent the overflow on the western bank were considered from time to time but nothing was done and eventually the old bed of the stream was dried up owing to the water escaping through the breach on the western bank. Certain persons, amongst them one Enayet Ali Chowdhuri, got settlement of the old bed of the stream and cultivated it, but the settlement was made on terms that if steps were taken to make the stream flow in its old bed it should be vacated.

Ultimately a sum of Rs. 11,000 was raised by public subscription and a *bundh* was erected on the western bank in 1918 and the stream flowed once more in its old bed. The erection of the *bundh* was made with the approval of the then Collector and under the supervision of the District Board Overseer. During the rains of 1918 a breach occurred on the eastern side of the stream and a road was damaged. Proceedings under sec. 133 were accordingly instituted against the persons who had erected the *bundh* for its removal and during the pendency of these proceedings a civil suit (No. 90 of 1918) was instituted against the 1st and 2nd parties in the sec. 133 proceedings claiming rights in the flow of water along the old bed of the stream, for its maintenance and for keeping the *bundh* intact. An order was passed in the sec. 133 proceedings in July 1919 for removal of the *bundh* within 7 days but this Court stayed the proceedings pending the decision of the civil suit. The Secretary of State was made a party in the civil proceedings and ultimately the suit was decreed and a perpetual injunction granted against all the Defendants including the Secretary of State, the right of the Plaintiff being established to divert the flow of the stream into its old bed. Subsequently the order under sec. 133 directing the removal of the *bundh* was set aside by this Court. The Secretary of State appealed against the decree in the civil suit and a compromise decree was passed on the 17th March 1921, providing (1) for the re-excavation by the Plaintiff of the

ABDUL JALIL *v.* THE KING-EMPEROR.

old bed of the stream, some part of the work to be done before 31st March 1921 and for the erection by them before 30th April 1921 of a *bundh* on the eastern side of the stream in accordance with the District Engineer's report, (2) that if the work of excavation and of *bundhing* the eastern bank was not completed by 30th April 1922 the injunction would be cancelled and the Respondents (that is, the Plaintiffs in the suit) would raise no objection to the Defendants or any other person cutting the western *bundh* and *bundhing* the eastern bank. In June 1922 the *bundh* on the eastern bank was damaged and one of the Defendants in the civil suit applied to the Collector of Chittagong for permission to remove the western *bundh*. The Collector on the 21st June 1922 directed the *khas* Tahasildar to enquire and report and as a result of his report passed an order on the 29th June in the following terms:—

"29th June 1922. Read reports of the *khas* Tahasildar Rouzan and the *solenama* in accordance with which the District Judge decreed the appeal on 21st March 1922. It is clear that the conditions had arisen which authorise the Defendants without objection by the Opposite Party to cut the western *bundh*. I am informed that inspite of this, opposition from the Opposite Party is apprehended. The very heavy rains of the past week makes this a very urgent matter. Issue order under sec. 144, Cr. P. C., to Abdul Bari Chowdhuri, Jugabandhu Moharer and Ahmed Ullah Chowdhury and to the public generally to abstain from interfering when the western *bundh* is cut. Serve it through Sub-Inspector, Fatikchari and tell him to be present when the *bundh* is cut.

(Sd.) L. Birley,
District Magistrate."

This order has been spoken of as an order by the District Magistrate directing the *bundh* to be cut. This in terms it is not, but I am inclined to think that in effect it really amounts to such an order for the District Magistrate, who in his capacity as Collector represented the Secretary of State in the civil suit and who was in effect a party thereto, was taking upon himself to construe the consent decree of the Civil Court and to say, that the circumstances had arisen which justified the dissolving of the injunction of the Civil Court and the cutting of the western *bundh*. In my view the District Magistrate had no right to usurp the functions of the Civil Court in this way, the injunction was still subsisting and could only be dissolved by the Court which granted it and it was this Court alone which could construe its own decree and say whether the circumstances had arisen which would justify the dissolution of the injunction and the cutting of the *bundh*. The fact that he may have acted on the advice of the Government pleader as to the construction of the consent decree cannot make his order a legal one in the view I take. The District Magistrate's order was served on the *Amlas* of Abdul Bari Chowdhury as he was away and they and Ahmed Ullah Chowdhury on the 4th July 1922 petitioned the District Magistrate to keep his order under sec. 144, Cr. P. Code in abeyance until the eastern breach was repaired. This he refused to do relying on the report of the *khas* Tahasildar. In the result a riot took place about noon on the 4th July, for when Enayet Ali Chowdhury and his party accompanied by the Police proceeded to cut the western *bundh* they were resisted by the villagers who were interested in its preservation assisted by other persons of neighbouring

ABDUL JALIL *v.* THE KING-EMPEROR.

villages. One of the villagers was killed in the riot and persons of both parties were injured.

In the result criminal proceedings were instituted and the Petitioners before us were convicted. Two common objects were stated in the charge, (1) enforcing by means of criminal force or show of criminal force a right or supposed right in respect of Dhurung *bundh* which had been ordered by lawful authority to be cut, (2) compelling by means of criminal force or show of criminal force the persons concerned in cutting the *bundh* to omit to cut the *bundh* which cutting they were legally entitled to do. Three points were urged before us on behalf of the Petitioners—(1) Illegality in procedure, (2) that the maintaining the *bundh* was not illegal, but as of right as the injunction had not been dissolved and that therefore there can be no conviction, (3) that the persons who came to cut the *bundh* were not entitled to do so and that there was therefore no offence, it being said that the District Magistrate's order, if it was an order to cut the *bundh*, was an illegal order as it was not made under sec. 133, Cr. P. C. and that it could not be made under sec. 144, Cr. P. C. In addition various minor criticisms were directed against the form of the order. It was further urged that if the order under sec. 144 was not an order to cut the *bundh* then no one had any authority to do so on 4th July 1922 in face of the order of the Civil Court and that the conviction cannot stand and that it cannot be sustained by saying that there was disobedience of the Magistrate's order having regard to the common objects named in the charge, disobedience of the Magistrate's order not being one of these. It is not I think necessary to decide in the circumstances of the case whether an order to cut a *bundh* could be lawfully made under sec. 144, for this was not in terms the Magistrate's order. In the result there was no order in express terms to cut the *bundh* and no one was entitled on the 4th July 1922 to cut the *bundh* in view of the Civil Court's injunction which was subsisting on that day and this being so neither of the common objects set out in the charge have been or could be established with the result that the conviction of and sentence passed on the Petitioners must be set aside and their bonds and bail bonds will be cancelled.

PANTON, J.—I agree that the Rule must be made absolute. The ultimate cause of this disturbance was, in my opinion, the loose language of the petition of compromise which was embodied in the decree of the District Judge. It created the impression that in certain events the western *bundh* might be demolished without any further order of the Court. This view, as my learned brother has pointed out, is incorrect. Then again both Courts below seem to have treated Mr. Birley's order as an order to cut the *bundh*. This, in terms, it was not. It was an order under sec. 144 of the Code of Criminal Procedure forbidding interference with the cutting of the *bundh* when this was done by persons not acting under his order. A mob, among which were the present Petitioners, attacked the Police who were seeing to the enforcement of the order. But so far as the efforts of the assailants were directed to saving the *bundh* from destruction these persons were not an unlawful assembly; and since the common objects set out in the charge are limited as they are, the convictions cannot be supported.

J. N. R. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 140 OF 1923.

NEWBOULD, J.
C. C. GHOSE, J.
1923,
19, July.

SARAT CHANDRA SEN,
Complainant,
v.
YAKUB TALUQDAR,
Accused.

Indian Penal Code (Act XLV of 1860), sec. 426 —Mischief—Dead tree, cutting and removal of, if amounts to an offence of mischief.

Where the accused, a servant of a landlord, was convicted of mischief for having cut and removed a dead jack fruit tree standing on the homestead of the tenant·

Held—*That the act did not amount to an offence of mischief.*

This was a Reference under sec. 438, Cr. P. C. made by the Sessions Judge of Bogra (G. C. Sen, Esq.), against the order of a Deputy Magistrate of Bogra (Babu M. N. Kundu), dated the 25th April 1923, convicting the Petitioner under sec. 426, I. P. C. and sentencing him to a fine of Rs. 10, in default to undergo 7 days' rigorous imprisonment.

The facts of the case will appear from the letter of Reference which was as follows :—

"Under sec. 438 of the Criminal Procedure Code, I have the honour to submit herewith the record of the marginally noted case for necessary orders by the Hon'ble Court.

The case for the prosecution was that one Kishori Mohan was a Bhuggattardar under one Jogeswari Gupta in respect of his homestead piece of land, that Kishori Mohan was at Nwadip for some time and that his brother was placed in charge of that *bari*, that one day in last November the landlord had a jack fruit tree worth Rs. 15 or Rs. 20 removed from the *bari* through his servants and that the servants thus committed an offence under secs. 426 and 352 of the Indian Penal Code.

The defences were that tree removed was a dead one, that the tree was removed under the orders of the landlord who was entitled to it, that the servants removed it *bonâ fide* without any criminal intention, that Kishori had left and had disposed of the *bari* and that the land was in *khas* possession of the landlord.

The learned lower Court found that the tree removed was a dead one, that the brother of Kishori was in charge of the *bari*, that it was not in possession of the landlord and that the servants must have shared the criminal intention of the master. He accordingly convicted one of the accused under sec. 426 of the Indian Penal Code and sentenced him to a fine of Rs. 10.

The case was tried summarily. It seems to me that the conviction is bad in law and should be set aside on the following among other grounds :–

(1) The facts proved and found do not constitute an offence under sec. 426 of the Indian Penal Code. The cutting and removal of a dead jack fruit tree do not amount to its destruction or to such a change in a property or in its situation thereof as destroys or diminishes its value or utility or affects it injuriously. A dead jack tree cannot be of less value or less utility simply because it is cut and removed. It can only be used as timber or fuel wood. It can be used for those purposes only after it is cut. Such being the case the cutting and removal do not amount to a mischief as contemplated by sec. 425 of the Indian Penal Code.

(2) The trying Magistrate was wrong in holding that a servant must necessarily share the criminal intention of his master. An absence of a finding that the servant himself intended to cause loss or damage vitiated the conviction under sec. 426 of the Indian Penal Code. The facts of the case would show that the servants had

Sarat Chandra Sen v. Yakub Taluqdar.

probably no dishonest intention in cutting and removing the tree and that his conduct was *bonâ fide*.

(3) As a number of intricate questions of law were involved this summary trial was bad.

(4) The dispute was of a civil nature and the parties should have been referred to the Civil Court."

Babu Dinesh Chandra Roy for the Accused.

Babu Satis Chandra Sinha for the Complainant.

The Judgment of the Court was as follows :—

We agree with the learned Sessions Judge that the conviction of the accused for committing mischief cannot be upheld. We accordingly set aside the conviction of the accused Yakub Taluqdar and acquit him of the charge of having committed mischief; and we direct that the fine, if paid, be refunded.

H. C. S.

PRIVY COUNCIL.

[Appeal from Bombay.]

Viscount Haldane.
Lord Shaw.
Lord Parmoor.
Mr. Ameer Ali.
1923,
Heard, 19, 20 and 23, April.
Judgment, 15, May.

Putlibai and ors, Appellants,
v.
Sorabji Naoroji Gamadia and ors., Respondents.

Indian Succession Act (X of 1865), secs. 99, 100, 101, 102, how to be construed—Parsi, Will of—Conception of joint family, if may be referred to in construing such Will—Absolute gift, clause repugnant to, invalid.

The testator, a Parsi, by cl. (9) of his Will, disposed of certain houses along with certain furnitures upon trust to permit his daughter during her life and until death or marriage, whichever shall first happen, and also all his sons and also their respective families during as well as after the respective life-time of such respective sons, including the widows of any of his male lineal descendants, to occupy the said houses and make use of the said furniture free of rent during their respective life-times and until the youngest of his grandsons living at the death of the last survivor of his sons shall attain the age of 18 years. By cl. (10) provision was made for the maintenance and upkeep of all such of his children and their respective families entitled to the right of residence as aforesaid until the expiration of ten years from his death or until the death of his last surviving son, whichever should first happen.

Cl. (11) of the Will directed that at the expiration of 10 years or after the death of the last surviving son, whichever should first happen, the properties (subject to the rights of residence already referred to) were to be divided into five shares of which one was to go to each son, but for life only. If he died, the persons presumptively entitled to the corpus under subsequent provisions were to have the income till the death of the last survivor of the five sons. Then by cl. (12) each son might by deed or Will appoint in favour of his own sons or their lineal descendants, and on failure of such issue in favour of his widow and daughters or their lineal descendants. By cl. (13), in default of the exercise of this power, the share of each son, if he had left a son or issue of such son living at the death of the last survivor of the testator's sons, was to be held for the sons of such son and the issue of his predeceased sons per stirpes *and if the son of the testator left no such son or issue then for his widow and daughters and the issue of predeceased daughters. Cl. (14) devised the*

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

residue of the testator's property to the executors upon trust to convert for payment of funeral and testamentary expenses, debts and legacies and to divide the balance into five equal parts and pay one part to each of his sons for his absolute use with a proviso that the trustees should not be bound to sell for ten years and should in the meantime be entitled to carry on the business of the testator:

Held, *as to the interpretation of cls. (9) and (10), that although the principle of joint family may not apply to a Parsi with the rigidity with which it applies in the case of a Hindu, still the conception of joint family rights which is common in Oriental countries ought not to be left wholly out of sight in interpreting the words of a Parsi Will.*

That the words in cls. (9) and (10) imported a gift to the sons of the right of residence and maintenance for themselves and their wives and families along with such servants as were required.

Semble :—*Secs. 99, 100 and 101 of the Succession Act might give rise to difficulty if the claim was made on behalf of a widow and family who have survived a son.*

That secs. 100, 101 and 102 of the Act being applicable to persons subject to a variety of systems of jurisprudence must be construed according to the generally current meaning of the words used and apart from such technical considerations as are only appropriate in the law of England.

That the limitations in cls. 11 to 13 contravened the provisions of sec. 100, as the bequests to the sons, daughters, widows and issue of the testator's sons did not in all possible instances dispose of the subject-matter to which they applied and so failed to comprise the whole of the remaining interest of the testator, cls. 15 and 16 of the Will moreover providing for forfeiture of the interest of the unborn beneficiaries in certain contingencies.

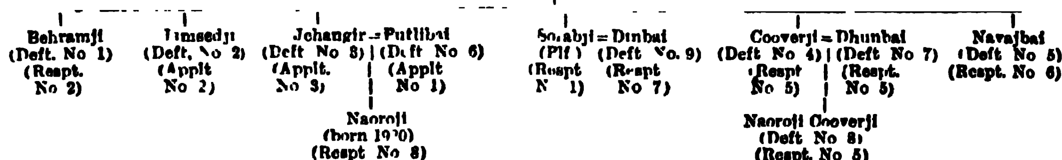
That the postponement of the residue for ten years or until the death of the surviving son was inoperative, the interest to which this direction was attached being absolute.

This was an appeal against the decree of the High Court of Judicature at Bombay in its Appellate Jurisdiction, dated the 8th April 1920 which slightly varied a decree of the same Court in its Original Jurisdiction, dated the 14th March 1919.

The suit was brought by the first Respondent for the construction of the Will of his father Naoroji Jehangir Gamadia and for the administration of his estate.

The parties are Parsis and their relationship is shown by the following pedigree :-

NAOROJI JEHANGIR GAMADIA (d 1916)



The testator died at Bombay on the 21st July 1916 leaving five sons and one daughter all of full age and all unmarried, but three of his sons (Appellants Nos. 2 and 3 and Respondent No. 2) married since the testator's death. By his Will, dated the 8th March 1915, he appointed three of his sons, *viz.*, Behramji (4th Respondent), Jamsedji (2nd Appellant), and Jehangirji (3rd Appellant) as his exe-

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

cutors and trustees. The present appeal was preferred by the wife of Jehangirji and by an Order in Council, dated the 27th day of March 1923 special leave was given to Jamsedji and Jehangirji to join as co-Appellants.

The clauses of the said Will which are material to this report and upon which the decision of the Courts below was sought were the 9th to the 16th and they were as follows :—

"9. I devise the bungalow in which I reside at Mahalaxmi and my house No. 56 in Homjee Street Fort together with all furniture articles of domestic or personal use or ornaments and all other chattels and effects including all horses carriages with the exception of moneys and securities for money which shall be in or about the said respective permises at the date of my death (hereinafter called the said furniture and effects) to my said executors upon trust to permit my daughter during her life and until her death or marriage whichever shall first happen and also my sons and also their respective families during as well as after the respective life-time of such respective sons including the widows of any of my male lineal descendants to occupy the said premises and make use of the said furniture and effects free of rent during their respective life-time and until the youngest of my grandsons living at the death of the last survivor of my sons shall attain the age of 18 years and from and after such youngest of my grandsons as aforesaid shall attain the age of 18 years to sell realise and convert the same into money and divide the sale proceeds after deducting all expenses among such persons as shall be entitled to the proceeds of my other Bombay properties under the directions in that behalf contained in cls. 11, 12 and 13 hereof: Provided always and hereby direct that the right of residence hereby granted to every member of the family as aforesaid is strictly personal and will entitle such member personally to right of residence and use of the furniture and effects but that such right shall not entitle any member entitled thereto to transfer or alienate the same to any other person not entitled thereto and that such right of residence of any member entitled thereto shall forthwith cease and determine and become void if he or she shall attempt to transfer alienate or encumber the same or if the legal effect or consequence whereof shall be such transfer: Provided always and I hereby direct that if any of my sons entitled to the right of residence under this clause shall marry any daughter or grand-daughter by son of Ardeshir Hormasji Wadia or cease to profess the Zorastrian Faith or become a convert or shall marry a person not professing the Zorastrian Faith or not born of Parsi parents professing Zorastrian Faith then in any of such cases the trust in favour of such person and his family for the right of residence or the use of furniture herein contained shall forthwith cease and determine and become void and that such person or his wife (not professing the Zorastrian Faith or not born of Parsi parents aforesaid) or issue by such wife shall not be entitled to the benefit of such right of residence or the use of such furniture: Provided further and I hereby further direct that any female descendant of mine entitled to reside in the said premises and use the said furniture shall subject as aforesaid be entitled to do so so long only as she shall be unmarried and that on her marriage the right to reside in the premises and use the furniture shall absolutely cease and determine: Provided further and I hereby authorise my trustees with full power to add to or make

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

improvements in and upon the said premises or to erect one or more separate houses or bungalows in the compound of the said premises and purchase additional furniture and articles for domestic use including horses carriages and motors for additional accommodation of the beneficiaries entitled to a right of residence in the said premises and for that purpose to expend moneys out of the corpus of any of my estate the trustees may in their discretion consider available therefor.

"10. I further devise all my immoveable properties in Bombay (including my Mahalaxmi bungalow and Homjee Street House mentioned in cls. 8 and 9 hereof but the same subject to the trusts by the said clauses directed) hereinafter referred to as the Bombay properties to my said executors upon trust to collect and get in the income thereof or such part thereof as may be tenanted and after defraying all charges for repairs taxes maintenance improvements and laying out of the said premises to expend the balance for the maintenance and upkeep of all such my children and their respective families entitled to the right of residence under cl. 9 hereof as shall reside in the said premises reserved for their residence until the expiration of 10 years from my death or until the death of my last surviving son whichever shall first happen.

"11. I direct that from and after the expiration of the said 10 years from my death or from and after the death of my last surviving son whichever shall first happen the trustees shall divide my Bombay properties (but the said Mahalaxmi bungalow and Homjee Street house subject to the right of residence therein granted) or the sale proceeds thereof and the investments for the time being representing the same into five equal shares or parts and hold such share as that of each such son upon trust to pay the income of each such share to such son until his death and from and after the death of each son or if he shall have died previously to pay the same to such persons as shall be presumptively entitled to the corpus under the provisions in that behalf hereinafter contained until the death of my last surviving son and from and after the death of my last surviving son to hold each of such shares upon such trusts as such son may have pursuant to the power in that behalf hereinafter given in cl. 12 hereof directed.

"12. I hereby authorise every son of mine whose interests shall not have ceased under cl. 16 hereof to dispose of by Will or deed upon such trusts and upon such conditions with such restrictions powers and provisions as he may think fit but subject to the proportion of shares and order of priority hereinafter provided and subject to cls. 15 and 16 hereof in favour of his issue widow or next-of-kin the share which shall be treated as allotted to him as aforesaid provided that he shall exercise such power in manner following that is to say if he shall have a son or sons or a lineal descendant of a son or sons not debarred under cl. 16 hereof then in favour of such son or sons or lineal descendant or descendants only and if more than one in equal shares *per stirpes* to the exclusion of his widow and daughters and issue if any of every daughter but if he shall have no son or descendant of a son then in favour of his widow and daughter or daughters or lineal descendant of a daughter if any but so nevertheless that the widow shall not be given more than what she would be entitled to in case of intestate succession nor more than half of the whole of the share of the son if her share according to the intestate succession amongst Parsis shall exceed half of

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

such share and in the case of the daughters and lineal descendants of daughters or any of them being more than one then in equal shares *per stirpes* and that so long as any son shall have left a lineal descendant male or female the power hereby given shall not be exercised in favour of any other next-of-kin and that such son shall also have power to exclude the widow whether there shall be any issue of his or not.

"13. And I direct that in default of exercise of such power and in so far as such power shall not extend or the trusts created thereby shall fail or determine then subject to the exercise of such power I direct that my trustees shall hold the share of such son of mine upon the trusts following that is to say if any son shall have left a son or sons or issue of any predeceased son living at the death of the last survivor of my sons and whether he shall have left the widow and daughters or a daughter and issue of any predeceased daughter or a widow alone or a daughter or daughters or issue of any predeceased daughter or any of them living at the time aforesaid or not the trustees shall divide such share of my son to the exclusion of the widow and daughters or daughter or issue of any predeceased daughter and all and every of them amongst all the sons of my son and the issue of any predeceased son of my son in equal shares such issue taking by substitution *per stirpes* according to the law for intestate succession among the Parsis the share which their his or her father would have taken if alive at that date and if there shall be only one son the trustees shall pay the whole of such share to such son alone to such exclusion as aforesaid. But if any son of mine shall have left no son or issue of such son of my son but shall have left a widow with daughters or a daughter only and issue of any predeceased daughter or any of them then the trustees shall divide such share between the widow and the daughters or a daughter and the issue of any predeceased daughter in manner following that is to say if there shall be a widow and more than one daughter or a daughter and descendants of one or more than one daughter the trustees shall divide the share of such deceased son amongst the widow and daughter or daughters and the issue of predeceased daughter or daughters if any so that the widow of my deceased son shall be entitled to double the share of a daughter and the issue of any predeceased daughter shall take by substitution *per stirpes* the share which their his or her mother would have taken had she been alive at that date or if there shall be only a widow with one daughter only or the issue of one predeceased daughter only then the trustees shall pay one moiety of the share to the widow and shall pay the remaining moiety to such one daughter or divide the same equally between the issue of the predeceased daughter and if my son shall have left no son or issue of any son nor a widow but shall have left only daughters or a daughter alone and the issue of any predeceased daughter or daughters or only the issue of one or more predeceased daughter or daughters or any of them then my trustees shall divide the whole of such share amongst such daughter or daughters and the issue of any predeceased daughter or daughters or the issue of such predeceased daughter or daughters as the case may be in equal shares such issue of a predeceased daughter taking by substitution *per stirpes* the share which their his or her mother would have taken had she been alive at that date and if there shall be only one daughter or issue of one predeceased daughter only the trustees shall

PUTLIBAI *v.* SORABJI NAOROJI GAMADIA.

pay the whole of such share to such daughter or divide the same equally amongst the issue of the predeceased daughter and if my son shall have left no son or any issue of any son nor any daughter or issue of any daughter but shall have left only a widow then the trustees shall pay to such widow one quarter of the share and the three quarters shall be added to the remaining shares of my sons.

"14. I devise and bequeath all the rest and residue of my moveable and immoveable property whatsoever unto my said executors upon trust to convert the same or such part thereof as may be necessary into money for payment thereout of my funeral and testamentary expenses and my just debts including those if any the recovery whereof may have been barred by the law of limitation and the legacies hereby or by any codicil hereto bequeathed and divide the residue or the sale proceeds thereof and the sale proceeds of such part thereof as may have been sold or converted and form part of such residue into five equal parts and pay one of such equal parts to each of my said sons for his absolute use and benefit: Provided always that my said trustees shall not be bound to sell the said property for a period of 10 years and shall in the meantime be entitled to carry on my business with full powers as if they were absolute owners thereof and without being responsible for any losses.

"15. Provided always and I declare that in case any person beneficially entitled to any share or interest in the income or corpus of my estate (hereinafter called the said interest) shall at any time alienate or charge or attempt to alienate or charge the said interest in the said trust premises or any part thereof or in case any reason of his or her bankruptcy by or any other event (whether happening before or after my decease) the said interest or any part thereof shall or but for this provision would belong to or become vested in some other person or persons or if one or more decree or decrees shall be passed against any such beneficiary for a sum exceeding rupees twenty-five thousand (Rs. 25,000) or if he or she shall become indebted in any sum or sums exceeding at any one time rupees twenty-five thousand (Rs. 25,000) then the trusts hereinbefore in the several clauses hereof contained for payment of the said interest whether in the income or the corpus to such beneficiary shall immediately thereupon cease and become void. And in the event of such interest being a share in the income of any of the trust premises or trust funds may during the residue of his or her life pay and apply such income or any part thereof in their absolute discretion unto or for the maintenance support or benefit of all or any to the exclusion of the others or other of the following objects namely. In the event of any such beneficiary being male *such male* and his wife if any and children or child or remoter issue for the time being in existence and in the event of such beneficiary being a female such female *and her husband* (if any) and children or child or remoter issue for the time being in existence in such share and manner as the said trustees may think fit and in case and so long as there shall be a want of such objects other than such beneficiary then unto or for the maintenance and support or benefit of all or any to the exclusion of the others or other of the following objects namely the said beneficiary and the person or persons to whom or for whose benefit the said income would for the time being be payable or applicable if the said beneficiary were then dead in such shares and manner as my trustees may think fit. And after the

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

death of the said beneficiary and the determination or failure of the life interest of such beneficiary and subject to the discretionary trust or power lastly hereinbefore contained my trustees shall hold the said share of the income upon trust for the persons who would have become entitled thereto under the provisions in that behalf contained in this my Will and in the event of such interest being a share in the corpus of my estate (hereinafter called the share in the corpus) the trustees shall hold the share in the corpus in trust for such persons who would become entitled thereto on the death of such beneficiary under the provisions in that behalf contained in this my Will subject to this and the next clauses hereof: Provided always that if any beneficiary under these presents shall be unmarried at the time of determination of his or her interest under this clause but shall marry after the determination of such interest then and in that event and so often as she or he shall marry the interest reserved for the benefit of his or her wife or her husband under this clause shall come into existence in the same manner as if he or she had been married at the time of such determination of such interest.

"16. Provided further and I further direct that if any beneficiary beneficially entitled to any share or interest in the income or corpus of my estate (hereinafter called the said interest) shall cease to profess the Zorastrian Faith or become a convert or shall marry a person not professing the Zorastrian Faith or not born of Parsi parents professing the Zorastrian Faith then on the happening of any of such events the right of the beneficiary to the said interest whether in the income or the corpus shall forthwith cease and determine and become void as if she or he had died on the happening of such event and the trustees shall hold such interest in trust for such person or persons as shall be entitled to the interest on the death of such beneficiary subject to this and the last preceding clause hereof."

On the death of the testator probate of his Will was granted to the executors named therein and they have purported to administer his estate.

On the 22nd March 1918 the Plaintiff instituted the present suit and prayed for the Will to be construed by the Court, and for a declaration that, subject to the provision for maintenance and residence of the testator's daughter (4th Respondent) and to provision being made for carrying out specific bequests the whole of the estate of the testator had become presently divisible between the sons of the testator. He further prayed that the rights and interests of the Plaintiff and Defendants in the estate might be ascertained and declared, and that the Plaintiff's share might be made over to him.

The Plaintiff whose contentions in his plaint were supported in their written statements by the 3rd, 5th and 7th Respondents submitted that the trusts created by cls. 9, 10, 11, 12 and 13 of the Will and the proviso postponing distribution for 10 years were void and inoperative. Defendants Nos. 1, 2, 3, 5 and 6 filed a joint written statement submitting that the trusts in favour of persons other than the sons and daughter of the testator were valid and that administration of the estate by the Court was unnecessary. Defendants Nos. 1, 2 and 3 also filed a separate written statement in their capacity as trustees.

The suit came for trial before Macleod, J., and the following issues were framed:—

(1) Whether the right of residence bequeathed by cl. 9 was valid except with

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

reference to the sons and daughter of the testator.

(2) Whether cl. 10 was operative or valid except as regards the sons and daughter of the testator.

(3) Whether the provisions in cls. 10 and 14 postponing the division of the Bombay properties for ten years or until the death of the last surviving sons were valid.

(4) Whether the power of appointment given by cl. 12 of the Will was validly created.

(5) Whether there was any possible appointee who would be appointed under the said power to take a valid interest in the estate.

(6) Whether cl. 13 was valid and operative.

(7) Whether cls. 15 and 16 were not valid.

(8) Whether on the true construction of the Will the five sons of the testator were not entitled to have the residue of the estate divided between them subject to provisions being made for the residence and maintenance of the daughter of the testator.

On the 14th March 1919, judgment was delivered by the learned Judge who decided the above questions as follows:—

(1) and (2). The gift of a residence to the members of the family was not a gift, to a class and as there were no grandchildren in existence at the death of the testator the bequest in their favour was void under sec. 99 of Act X of 1865.

(3). The effect of these clauses was to direct an accumulation of income and was invalid.

(4) and (5). The testator gave a power to his sons to appoint in favour of persons unborn at his death with the condition that the interests of any appointee should cease on the happening of anyone of certain named events. The appointees therefore would not take the remaining interest of the testator in the thing bequeathed and it follows that the power of appointment could not be validly exercised.

(6). Invalid.

(7). Valid.

(8). The residuary estate was now divisible among the five sons subject to provision being made for the residence and maintenance of the testator's daughter and a decree was passed accordingly.

From this decree an appeal was preferred by the 2nd and 3rd Defendants in their personal capacity.

The appeal came on for hearing before a Division Bench of the High Court consisting of Heaton, Acting C. J. and Marten, J., and in the course of argument terms were agreed on by Counsel representing the parties before the Court.

These terms were communicated to the Court which intimated that they would be certified as for the benefit of the minor and ordered a draft consent decree to be drawn up and submitted for approval.

On the 19th September 1919 an application was made by the Plaintiff for approval of the draft minutes of the decree. On the 7th October 1919 Defendant No. 2 asked for a declaration that the consent terms were not binding on him and on the 9th October 1919 the 2nd and 3rd Defendants also applied for exclusion from the proposed decree.

The three applications were heard together before the same two Judges who delivered judgment on the 8th April 1920.

They held that although Counsel for the 1st Defendant had consented to the terms of compromise he had apparently done so under a misapprehension of fact and such consent was not binding, and that Defendant No. 9 though represented

PUTLIBAI *v.* SORABJI NAOROJI GAMADIA.

by the same solicitors as her husband was not represented by separate Counsel and they decided that the agreement was not enforceable. They accordingly allowed the 1st Defendant's application, dismissed the other two and ordered the appeal to be re-heard.

At such re-hearing a further judgment was delivered on the 8th April 1920. The learned Judges agreed substantially with the findings of the first Court on the issues in the case and held that, cl. 9 must be confined to the daughter and five sons: the limitations intended to take effect under cls. 11, 12 and 13 after the death of each son are all void and the reversionary interests expectant on the determination of each such life estate formed part of the residuary estate of the testator.

The proviso in cl. 14 postponing the sale of the properties for 10 years was void as being repugnant to the absolute estate given to the five sons in the residue, and in the events that had happened cls. 15 and 16 could no longer apply to the absolute interests given by cl. 14.

The present appeal was preferred by Defendant No. 6, the wife of one of the executors, but by an order in Council, dated the 27th day of March 1923 Defendants Nos. 2 and 3 were ordered to be struck out as Defendants and added as co-Appellants.

Messrs. Upjohn, K. C. and *E. B. Raikes* for the Appellants.—The gift under cl. 9 is not a class gift; it is a gift to the sons who in an Oriental community are representative of the whole family. The family as contemplated by the testator was a family beginning with his son and going on to his grandson.

The words "strictly personal" are merely in reference to the provision against alienation. Sec. 99 of the Succession Act does not apply; the gift is not to a person but to the family as represented by that person.

The limitations contained in cls. 11 to 16 cannot be construed until the events contemplated occur. *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1) and *Narendra Nath Sircar* v. *Kamalbasini Dasi* (2).

Cls. 15 and 16 are void under sec. 101, Indian Succession Act; sec. 100 applies and these clauses cannot defeat cls. 11, 12 and 13.

Nor is sec. 100 applicable. The whole interest has been given to the trustees and it is immaterial how it is divided up.

In Ill. (*c*) to sec. 101 there is a possible period when the fee is in the air; that shows that if events happen during the period allowed by sec. 101, sec. 100 is not applicable.

The law of *Doe d. Blomfield* v. *Eyre* (3) relied on by the lower Court has been excluded by sec. 100 of the Succession Act.

Sir John Simon, K. C. and *Mr. J. G. Wood* for the Respondents Nos. 1 and 9.—Cl. 9 contemplates three categories, the testator's (1) daughter, (2) son and (3) family and each is separately provided for.

Limitations to others than the sons are void under sec. 99.

Cls. 15 and 16 are valid, and the limitations contained in them destroy those in cls. 11, 12, 13, because they fetter the "remaining interest of the testator" and the whole remaining interest is not bequeathed and is void under sec. 100.

It is not premature to decide the question of construction because present rights are affected by it.

(1) L. R. 24 I. A. 76 at p. 90; s. c. 1 C. W. N. 387 (1897).

(2) L. R. 23 I. A. 18: s. c. I. L. R. 23 Cal. 563 (1896).

(3) 5 C. B. 713 (1848).

PUTLIBAI *v.* SORABJI NAOROJI GAMADIA.

Hampton v. *Holman* (4) and *In re Staples* (5).

Messrs. L. DeGruyther, K. C. and *G. D. McNair* for the Respondents Nos 3 and 5 contended that the right of residence was confined to the sons and their families and that the provisions of cls. 11, 12 and 13 of the Will were void under sec. 100 of the Indian Succession Act. So long as there is any possibility of defeasance the beneficiary does not hold the estate in the same unfettered manner as the testator and does not receive the whole of the remaining interest in the thing bequeathed.

Mr. E. B. Raikes replied.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE. This is an appeal from a decree, made on the 8th April 1920, of the High Court at Bombay, in its appellate capacity, affirming with variations a decree dated the 11th March 1919, of Macleod, J., the Judge of first instance. The questions decided arose in a suit for the construction and administration of the trusts of the Will of the late Naoroji Jehangir Gamadia, who left a large estate, mainly in Bombay. The chief questions which their Lordships have to decide are whether certain provisions made by the Will for persons other than the testator's sons and daughters, relating to residential property, are valid, and whether other and more general dispositions also made by the Will can be treated as effective

The Courts below have decided that all the dispositions referred to, with certain limited exceptions, are invalid, and that consequently the property is now presently divisible between the testator's sons equally under a gift of the residuary estate, but subject for a limited period to a right of maintenance out of the income of such persons as during that period may be entitled to the benefit of such of the excepted dispositions of residential property as have been found to be valid.

The suit was originally brought by the first Respondent against the Respondents Nos. 4, 2, 3, 5 and 6, and the present Appellant. The Respondents Nos. 7, 8 and 9 were added as Defendants by order. The Respondent No 10 is a child of the first Appellant, and was added as a Defendant during the proceedings in the Appellate Court below.

The first Appellant is the daughter-in-law, and the second and third Appellants are sons of the testator, who left in addition, three other sons and a daughter, who are Respondents The second and third Appellants were Defendants to the suit, and by an Order in Council of the 27th March 1923, were ordered to be added as co-Appellants.

By the Will the testator, after declaring certain charitable trusts of a house in Bombay, as to which no question now arises, disposed by cl 9 of other houses in Bombay described as the Mahalaxmi Bungalow and 56 Hornjee Street, along with certain furniture and other effects :—

"upon trust to permit my daughter during her life and until her death or marriage whichever shall first happen, and also all my sons and also their respective families during as well as after the respective lifetime of such respective sons, including the widows of any of my male lineal descendants to occupy the said premises and make use of the said furniture and effects free of rent during their respective lifetime and until the youngest of my grandsons living at the death of the last survivor of my sons shall attain the age of 18 years and from and after such youngest of my grandsons as aforesaid shall attain the age of 18 years to sell, realise and convert the same into money

(4) 5 Ch Div 183 at p 187 (1877).
(5) [1916] 1 Ch. 322 at p 326.

PUTLIBAI *v.* SORABJI NAOROJI GAMADIA.

and divide the sale proceeds after deducting all expenses among such persons as shall be entitled to the proceeds of my other Bombay properties under the directions in that behalf contained in cls 11, 12 and 13 hereof, provided always and I hereby direct that the right of residence hereby granted to every member of the family as aforesaid is strictly personal and will entitle such member personally to right of residence and use of the furniture and effects, but that such rights shall not entitle any member entitled thereto to transfer or alienate the same."

There then followed provisos that on any attempted alienation or transfer the right should cease, and also provisions directing that in case of any son marrying a daughter or son's daughter of a certain person or ceasing to profess the Zoroastrian faith or marrying a person who would not profess that faith or was not born of Parsi parents professing the faith, "then and in any such case the trust in favour of such person and his family for the right of residence and use of furniture herein contained shall forthwith cease and determine and become void."

By cl. 10 the immovable properties in Bombay, including the bungalow and the Homjee Street houses, subject to the trusts affecting them already mentioned, were devised on trust to expend the net income for the maintenance and upkeep of all such of his children and their respective families entitled to the right of residence under cl. 9 as should reside in the premises there reserved for their residence, until the expiration of ten years from his death or until the death of his last surviving son, whichever should first happen.

It is on these two clauses that the first question to be decided arises. It will, however, be convenient before further reference to this question, to set out so much of the rest of the Will as is required for the decision of the other questions.

Cl. 11 directed that on the expiration of the first ten years from the testator's death, or from and after the death of his last surviving son, whichever shall first happen, the trustees should divide the Bombay properties (but the Mahalaxmi Bungalow and the Homjee Street House subject to the right of residence therein granted), or the sale proceeds thereof, and the investments for the time being representing the same into five equal shares, and should hold each such share as that of each such son upon trust to pay the income of each such share to such son until his death, and from and after the death of each son, or, if he should have died previously to pay the same to such persons as should be presumptively entitled to the corpus under the provisions in that behalf thereinafter contained, until the death of his last surviving son, and from and after the death of the last surviving son to hold each of such shares upon such trusts as such son might have pursuant to the power in that behalf thereinafter given in cl. 12 directed.

Cl. 12 authorised every son whose interest should not have ceased under cl. 16 to dispose by Will or deed upon such trusts and upon such conditions with such restrictions, powers and provisions as he might think fit, but subject to the proportion of shares and order of priority thereinafter provided and subject to cls. 15 and 16 in favour of his issue, widow or next-of-kin, of the share which should be treated as allotted to him as aforesaid, provided that he should exercise the power in the manner following :—

(1) If the son had sons or lineal descendants of sons, then in their favour only.

(2) In default of these, in favour of his widow and daughters or lineal descendants of daughters.

(3) Only in default of any lineal descen-

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

dants, male or female, in favour of any other next-of-kin.

Cl. 13 directed that, in default of the exercise of the power so given, each son's share should devolve on his sons or their issue *per stirpes*, and failing such sons or issue, on his sons' widows and daughters, or the issue of the latter. In the event of failure of sons and daughters and their issue the widow of any son was to take one-fourth of his share, and the testator's remaining sons were to have the remaining three-fourths added to their shares.

Cl. 14 devised the residue of the testator's property to the executors upon trust to convert for payment of funeral and testamentary expenses, debts, and legacies, and to divide the balance into five equal parts, and to pay one part to each of his sons for his absolute use with a proviso that the trustees should not be bound to sell for ten years, and should in the meantime be entitled to carry on the business of the testator.

Cl. 15 directed that in case any person beneficially entitled to any share in the income or corpus of the estate should (1) alienate or charge his interest; or (2) become bankrupt; or (3) should have decree passed against him for over Rs. 25,000; or (4) should become indebted in any sum or sums exceeding Rs. 25,000, his interest should thereupon cease and become void, and it was directed how such interest should be applied according as it was a share in the income or in the corpus.

Cl. 16 directed that if any beneficiary should cease to profess the Zoroastrian faith, or become a covert, or marry a person not born of Parsi parents, his interest should forthwith cease and become void as if he or she had died, and the trustees should hold such interest in trust for such persons or person as should be entitled to it on the death of such beneficiary but subjest to the provisions of cls. 15 and 16.

The questions raised in this appeal fall under two heads. The first relates to the persons entitled to the rights of residence given by cl. 9. The second is concerned with whether the five sons of the testator to whom he has given his residuary estate have become entitled to have it divided among them at once, provision being made only for the maintenance and residence of the testator's daughter, the right to such an immediate division being based on the invalidity of the limitations and powers in cls. 11 to 16, inclusive.

The case was elaborately argued in the Courts of Bombay, first before Macleod, J., and afterwards before the High Court at Bombay in its Appellate jurisdiction, Heaton, Acting C. J., and Marten, J., being the Judges. In the Court of Appeal there were two hearings, the first of which resulted in a judgment mainly concerned with procedure and ending with a direction for a re-hearing to be concerned with the merits. The re-hearing took place in the spring of 1920. The outcome was that the decision of Macleod, J., was, so far as the substance was concerned, affirmed, but for somewhat different reasons, and with declarations which differed in form from those made by him.

The learned Judges in both Courts below delivered opinions characterised by much knowledge and consideration and from the work put into those judgments their Lordships have derived much assistance. If they have arrived at conclusions on certain points divergent from those reached below, it is not from want of appreciation of the weight attaching to the views there expressed.

Turning, in the first place, to the points raised on the construction of cls. 9 and 10, these are whether the rights of residence

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

and maintenance under these clauses extend to anyone excepting the sons and daughter of the testator. So far as the question is one of more than mere construction account must be taken of the provisions in the Indian Succession Act, under which, by sec. 100, "where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in his Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed." Sec. 101 of the Act invalidates any bequest whereby the vesting of the thing bequeathed may be delayed beyond the life of a person living at the testator's death, and the minority of some person to be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. Sec. 102 provides that if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules in the two preceding sections or either of them, such bequest is void.

The rules just quoted constitute the law of British India applicable to succession to the property of everyone except Hindus, Mohammadans or Buddhists. They are, therefore, applicable to those subject to a variety of systems of jurisprudence, and must therefore be construed according to the generally current meaning of the words used and apart from such technical considerations as are only appropriate in the law of England. The Will in the present case was that of a Parsi, and although the principle of joint family may not apply to a Parsi with the rigidity with which it applies, for example, in the case of a Hindu, still the conception of joint family rights which is common in Oriental countries ought not, in their Lordships' opinion, to be left wholly out of sight in interpreting the words of a Parsi such as the author of the Will before them. When, therefore, the question arises as to the meaning of the direction in cl. 9 to the executors to permit occupation to the daughter until death or marriage, and to all the sons and also all their respective families, during as well as after the respective life-times of the sons, including the widows of the testator's lineal male descendants the testator ought to be contemplated as having before his mind the family arrangements which would be natural in the case of his own sons. As to the daughter no question arises. No reference is made to a family in her case, and it may well be that she could not properly claim a right to bring in husband and family if she had them. But in the cases of the sons their Lordships think that on the true construction of the words the title conferred on them to occupy extended to occupation along with their wives and families. The question is one purely of intention as shown by the particular words used in this Will, and their Lordships think that so regarded the words give the right to the sons themselves, and that it is only through them that it extends to those they would naturally bring in for the purposes of occupation. Servants must be included on more general grounds. Even the daughter must be entitled if she resides to have a cook and the servants necessary for a household. But, while in her case it is not natural in the same way that she should bring with her a family of which she is not the head, in the cases of the sons they may have such families and be bound by religion as well as law to have these resident with them. The individual right of occupation is, therefore, although made strictly personal by the proviso to the clause, one which, while given

PUTLIBAI *v.* SORABJI NAOROJI GAMADIA.

to the sons themselves, is of this character. The expression "personal" in the proviso signifies, in the light of the words prohibiting alienation which follow, merely that the testator desired to prohibit attempts at alienation of a son's title. As the sons are all alive, no question so far arises as to the title to reside which can be claimed for the widows or families of deceased sons.

Their Lordships therefore abstain from expressing an opinion on the title in such circumstances. They desire merely to point out that secs. 99, 100 and 101 may give rise to difficulty in the claim of a widow and family who have survived a son. It is not clear that the whole of the testator's interest in the thing bequeathed was comprised in the bequest in such a case in their favour. All that is decided on this occasion is that the words used import a gift to the sons of the right to occupy for themselves and their wives and families, along with such servants as are required. The Appellant, Putlibai, is the wife of the Appellant, Jehangir, and it is clear on this construction that she ought to be allowed to occupy along with her husband who supports her claim, if he desires it. But the title is in law that of Jehangir, the husband, and not hers. It does not, however, appear that serious additional expense has been incurred through her having joined with her husband in this appeal, and the course taken has its convenience from the point of view of the Courts. What has now been said disposes also of the analogous question raised under cl. 10 as to the persons entitled to the maintenance allowances provided by that clause.

As to the other questions raised in the appeal their Lordships have arrived at substantially the same results as the learned Judges in the Courts below. They think that, subject to provision being made for the valid bequests as to which no question arises, and for giving effect to the rights of occupation and maintenance just considered, the five sons of the testator have a present title to have the residue of the testator's estate divided between them. The Will by cl. 11 directs that at the expiration of ten years, or after the death of the last surviving son, whichever should first happen, the Bombay properties and their proceeds (subject to the rights of residence already referred to), are to be divided into five shares, of which one is to go to each son. But he is to have a life interest only. If he dies, the persons presumptively entitled to the corpus under subsequent provisions are to have the income until the death of the last survivor of the five sons. Then, by cl. 12 each son may by deed or Will appoint in favour of his own sons or their lineal descendants, and on failure of such issue then in favour of his widow and daughters or their lineal descendants. By cl. 13, in default of the exercise of this power, the share of each son, if he has left a son or issue of such son living at the death of the last survivor of the testator's sons, is to be held for the sons of such son and the issue of his predeceased sons *per stirpes*, and if the son of the testator has left no such son or issue then for his widow and daughters and the issue of predeceased daughters.

Their Lordships concur in the view expressed in the judgments of the Court of Appeal that these limitations contravene the provisions of sec. 100. The bequests to the sons, daughters, widows and issue of the tetator's sons thus made do not in all possible instances dispose of the subject-matter to which they apply, and so fail to comprise the whole of the remaining interest of the testator. It is obvious that

PUTLIBAI v. SORABJI NAOROJI GAMADIA.

he has reserved contingent rights which might well prove to be of value. The unborn beneficiaries do not take the whole interest undisposed of by reason of the title of his own sons being only for their lives. But the difficulties are not exhausted by these considerations. Cl. 15 gives over the share in income or corpus alike of any beneficiary who alienates, in any of a number of ways, and in that event creates a discretionary trust, which may extend, so far as the income is concerned, only to a part of it, for the benefit according to selection by the trustees of some others of a class of beneficiaries somewhat wider than that of those who are to take under the clauses just referred to. The 16th clause also puts an end to the title of every beneficiary who ceases to profess, or marries anyone not professing the Zoroastrian faith, and gives the interest over in favour of those who take on the death of such beneficiary. In the face of this clause it cannot be contended successfully that sec. 100 is complied with. For the whole of the remaining interest need not pass out of the hands of the trustees if there is a forfeiture of the income of the sons of the testator.

It was argued that, even if these questions may arise, they do not arise now, and that the Court ought to have refused to decide them, in accordance with the principle that declarations are not usually made as to merely future interests. But the interests are not merely future interests. If the argument based on the invalidity of the subsequent limitations just considered is well founded, the five sons have a present title to the residue subject only to the minor provisions already referred to, which title they are now in a position to enforce.

It follows from this conclusion that in so far as there is a direction in cls. 10, 11 and 14 implying a postponement of the division of the residue for ten years, or until the death of the last surviving son, that the direction is inoperative, the interests to which it attaches being absolute.

Their Lordships think that what they have said disposes of all the questions that were argued at the Bar. The reasoning of Macleod, J., is somewhat different from that of the Court of Appeal, although the result he reached was in essentials not different. Their Lordships have not thought it necessary to express an opinion on the grounds on which Macleod, J., himself arrived at in conclusion that the five sons were presently entitled to absolute interests. But they appreciate the acuteness which guided him in the distinctions he drew, and they do not desire to be understood as differing from his mode of approaching the questions he decided merely because they have themselves adopted what seems to them the simpler argument which prevailed with the Court of Appeal.

There remains the question of the form of the decree. After putting the procedure into what seemed to them a somewhat better shape by the first judgment they delivered, the Court of Appeal declared in a final judgment, to begin with, that the right of residence given by cl. 9 to each son was strictly personal and did not entitle him to take with him his wife and children as residents. With this declaration their Lordships are unable to agree for the reasons already assigned. They are of opinion that the right is one which is given at all events to each of the sons now alive individually, and is a right which entitles each son to occupy not only by himself, but with his wife and family and such servants as he requires. A declaration to this effect must be made. As to the rest of the decree of the Court of Appeal their Lordships see no reason to disturb any part

PUTLIBAI *v.* SORABJI NAOROJI GAMADIA.

of it, and it stands affirmed. That Court dealt with the costs of the suit and of the appeal in a fashion to which their Lordships take no exception, excepting so far as concerns the direction that the Appellants and the second Respondents in the Court of Appeal should pay costs. Their costs in the Courts below must be provided for out of the estate.

As to the costs of the appeal to the Sovereign in Council, they have given to this question consideration. The litigation has been occasioned by dispositions made by a wealthy testator in contravention of the law of India. The points so raised have given rise to much difficulty and complication. The first Appellant may not strictly speaking have been entitled to sue or to bring this appeal. But her husband has joined with her in a way that gets over any serious consequences arising from this. Under these circumstances their Lordships think that the costs of all parties of this appeal as between solicitor and client should be paid out of the estate. The case will go back to the Court of first instance, with directions to vary the decree in accordance with what has been now said.

They will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Kenneth Brown, Baker & Baker* for the 1st and 9th Respondents.

Solicitors: *Messrs. Ashurst, Morris, Crisp & Co.* for the 3rd and 5th Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD BUCKMASTER.	KUMAR PRASANNA
LORD DUNEDIN.	DEB RAIKAT,
LORD CARSON.	Appellant,
SIR JOHN EDGE.	*v.*
LORD SALVESEN	UDDHAB CHANDRA
1923,	SHAHA, since
Heard, 23, April.	deceased, and ors,
Judgment, 23, April.	Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 50 (2) —Presumption arising from uniform payment of rent for 20 years, if rebutted by confirmatory kabuliyat.

The landlord relied on a kabuliyat *of a date later than the Permanent Settlement to rebut the presumption arising under sec. 50 (2) of the Bengal Tenancy Act from proof of payment by the tenant of the same rent for more than 20 years that the rent has not varied from the time of the Permanent Settlement:*

Held—*That the* kabuliyat *being a confirmatory* kabuliyat *could not be relied on for showing that a new tenancy had been created by it or that there had been a change of rent since the date of the Permanent Settlement.*

These were consolidated appeals from one judgment and 10 decrees, dated the 25th March 1919, of the High Court of Judicature at Fort William in Bengal, which affirmed the judgments and decrees made on various dates by the District Judge on appeal from the judgments and decrees of the Settlement Officer of Jalpaiguri.

The Appellant was the landlord and the Respondents were his tenants, and the main question for determination on the present appeals was—whether the rent of the several tenants was liable to enhancement, and that depended upon the true construction of the *kabu-*

KUMAR PRASANNA DEB RAIKAT *v.* UDDHAB CHANDRA SHAHA.

liyat (*i.e.*, counterpart of the lease) executed by the tenants.

The Settlement Officer in some cases held in favour of the landlord, but the District Judge and the High Court decided that the rent of the tenants was not liable to enhancement. Hence the present appeals.

The appeals arose out of a number of suits filed either by the landlord or his tenants under sec. 106 of the Bengal Tenancy Act, 1885, and the facts and circumstances of them all were practically identical. The terms of the *kabuliyat* executed by the several tenants in favour of the landlord were similar. It would be sufficient to state in detail the pleadings in only one suit, namely, Suit No. 21 of 1913, which was filed by the landlord on the 18th September 1913, in the Court of the Settlement Officer of Jalpaiguri, for a declaration that the rent of his tenant was liable to enhancement.

The material terms of the *kabuliyat* executed by the tenant in suit No. 21 of 1913 were the following:—

"You have granted an *amaldari* fixing the rent from this year at the aforesaid sum of Rs. 31 (rupees thirty-one) per annum. I, too, of my free will, having agreed to pay the said rent, submit this *kabuliyat* to the effect that I shall year by year and *kist* by *kist* pay the said rent into your office according to demands, and take *dakhilas*, etc., and continue to enjoy the profits. I shall not be allowed credit for any payment even of a single *cowri* as rent if made without any *dakhila*, I shall keep intact the limits and boundaries of the *jote* as before. I shall plant trees, but shall not cut and sell any, nor shall I excavate any large pit, etc. If I do so, I shall pay as penalty three times the value thereof. As no measurement and *jummabandi* are made now, you have given the *amaldari* at the aforesaid rent. I shall submit a fresh *kabuliyat* and take a fresh pottah at the *jumma* that may be assessed afterwards upon measurement. If I wickedly withhold payment of rent, or do not submit a *kabuliyat* at the *jumma* that may be assessed upon measurement then you shall bring the said *jote* into your *khas* possession, or let it out to another tenant and thereby make arrangement for realization of rent."

The Defendant in Suit No. 21 of 1913 pleaded that the rent of his tenancy was not liable to enhancement, and after framing the necessary issues the said Settlement Officer delivered judgment on the 1st May 1914. He held that the rent of the tenant was liable to enhancement, and concluded his finding in the following words:—

"A perusal of the recital as well as of these terms clearly points to the fact that the parties were entering into a fresh contract, and though the rent of the tenancy was left unenhanced the old contract was put by and a fresh one entered into. It cannot therefore properly be said that the tenancy in suit existed from a time previous to the date of this *kabuliyat*, *i.e.*, 9th Aswin 1274. The *kabuliyat* clearly stipulates enhancement of rent, and therefore the rent is liable to enhancement."

The Defendant appealed from the above decision to the District Judge of Dinajpur, who came to a contrary conclusion and allowed the tenant's appeal, observing as follows:—

"The fact that this was the first document executed between landlord and tenant concerning the *jote* does not necessarily imply the creation of a new right. It expressly provides that the rent payable shall be the same as it was before,

and the clause about the revision of the terms in accordance with the result of any future measurement does not introduce a new element or a condition which could not have been enforced against the former tenant, if there had been no sale. But this is the stipulation which I presume the learned lower Court was referring to when it said that this *kabuliyat* clearly stipulates for enhancement of rent. I think that it only stipulates for an enhancement of rent in the event of the area being found to be more than the estimated area."

After the decision of the said District Judge in Suit No. 21 of 1913, the Settlement Officer held in the other suits that the rent of the several tenants was not liable to enhancement, and his judgment was affirmed on appeal by the District Judge.

The landlord appealed from the decrees made against him in the several suits by the District Judge to the High Court of Judicature at Fort William in Bengal which heard all the appeals together and delivered one judgment on the 25th March 1919.

The learned Judges of the High Court affirmed the decision of the District Judge in terms following :—

"We think that the learned District Judge was right in holding that the *kabuliyat* did not stipulate for the enhancement of rent except in the event of the area being found on measurement to be in excess of what was then estimated To use the words of the Court in the case of *Bisheswar Roy Chowdhury* v. *Rajendra Kumar Singh* (1), 'the document is the recognition of a previously existing interest and not the creation of a new one.' It is noticeable that the rent has, in fact, remained unchanged throughout."

(1) 18 C. W. N. 949 (1914)

In the result the High Court made decrees dismissing the appeals of the landlord with costs, and he preferred these appeals from those decrees to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and *Dubé* for the Appellant *ex parte* contended that, upon the true construction of the *kabuliyat*, the presumption raised by sec. 50, sub-sec. 2 of the Bengal Tenancy Act, 1885, was rebutted and the rent of the tenants was liable to enhancement.

They referred to *Upendra Krishna Mandal* v. *Jomail Khan Mahomed* (2) and *Nabakumari Debi* v. *Behari Lal Sen* (3).

Their LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—Their Lordships see no reason for the further consideration of this case. The whole question for determination is whether or no there has been proved in the suits which have ended in these appeals anything which will rebut the presumption established by sec. 50, sub-sec. 2 of the Bengal Tenancy Act, 1885. That presumption is stated to follow from these conditions, that :—

"If it is proved in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement."

The evidence upon which the Appellant relies is to be found in the form of the *kabuliyat* under which the Respon-

(2) L. R. 31 I. A. 144: s. c. I. L. R. 32 Cal. 41; 8 C. W. N. 889 (1904).

(3) L. R. 34 I. A. 160: s. c. I. L. R. 34 Cal. 902; 11 C. W. N. 865 (1907).

KUMAR PRASANNA DEB RAIKAT *v.* UDDHAB CHANDRA SHAHA.

dents held their title. This has been the subject of consideration by the High Court and by many Judges in the various suits. The real question upon the face of that *kabuliyat* is whether it shows that there has been a new tenancy then created, or whether it is executed in reliance upon a pre-existing tenure.

Their Lordships have considered the document carefully, and they see no reason whatever to differ from the views expressed in the Courts through which this case has proceeded that the *kabuliyat* undoubtedly proceeds upon the basis that there were pre-existing rights, and consequently it cannot be relied upon for the purpose of showing that there has been a change in the rent since the date of the Permanent Settlement.

For this reason their Lordships will humbly advise His Majesty that these appeals should be dismissed. As the Respondents have not appeared, there will be no order as to costs.

Solicitors: *Messrs. Watkins & Hunter* for the Appellant.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 3379 OF 1921.

BUCKLAND, J. 1924, 8, January.

SARUPCHAND HUKUMCHAND *v.* MADHORAM RAGHUMALL.

Rules of the High Court, Original Side, Chap. X, Rule 36—Jurisdiction of the Court to vacate an order for dismissal before it is perfected—Cases referred to arbitration, appearing in the special list, jurisdiction of the Court to make order in—Matters referred to arbitration, parties to be diligent in.

The principle that where an order has not been perfected, the Judge has power to reconsider the matter applies equally well to an order of dismissal for default under Chap. X, r. 36, Rules of the High Court in its Original Jurisdiction. But the jurisdiction comes to an end once the order is completed.

IN RE SUFFIELD AND WATTS (1) *followed.*

SCRIPT PHONOGRAPHY CO., LTD. *v.* GREGG (2) *explained.*

It does not necessarily follow from Sch. II of Civil Procedure Code (Act V of 1908), sec. 3, sub-sec. (2) that when cases referred to arbitration appear in the special list, the arbitration cannot be superseded and such order as seems right and proper made in the suit itself.

By referring matters to arbitration under Sch. II of the Civil Procedure Code (Act V of 1908) parties may not make opportunities to delay the solution of their differences.

The facts of the case will appear from the judgment.

Mr. N. N. Sarkar and *Mr. B. C. Ghose* for the Plaintiff.

Sir Binode Mitter, Mr. H. R. Panckridge and *Mr. K. P. Khaitan* for the Defendant.

The JUDGMENT OF THE COURT was as follows —

BUCKLAND, J.—This is an application to vacate an order made on the 14th December last dismissing a suit for default under Chap. X, r. 36 of the rules of this Court in its Original Jurisdiction.

Before dealing with the facts I will refer briefly to the point taken on behalf of the Defendants that I have no jurisdiction to entertain the application on the ground that, though a Judge ordinarily may rehear and vacate an order made by him before it is drawn up and filed so as to become effective, he cannot do so with reference to an order of dismissal. The

(1) 20 Q. B. D. 693 at p. 697 (1888).
(2) 59 L. J. Ch. 416.

SARUPCHAND HUKUMCHAND v. MADHORAM RAGHUMALL.

general principle is well-established. I have been referred to *In re Suffield and Watts* (1), in which Lord Justice Fry enunciated the principle that when an order has not been perfected the Judge has power of reconsidering the matter, but once completed his jurisdiction has come to an end. I myself have already had occasion to consider the principle and apply it, and I am informed that many of my learned brethren in unreported cases have done the same. I thought there was no doubt about it, until learned Counsel contended that though the rule generally might be as stated, yet it did not apply where the suit had been dismissed. In support of this he has referred me to certain authorities, but from them it does not appear whether or not in all the order had been perfected. He therefore places greater reliance on *Script Phonography Co., Ltd.* v. *Gregg* (2). But the point which I have to consider did not arise. Mr. Justice North held that though an order had not been drawn up and served upon the Plaintiff it became operative as from the date when it was made with reference to the next step which the Plaintiff ought to have taken and which he did not take. This involves consideration of the matter from a very different standpoint. Certainly it does not, as I read the case, mean that a Judge is precluded from rehearing and vacating an order made by himself so long as it has not been drawn up or served because the order happens to be one of dismissal. In my opinion the point has no substance.

Another point has been taken by Mr. Sarcar which I think I should mention, though he does not now wish to rely upon it. He has drawn my attention to the second schedule of the Code of Civil Procedure, sec. 3, sub-sec. (2), which provides that where a matter is referred to arbitration the Court shall not, save in the manner and to the extent provided in the schedule, deal with such matter in the same suit. That would appear to preclude cases which have been referred to arbitration being dealt with when they appear on the special list. It does not necessarily follow that when they so appear the order for arbitration cannot be superseded (and that probably would be the correct course) whereupon such order as seems right and proper could be made in the suit itself. But rather than have the matter dealt with upon this basis as that would mean further delay, Mr. Sarkar is willing that I should deal with the whole matter.

He has also submitted that inasmuch as the case did in fact appear on the protective list within six months of its institution the rule under which it was dismissed cannot apply. If necessary, I should obtain a certificate from the Registrar as to this, for the parties are not in a position fully to inform me.

Coming to the merits it appears that the delay was occasioned while the matter was before the arbitrator. Facts such as those which are set out in the petition were stated at the time when the case appeared in the protective list; but they were not proved by affidavit, and consequently I was unable to pay any attention to such statements. During the period between the 17th November 1922 and the ultimate dismissal it appears that practically nothing was done. The parties agreed in April 1923 for the time for the making of the award to be extended. The Defendant says that he was ready to agree to that course, but that it was for the Plaintiff to make the necessary application which the Plaintiff failed to do.

(1) 20 Q. B. D. 693 at p. 697 (1888).
(2) 59 L. J. Ch. 416

SARUPCHAND HUKUMCHAND v. MADHORAM RAGHUMALL.

Then the arbitrator left for his native village which further delayed matters, and the Plaintiff alleges that it was agreed that the arbitration should be proceeded with after he returned. There is nothing in support of this, no documentary evidence, and the Defendants deny that any such agreement was made. There can be no doubt that the delay was considerable, also that parties whose duty it was to take steps to make the arbitration effective did not take them, and I should be very reluctant to make any order in favour of the Plaintiff were this a suit for damages only. But it is stated--and it is not denied—that as regards Rs. 1,578-1-6 the suit is actually for the price of goods sold and delivered. If that is so, I feel that it may result in injustice not to allow the suit to proceed where the Defendant has actually had goods but has not paid the price. But, nevertheless, it ought to be made clear to parties, who wish to take advantage of the second schedule to the Code of Civil Procedure and accordingly agree to refer suits to arbitration rather than have them tried by this Court, that they may not thereby make opportunities to delay the solution of their differences. Means and processes are at their disposal if the arbitrator do not proceed with diligence and it is not sufficient excuse to say that the matter has been referred to arbitration and the fault is that of the arbitrator. But for reasons stated I vacate this order and I direct that the suit be heard. The suit will appear on the warning list on Monday the 4th February. Costs costs in the cause.

S. N. B.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 2573 OF 1921

WALMSLEY, J.
SUHRAWARDY, J
1923,
21, November.

JAGABANDHU NANDI and ors., Defendants, Appellants,
v.
ABDUL HAMID MEA and ors., Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 148A—Co-sharer's suit—Plaint, whether in compliance with the section—Decree, if rent decree.

Where a co-sharer landlord's plaint in a suit for rent mentioned what was the rent payable in the 16 as. share, what was payable in the different shares, what was believed to be due altogether for the period in suit with damages in the 16 as. and what was due to the Plaintiffs on their shares and what was payable to the other landlords in their shares, and then went on to allege that the other landlords having refused to let the Plaintiffs know what was due to them, the Plaintiffs had been unable to ascertain that and on that account they asked for a decree for the amount due to themselves alone and in the alternative prayed that if the other landlords wished to be added as Plaintiffs on disclosing what was due to them then they might be transferred from the category of the Defendants to that of Plaintiffs:

Held—*That there was sufficient compliance with the requirements of sec. 148A of the Bengal Tenancy Act and the decree in the suit was a rent decree.*

BAIKUNTHA NATH v. RAMAPATI (1) *distinguished.*

This was an appeal preferred on the 21st of November 1921 against the decree of the Additional Subordinate Judge of

(1) 27 C. L. J. 101 (1917).

JAGABANDHU NANDI *v.* ABDUL HAMID MEA.

Zillah Bakerganj (Babu Jatindra Chandra Lahiri), dated the 17th of August 1921, modifying the decree of the Munsif, 1st Court at Barisal (Babu Surjamani Dev), dated the 7th of June 1922.

The facts material to the report were as follows :—

The Plaintiffs brought a suit on a mortgage. Two of the mortgaged properties were purchased by the Defendants in execution of decrees for rent obtained by the Nawab of Dacca, a co-sharer landlord. These rent suits purported to be under sec. 148A of the Bengal Tenancy Act. In the plaints of these suits following statements, amongst others, were made :—

"The Plaintiffs and the co-sharer Defendants own and possess, by separate collection, in zemindari and *mirash ijara* right, the 16 annas zemindary No. 3558, Tappa Sultanabad, the Plaintiffs' share being 13 as. 11g. 3k. 2kr. 4 til, and that of the co-sharer Defendants being 2 as 5g. 1k. 16 til. . . . . . .

The sum of Rs. 143-5-8 p. including damages as per account given in schedule below was due to the Plaintiffs and co-sharer Defendants from the tenant Defendants, of this Rs. 122-15-6 was payable to the Plaintiffs and Rs. 20-6-2 p. to the co-sharer Defendants. . . . . . .

Although the Plaintiffs and the co-sharer Defendants have separate *tahasil*, for the purpose of realising the rent of the entire mehal under sec. 148 (*ka*) of the Bengal Tenancy Act, it is necessary to make all the proprietors parties and to institute a suit for the whole of the arrears of rent and cesses in respect of the holding. But the co-sharer Defendants acting in collusion with tenant Defendants have not allowed the Plaintiffs to know, if any amount of rent is due to the said co-[illegible]s, and the Plaintiffs not being able [illegible] the same institute this suit for the present for the amount of Rs. 122-15-6 due to their share for the reliefs given below.

Prayers.

(*ka*) A decree may be passed for the amount claimed together with future interest against the tenant Defendants.

(*kha*) If the co-sharers desire to be added as Plaintiffs on disclosing the rent due to them, then they or any of them who so desire may be transferred to the category of Plaintiffs.

(*ga*) If the co-sharers pray to be added as Plaintiffs, the amount that may be due to them be added to the claim in suit and on accepting the deficit court-fees, a decree may be passed for the said claim with future interest, and for Rs. 122-15-6 separately in the share of the Plaintiffs."

After their purchase the Defendants had served a notice under sec. 167 of the Bengal Tenancy Act upon the Plaintiffs annulling their mortgage incumbrance. In the mortgage suit, the Defendants pleaded that the Plaintiffs could not enforce their mortgage decree against the properties purchased by them. The Plaintiffs' case was that the rent suit was not properly framed under sec. 148A of the Bengal Tenancy Act, therefore the Defendants were not entitled to annul the incumbrance. The Munsif held that the rent suits were properly framed under sec. 148A, Bengal Tenancy Act and therefore the mortgage could not be enforced against the properties sold in execution of these rent decrees. The Plaintiff appealed and the Subordinate Judge set aside the decision of the Munsif by his judgment in which he observed *inter alia* :—

"The primary claim was in respect of the Nawab's share, for there was a prayer to the effect that if the Banerjees, about whose dues nothing was known, would appear and claim any arrears, they might be

JAGABANDHU NANDI v. ABDUL HAMID MEA.

transferred to the category of Plaintiffs and their dues might be included in the suits. None of the Banerjees, however, appeared and the suits were decreed for the Nawab's share as claimed. Now these prayers were exactly the same as were made in the case of *Baikuntha Nath Sen* v. *Ramapati Chatterjee* (1), where it was observed that the suit was not properly framed under sec. 148A, Bengal Tenancy Act. The section requires that the suit should be for the whole rent due at the time of institution and that it is only a suit instituted for the whole rent that may afterwards be proceeded with for the Plaintiff's share with special consequences. In the present case the Nawabs started their suits for their shares of the rents. Their intention was surely to frame a complete suit but there was a defect inasmuch as they did not say in so many words that nothing was believed to be in arrear in the co-sharers' share and that consequently the claim in their own share represented the entire rent. Such a statement was made in the case of *Nandalal Chowdhury* v. *Kala Chand Chowdhury* (2) and as it was made in a case of joint collection, their Lordships found that there was a compliance with the requirements of sec. 148A. In such a case, to my mind, the question is not only one of form but of fact also and it is open to the contesting Defendants to show that the claims in the rent suits were for the entire rents but no evidence on this point appears to have been adduced by them. In the case of *Brohmandannath Deb Sircar* v. *Hem Chandra Mitter* (3), the absence of any suggestion or proof on the point no doubt led to a finding that the claims in dispute there were for the entire rent but the reason for the inference was that the contention was raised by the very co-sharer landlords who had been impleaded as *pro formâ* Defendants."

(1) 27 C. L. J. 101 (1917).
(2) 15 C. W. N. 820 (1910).
(3) 18 C. W. N. 1016 (1914).

Babu Brajendra Nath Chatterjee (with him *Dr. Sarat Ch. Basak* and *Babu Sachindra Nath Roy Chowdhury*) for the Appellants.—The learned Subordinate Judge was wrong in holding that the rent suits were not under sec. 148A, Bengal Tenancy Act. The plaint in para. 5 distinctly says that the suit was brought under sec. 148A, Bengal Tenancy Act and that the Nawab, the co-sharer landlord, wanted to bring a suit for the whole rent that was due at that time, but he could not do so because his co-sharers, the Banerjees, who were in collusion with the tenants, would not give any information whether their share of the rent had been realised or not. I submit this was sufficient compliance with the requirements of sec. 148A of the Bengal Tenancy Act.

[SUHRAWARDY, J.—But the Nawab did not sue for the whole rent; he sued only for his share of the rent; he did not say that nothing was due to the co-sharers, the Banerjees, so that the arrears due to him were the whole amount due at that time.]

It was impossible for the Nawab to say that nothing was due to the other co-sharer landlords. They did not give him any information. How could he say that nothing was due to the other co-sharers when he had not and could not get any information regarding the matter. He stated in the plaint what was the real state of things. The Court in that rent suit treated the plaint as a plaint under sec. 148A and even up to this time it has not been proved that any rent was due to the other co-sharers at the time of those rent suits. The Subordinate Judge himself

JAGABANDHU NANDI v. ABDUL HAMID MEA.

says in his judgment that there was the intention to bring the suit under sec. 148A but there was a defect inasmuch as it was not stated in so many words that nothing was believed to be due to the other co-sharers. He relied upon the case of *Baikuntha* v. *Ramapati* (1), but that case is quite distinguishable. There was no separate collection but here the Nawab collected his share of rent separately. The very fact that all the co-sharers were made parties, though each was entitled to sue for his share alone, goes to show that the suit was under sec. 148A.

There are some other cases in my favour, *viz.*, *Nandalal* v. *Kala Chand* (2), *Brohmandannath* v. *Hem Chandra* (3), *Prafulla Chandra* v. *Baburam* (4) and *Ramdhyan* v. *Pardip Singh* (5). Then there is another important fact. In the rent suit which took place in 1914, the Court made a decree under sec 148A and ordered sale of the tenures under the Bengal Tenancy Act and the Defendants purchased with a power to annul all incumbrances. And this power was exercised by the Defendants and notice under sec. 167, Bengal Tenancy Act was served upon the Plaintiff annulling the incumbrances. And the order of sale made by the Court in the rent suits either rightly or wrongly is still standing, it has not been set aside and I. submit as long as that order stands, its legal consequence, *viz.*, the annulment of the incumbrance must follow.

Babu Gunada Ch. Sen (with him *Babu Prasanta Bhusan Gupta*) for the Respondents —The rent suit was not one under sec. 148A, Bengal Tenancy Act. The facts were exactly similar to the facts of the case of *Baikuntha* v. *Ramapati* (1). I take my stand upon that decision. There are certain other decisions no doubt, but the facts were different. The Plaintiff in the rent suits did not say that nothing was due to the other co-sharers, he must be prepared to swear that his suit was for the whole rent and that nothing was due to the other co-sharer; unless he is prepared to swear that he cannot get a decree under sec. 148A.

[SUHRAWARDY, J.—But how could he swear when he could not get any information as to whether anything was due to the other co-sharers?]

But the law requires that he must do so, otherwise he could not get a rent decree with its special advantages. Again in para. 3 the Nawab says that Rs. 143 and odd were the whole amount due but the suit was for Rs. 122 and odd. I rely upon the case of *Baikuntha Nath* v. *Ramapati* (1) and as long as that decision is not overruled, this appeal cannot succeed.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal is preferred by some of the Defendants who bought at an auction-sale some property which had been included in a mortgage executed by the Defendant No. 1 in favour of the Plaintiff. The Defendants say that the sale was a rent sale at which they purchased and that, after they had purchased, they took steps under the Bengal Tenancy Act to annul the encumbrances and, in consequence, the property in their hands is exempted from the mortgage liability. The whole question turns upon whether or not the decree in execution of which the Defendants made their

(1) 27 C. L. J. 101 (1917).
(2) 15 C. W. N. 820 (1910).
(3) 18 C. W. N. 1016 (1914).
(4) 34 C. L. J. 462 (1921)
(5) 4 P. L. J. 500 (1918).

(1) 27 C. L. J. 101 (1917).

JAGABANDHU NANDI v. ABDUL HAMID MEA.

purchase was a rent decree and that again turns upon the question whether the plaint which led up to the decree was a plaint such as is contemplated by sec. 148A of the Bengal Tenancy Act. The learned Munsif held that the plaint was properly drawn up under sec. 148A of the Bengal Tenancy Act. The learned Subordinate Judge on appeal took a contrary view and he relied on the decision in the case of *Baikuntha Nath Sen* v. *Ramapati Chatterjee* (1). It appears to me that the learned Judge has really misunderstood that decision. If the opening paragraphs of that judgment are read, it will be seen that there was practically no attempt on the part of the Plaintiff in that suit to comply with the provisions of sec. 148A of the Tenancy Act. There was only a casual reference to the fact that some share of the rent might be due to the co-sharers and, if necessary, the Plaintiff might be allowed to amend his plaint so as to secure a decree for the whole sum. That decision, I think, stands by itself on a set of facts which may be distinguished from the facts of other cases. On the other hand, there are several cases—*Nandalal Chowdhury* v. *Kala Chand Chowdhury* (2) and *Brohmandannath Deb Sircar* v. *Hem Chandra Mitter* (3) and later cases in which the facts appear to be very similar to those in the present case. All of them have this common feature that the Plaintiff in each case made an honest effort to frame his suit in such a manner as to comply with the provisions of sec. 148A of the Bengal Tenancy Act. In the present instance, the Plaintiffs certainly tried to do so and I think they succeeded. A translation of the plaint has been placed before us and it appears that the plaint mentioned what was the rent payable annually in the 16 annas share, what was payable in the different shares, what was believed to be due altogether for the period in suit with damages in the 16 annas and then what was due to the Plaintiffs in their share and what was payable to the other landlords in their shares. Then, the plaint went on to allege that the other landlords refused to let the Plaintiffs know what was due to them and the Plaintiffs had been unable to ascertain that and on that account, they asked for a decree for the amount due to themselves alone. They also made an alternative prayer that, if the other landlords wished to be added as Plaintiffs on disclosing what was due to them, then they might be transferred from the category of Defendants to that of Plaintiffs. In my opinion, there was sufficient compliance with the law as set out in sec. 148A of the Bengal Tenancy Act in the rent suit which led up to the Defendants' purchase. Accordingly I hold that Defendants-Appellants bought the property at a rent sale and then made it free from the mortgage liability. The result is that this appeal is allowed, the judgment and decree of the lower Appellate Court are set aside so far as plots Nos. 1 and 2 are concerned and those of the Court of first instance are restored with costs in this Court and in the Court of Appeal below.

SUHRAWARDY, J.—I agree.

N. G.

(1) 27 C. L. J. 101 (1917).
(2) 15 C. W. N. 820 (1910).
(3) 18 C. W. N. 1016 (1914).

PRIVY COUNCIL.
[APPEAL FROM BOMBAY.]

VISCOUNT HALDANE.
LORD PHILLIMORE.
LORD CARSON.
1923,
Heard, 4 and 7, May.
Judgment, 7, June.

ALCOCK, ASHDOWN & Co., LTD., Appellants,
v.
THE CHIEF REVENUE AUTHORITY OF BOMBAY, Respondent.

Specific Relief Act (I of 1877), sec. 45—High Court, if may direct Chief Revenue Authority to state a case under Income Tax Act (XX of 1918), sec. 51—Government of India Act (9 & 10 Geo. 5, Ch. 101), sec 106 (2), if a bar—Opinion of Chief Revenue Authority that application requiring case to be stated frivolous, if conclusive—Investments in securities of capital, whether question of fact or law.

The High Courts have power under sec. 45 of the Specific Relief Act to direct the Chief Revenue Officer to state a case under sec. 51 of the Income Tax Act of 1918, where the latter refuses without justification to do so.

The order of a High Court directing the Chief Revenue Authority to state a case under sec. 51 of the Indian Income Tax Act of 1918 would not be an exercise by the High Court "of original jurisdiction in any matter concerning the revenue" within the meaning of sub-sec. (2) to sec. 106 of the Government of India Act, the second part of the clause being also inapplicable, as such a proceeding has not to do with the collection of the revenue but with the preliminary assessment to ascertain what that revenue is.

CHIEF COMMISSIONER OF INCOME TAX, MADRAS v. NORTH ANANTAPUR GOLD MINES, LIMITED (2) *overruled.*

The opinion of the Chief Revenue Authority that an application of the person to be assessed asking him to state a case for the opinion of the High Court is frivolous and that the reference is unnecessary, is not conclusive. If there is a serious point of law to be considered, there lies a duty upon the Chief Revenue Authority to state the case, and if he does not appreciate that there is such a serious point, it is in the power of the High Court to control him and to order him to state a case.

When a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it.

JULIUS v. BISHOP OF OXFORD (3) *followed.*

The question whether capital placed in a particular investment is capital employed in the business or not, is not a pure question of fact upon which the decision of the Chief Revenue Authority would be conclusive but a question of law or of mixed law and fact.

This was an appeal by the above-named Appellants from an order of a Division Bench of the High Court of Judicature at Bombay (Ordinary Original Civil Jurisdiction) made on the 21st of October 1920 discharging a rule *nisi* obtained on the 20th of August 1920 by the Appellants for an order in the nature of a mandamus directing the Respondent to show cause why the Respondent should not refer to the High Court for its decision certain questions arising out of an assessment to excess profits duty made upon the Appellants by the Respondent under the Excess Profits Duty Act, 1919 (Act No. X of 1919).

The sole question in this appeal was whether the Respondent was bound to state a case and refer the same together with his opinion thereon to the High Court pursuant to sec. 51 of the Indian Income Tax Act, 1918 (Act No. VII of 1918) and sec. 15 of the Excess Profits Duty Act, 1919. The facts upon which

(2) I. L. R. 44 Mad. 718 (1921).

(3) L. R. 5 A. C. 214, 222 (1880).

this question arose were, shortly, as follows :—

The Appellants were a joint stock company incorporated under the Indian Companies Act of 1882 having their registered office at 40, Church Gate Street, Fort, Bombay, and engaged in engineering, shipbuilding and general contracting work.

The Respondent was the authority appointed (by Rules made pursuant to sec. 18 (1) of the Excess Profits Duty Act 1919) to hear appeals against assessments to excess profits duty made under that Act.

During the years 1912 to 1918 the Appellants had accumulated profits of trading, and, finding that in the war years the possibilities of employing these accumulated profits in their engineering, shipbuilding and general contracting work were limited, they retained a considerable portion of these accumulated profits in their business in the form of cash and securities. These profits were *bonâ fide* accumulated and retained in this way and were kept in the business in the form of cash and securities, simply in order that they might be readily available for employment in the erection of new buildings and in purchase of plant, machinery, stock and materials when opportunity offered.

The Appellants' books and accounts were made up to the 31st December in each year. The following figures are a summary of an affidavit by one of the directors of the company showing profit and loss for the year ending 31st December 1918.

At 31st December 1918 the capital of the business was—

Fixed and other assets employed in "Engineering" and general contracting works as shown by balance sheet . .	Rs. 37,29,643
Excess depreciation written off assets disallowed by Collector of income tax	7,55,978
	44,85,621
Less—Liabilities as per balance sheet . . .	22,07,985
Capital excluding all cash and investments . .	22,77,636
Cash and investments as per balance sheet . .	50,13,786
Total capital at 31st December 1918 .	Rs. 72,91,422
The Appellants in their return deducted from such total the profits for the year 1918 under sec. 1 of Sch. II of the Excess Profits Duty Act, 1919 .	16,17,710
Capital employed as claimed by Appellants .	Rs. 56,73,712

On the 5th of August 1919, the Appellants made a return to the Collector of Taxes of their profits for the purposes of the Excess Profits Duty Act, 1919, under which excess profits duty at the rate of 50 per cent. was charged upon the excess of the profits of an accounting period over the standard profits ascertained as provided by the Act. [The Indian Excess Profits Duty is chargeable in respect of the profits of any business carried on in British India on the amount by which the profits in the accounting period exceed the standard profits.] By sec. 5 of the Excess Profits Duty Act, 1919, the profits of the business are the "taxable income" as finally ascertained for the purposes of

the Indian Income Tax Act, 1918, which (by sec. 14 of the latter Act) is the aggregate income from all sources (with certain exceptions not relevant here) of the assessee, including income from securities.

In making this return, the Appellants (as they were entitled to do) elected that their standard profits should be computed as provided by sec. 6 *(1)* *(b)* *(iii)* of the Act. They accordingly selected the years 1913, 1914, 1916 and 1917 and claimed that their profits of the accounting period did not reach the point which involved liability to the duty.

The ground upon which this claim was based was that all the assets of the Company representing issued capital and accumulated profits earned by the Appellants should be treated as capital employed in the business within the meaning of the proviso to sec. 6 *(1)* of the Act, and, on this contention, the Appellants would on the figures -as to which there was no dispute - be under no liability to excess profits duty for the accounting period, namely, the year ending 31st of December 1918. This contention was rejected by the Collector of Taxes who refused to treat the assets represented by cash and securities above referred to as forming part of the capital employed in the Appellants' business save to the extent of Rs. 6 lakhs and allowed only as the total capital employed in the Appellants' business the sum of Rs. 16 lakhs. The Collector of Taxes took the view that, so far as the assets were in the form of cash and securities, and not of engineering or contracting plant or implements, they did not (save to the extent of the 6 lakhs above-mentioned) form part of the capital employed in the Appellants' business and should not be taken into account for the purposes of the section. The Collector's decision will be found in the record. No ground was given by him for the elimination of Rs. 12 lakhs of the capital employed represented by assets other than cash and securities, namely, the balance of the Rs. 22,77,636. He did not fix the standard capital required by the Act.

On the 30th of October 1919 the Appellants appealed against this assessment to the Respondent. The appeal was heard on the 3rd of August 1920 by the Respondent who, on the 5th of August 1920, confirmed the assessment.

At the hearing of the appeal, the Appellants contended that the whole of the cash and securities above-mentioned standing in their balance sheet for the year ending 31st December 1918 should be taken into account in arriving at the amount of capital employed in their business and, pursuant to sec. 51 of the Indian Income Tax Act, 1918 (which provides for a statement of a case on a point of law), and sec. 15 of the Excess Profits Duty Act, 1919, applied to the Respondent to draw up a statement of the case setting forth the question and to refer the same together with his opinion thereon to the High Court for its decision. Notwithstanding this application, however, the Respondent, by the order referred to, held that as the law was quite clear on the point it was unnecessary to refer the case to the High Court and has in fact refused to refer it.

The Appellants accordingly presented a petition, dated the 19th of August 1920 to the High Court under the provisions of sec. 45 of the Specific Relief Act, 1877 (Act No. I of 1877) praying that the Respondent might be ordered to refer the question together with his opinion thereon for the decision of the High Court and on the 20th of August 1920 obtained from

the Honourable Mr. Justice Setalvad an order *nisi* to that effect. This Act provides (sec. 45) that any of the High Courts of Judicature at Fort William, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its Ordinary Original Civil Jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature.

On the 13th of October 1920, the Appellants moved the High Court for a rule absolute. The motion was heard by a Division Bench of the High Court consisting of Sir N. C. Macleod (the Chief Justice) and the Honourable Mr. Justice Fawcett who by order, dated the 21st of October 1920, discharged the rule *nisi*. The High Court took the view that the question as to what was the capital employed in the business for the purposes of the Excess Profits Duty Act was a question of fact and that no point of law was involved, and that only such part of the assets as was found by the Collector to be at the end of the accounting period in the form of engineering, shipbuilding and contracting works or plant, plus such part of the cash and securities as the Collector had thought proper to allow, was capital employed in the business for the above purposes.

On the 19th of January 1921 the Appellants, feeling themselves aggrieved by the order of the High Court, presented a petition to the High Court (in appeal from its Original Civil Jurisdiction) for leave to appeal to His Majesty in Council. The petition came on for hearing on the 17th of February 1921 when the High Court (consisting of the Honourable the Chief Justice and the Honourable Mr. Justice Shah) reserved judgment.

On the 2nd of March 1921 the Court certified that the case was fit for appeal to His Majesty in Council. The judgments delivered by the members of the Court are set out in the record.

The Appellants duly complied with all the conditions imposed upon them in relation to their appeal to His Majesty in Council.

Messrs Clauson, K. C., Latter, K. C. and *Cyril King* for the Appellants.—There is a statutory duty upon the Chief Revenue Authority to state a case for the opinion of the Court under sec. 51 of the Income Tax Act, 1918 and it is not material that the duty is in relation to income tax.

In order to enforce that duty the High Court has power in the nature of a mandamus under sec. 45 of the Specific Relief Act.

The memorandum of association contained power to invest funds which become capital "employed in the business" within the meaning of the Excess Profits Duty Act, 1919.

The words "employed in the business" do not refer merely to funds used in the trade, it can include capital invested within the powers of the memorandum.

[They were stopped.]

Messrs. Dunne, K. C. and *Reginald Hills* for the Respondent.—This was purely a revenue matter and the High Court had no jurisdiction because of sec. 106, sub-sec. *(2)* of the Government of India Act, 1915.

Spooner v. *Juddow* (1) and *Chief Commissioner of Income Tax, Madras* v. *North Anantapur Gold Mines, Limited* (2).

Further the provisions of the Indian

(1) 4 M. I. A. 353 (1850).
(2) I. L. R. 44 Mad. 718 (1921).

Income Tax Act, 1918, give the Revenue Authorities a discretion as to whether or not they will take the opinion of the High Court. There is no imperative duty laid upon them such as to justify an order in the nature of a mandamus.

The words of the Act "it shall be lawful" do not compel the Revenue Authority to exercise its power and the principle of *Julius* v. *Bishop of Oxford* (3) is not applicable.

In any event the High Court has expressed an opinion unfavourable to the Appellant so that no useful purpose would be served by ordering it to consider the matter, as from their decision no appeal lies.

Tata Iron and Steel Co. v. *Chief Revenue Authority* (5).

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—This is an appeal from an order made by the High Court of Judicature at Bombay on the 21st October 1920, discharging with costs a rule *nisi* directed to the Chief Revenue Authority of Bombay, whereby the Authority was called upon to show cause why he should not be ordered to refer to the Court for its decision certain questions stated in Ex. D to a petition presented to him, or in the alternative why he should not hear and determine according to law the application of the Petitioners. The following is the matter in dispute. The applicants for the rule, Alcock, Ashdown and Company, Limited, the present Appellants, were called upon under the Indian Excess Profits Duty Act, 1919, to make a statement of their profits for the year 1918. Under the powers given them by the Act they elected to have the standard of their profits ascertained upon an average of the four years 1913, 1914, 1916 and 1917. They thereupon made a return of the average capital and the average profits of these four years and of their capital and profits for the year 1918, whereby they purported to show that the percentage of profit for 1918 was not in excess of the average profit on the average capital of the four standard years; and they claimed, therefore, to be exempt from excess profits duty.

The Collector of income tax, however, made an assessment upon them whereby he brought out their excess profits at upwards of 17 lacs of rupees, on which a 50 per cent. duty would have to be paid after some minor deduction had been made, and he required the payment of this duty by three instalments.

The Appellants appealed to the Chief Revenue Authority, and their appeal was heard on the 3rd August 1920. At the hearing of that appeal, Counsel for the Appellants asked the Authority to state a case for the opinion of the High Court, and by letter dated the 5th their agents set out the questions upon which they desired the case to be stated. In the meanwhile, and apparently before this letter had reached the Authority, he, by letter dated the 5th, informed them that at the hearing he had confirmed the assessment made by the Collector of income tax. In his letter he further said that it had been decided that as the law was quite clear on the point, it was unnecessary to refer the case to the High Court.

On the 11th August the Authority sent an answer to the agent's letter of the 5th—which, by some accident, is referred

(3) L. R. 5 A C 214, 222 (1880).
(5) L. R. 50 I. A. 212: s. c. 28 C. W. N. 307 (1923).

to as dated the 4th. This answer was to the following effect :—

"I have the honour to state that the appeal was finally decided by me on the 3rd instant. A reference to the High Court was deemed unnecessary.

"In calculating the income liable to duty, income from investments excluded from business capital has been specifically excluded This is added as, from your letter under reply, you seem to be under some misapprehension and think that such income has also been charged with duty."

Thereupon the Appellants obtained the rule *nisi*. In their petition to the Chief Revenue Authority they had made the following averment :—

"The Collector has disregarded the first proviso to sec. 6 (*1*) of the Act, and has held that the investments of the Petitioner did not form part of the business capital of the Petitioner, notwithstanding that under secs 6 (*1*) (*b*) (iii), under which the Petitioner is to be assessed, the interest on such securities is to be brought into account and notwithstanding the nature of the Petitioner's business The Collector has arrived at his assessment by a compromise which is not justified by the provisions of the Act"

The application for the rule was supported by an affidavit of which the following are material passages .—

"During the war it was impossible for Messrs Alcock, Ashdown and Company Limited, to expand their business by the erection of new buildings and it was impossible for them to obtain plant, machinery, stock and materials, and that therefore part of their profits which were *bonâ fide* retained in the said business for the purpose of expanding the same had to be retained in the form of cash and investments pending such time as they were able to expend the same for the purposes aforesaid In addition to such accumulated profits the said cash and investments included Rs 22,07,981-5-3, which the Company owed.

"On the 31st December 1917, their cash and investments amounted to Rs 23,70,178 and on the 31st December 1918, to Rs. 50, 13,786.

"By the 31st December 1919, the said item of cash and investments had been reduced to Rs. 32,77,555, and now stands at the sum of Rs. 30,15,292."

And there was a further submission that an allowance of 6 lacs was the allowance of an arbitrary figure.

On showing cause the Authority exhibited to an affidavit copies of "the decisions," in other words, the reasons for the decisions, of the primary Revenue Authority and of the Chief Authority on appeal. From these it appears that both the Revenue Authorities had purported to follow the principle of construction laid down by them in a previous case, whereby they had arrived at the conclusion that in calculating capital, only the capital actually employed in the business was to be taken into account; that in this case the Income Tax Collector found that 50 lacs of rupees were invested in securities or kept as fixed deposits in other concerns, that in his view this money was money employed in those concerns and not in the business of the company, that from the statement of the representative of the Appellants it appeared that at the most about 16 lacs would be required in the near future for the expansion of the business, that the whole of it could be safely disregarded in computing capital employed in the business, but however that might be, he (the Collector) had taken an arbitrary figure of about 6 lacs which he thought might be regarded as capital temporarily set aside but required for business purposes, and regarding the rest as capital not to be employed in the business, had reduced the capital from over 56 lacs to about 16, and therefore brought out a huge profit.

The Chief Revenue Authority, while generally agreeing and confirming, said

that he considered the Collector's allowance of 6 lacs was liberal.

When the matter came on for argument before the High Court, the first question to be decided was whether the Court had any jurisdiction to order the Authority to state a case. This was argued before the High Court upon the language of sec. 51 of the Indian Income Tax Act of 1918, which is made by the Excess Profits Duty Act applicable also to cases under this Act. But in the case prepared for their Lordships' Board and in the argument before their Lordships, the objection to the jurisdiction was put more broadly. The High Court of Bombay in considering this point merely applied itself to the question whether or not the Authority had a duty in the circumstances to state a case. But as the point was raised before their Lordships, it took the form of saying that even if the Authority had a duty, the Court could not require him to exercise it; and for this purpose reliance was placed upon the well-known general purview of Indian legislation which excludes matters of revenue from the consideration of the ordinary Civil Courts, the principle being exemplified in the case of *Spooner* v. *Juddow* (1) and upon sec. 106 (2) of the Government of India Act, and lastly, upon a recent decision of the High Court of Madras, given since this case was before the Court of Bombay [*Chief Commissioner of Income Tax, Madras* v. *North Anantapur Gold Mines, Limited* (2)].

Upon the point thus broadly stated, their Lordships have no difficulty in pronouncing a decision. To argue that if the Legislature says, that a public officer, even a Revenue Officer, shall do a thing, and he without cause or justification refuses to do that thing, yet the Specific Relief Act would not be applicable, and there would be no power in the Court to compel him to give relief to the subject, is to state a proposition to which their Lordships must refuse assent. Sec. 45 of the Specific Relief Act enables any of the three High Courts to "make an order requiring any specific act to be done or forborne . . . . . by any person holding a public office whether of a permanent or a temporary nature, or by any corporation or by any Court of Judicature," provided that "such doing or forbearing is under any law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character" and subject to other certain conditions not material to this case.

It is true that the section is not to authorise the High Court "to make any order which is otherwise expressly excluded by any law for the time being in force." The excluding law is suggested to be the already cited clause in sec. 106, sub-sec. (2) of the Government of India Act, which is in the following terms:—

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

In their Lordships' view, the order of a High Court to a Revenue Officer to do his statutory duty would not be the exercise of "original jurisdiction in any matter concerning the revenue," and the latter part of the clause need not be considered, for the proceedings in this case had not to do with the collection of the revenue, but with the preliminary assessment to ascertain what that revenue was.

(1) 4 M. I. A. 353 (1850).
(2) I. L. R. 44 Mad. 718 (1921).

ALCOCK, ASHDOWN & CO., LTD. v. THE CHIEF REVENUE AUTHORITY OF BOMBAY.

There remains, however, the question which was also considered by the High Court of Madras, though rather as a branch of the question on which their Lordships have just pronounced their decision than as a separate point in itself, and which was considered by the High Court of Bombay in the present case and in another case which has recently been before their Lordships. This question the Bombay Court determined adversely to the Chief Revenue Authority, holding that there would be under sec. 51 of the Income Tax Act a duty to state a case if a point of law arose. Here it is necessary to refer somewhat in detail to the provisions of the two Acts. Sec. 15 of the Excess Profits Duty Act, 1919, says that the provisions of various sections, including sec. 51, "of the Indian Income Tax Act, 1918, shall apply, with such modifications, if any, as may be prescribed, as if the said provisions referred to excess profits duty instead of to income tax, and every officer or authority exercising powers under the said provisions may exercise the like powers under this Act in regard to excess profits duty as he or it exercises in regard to income tax under the said Act."

Sec. 51 of the Indian Income Tax Act must be set out at length :—

"51. (1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chap. VII, a question has arisen with reference to the interpretation of any of the provisions of this Act or of any rule thereunder the Chief Revenue Authority may, either on its own motion or on reference from any Revenue Officer subordinate to it, draw up a statement of the case and refer it with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary.

"(2) If the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Revenue Authority by which it was stated, to make such additions thereto, or alterations therein, as the Court may direct in that behalf,

"(3) The High Court upon the hearing of any such case shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Revenue Authority by which the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar; and the Revenue Authority shall dispose of the case accordingly, or, if the case arose on reference from any Revenue Officer subordinate to it, shall forward a copy of such judgment to such officer, who shall dispose of the case conformably to such judgment

"(4) Where a reference is made to the High Court on the application of an assessee, costs shall be in the discretion of the Court."

It is said that, though under this section the Chief Revenue Authority may, if he thinks fit, draw up a statement of the case and refer it to the High Court, he is not bound to do so, even on the application of the person to be assessed, if he is satisfied that the application is frivolous or that the reference is unnecessary, and that the Authority has in the present case shown that he is satisfied that the application was frivolous and the reference was unnecessary.

Their Lordships, however, agree with the Bombay High Court that this is too narrow a construction of the section. Take first the case which is last in the clause. If the assessee applies for a case, the Authority must state it, unless he can say that it is frivolous or unnecessary.

He is not to wait for the Court to order him to do it; it will be a misfeasance and a breach of the statutory duty if he does not do it. Put that case aside. The rule here is supported upon the earlier part of the section. No doubt that part does not say that he shall state a case, it only says that he may. And as the learned Counsel for the Respondent rightly urged, "may" does not mean "shall." Neither are the words "it shall be lawful" those of compulsion. Only the capacity or power is given to the Authority. But when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it. To use the language of Lord Cairns in the case of *Julius* v. *The Bishop of Oxford* (3):—

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

In their Lordships' view, always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court, and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case.

So far their Lordships are in agreement with the High Court. There remains the question which has led to this appeal. The High Court has apparently considered that there is no serious point of law involved in this case. It was, indeed, contended by Counsel for the Respondent that the High Court had accepted the position that there was a question of law and then had gone on to decide it adversely to the Appellants; but their Lordships think this contention inadmissible. If there is a point of law, it ought to be decided in a regular manner and upon proper materials; and here it should be said that the manner is not regular and that it is at least doubtful whether the materials are complete.

Their Lordships must therefore consider whether the High Court should have ordered a case to be stated. This, as it appeared to the learned Chief Justice, depended upon the question whether the Chief Revenue Authority had reasonable grounds for being satisfied that a reference was unnecessary. This is not quite the way in which their Lordships would put it. But to proceed: In the view of the Chief Justice profits not employed in the business are not capital for the purpose of this Act, and profits intended to be employed in the business are not therefore necessarily to be treated as capital, and finally, whether profits are or are not employed in the business is a question of fact to be determined by the Authority. Fawcett, J., agreed, and held that it was not shown to be clearly incumbent on the Chief Revenue Authority to refer these questions to the Court, and that he had reasonable grounds for being satisfied that the reference was unnecessary.

Quite recently, in the case of *The Gas Lighting Improvement Company, Limited* v. *Commissioners of Inland Revenue* (4), before the House of Lords, a decision has been given on the English Excess Profits Act, the terms of which, so far as they differ, are less favourable to

(3) L. R. 5 A. C. 214, 222 (1880).

(4) L. R. [1923] A. C. 723.

the present Appellants than the terms of the Indian Act. In this case the House decided against the tax-payer that the question whether capital placed in a particular investment was capital employed in the business or was not, was not a pure question of fact upon which the decision of the Income Tax Commissioners would be conclusive but was a question of law or of mixed law and fact, the decision of the Commissioners upon which would be open to review; and accordingly it was reviewed, and judgment was given against the tax-payer that the particular investment in question did not form part of the capital of the business.

It follows that the decision of the Authority in this case could not be held to be conclusive as a decision upon a mere question of fact. Nor did the Chief Revenue Authority or his subordinate so treat it. They treated it as a matter of principle and refer to their judgments in a previous case as laying down the principle, that is laying down the law upon the subject.

In their Lordships' view, an important question of law upon the construction of the statute is involved. This may be most tersely expressed by asking the question what are the interest-bearing securities which form part of the assets of the business and are therefore to be treated as part of the capital; and one guide in arriving at this conclusion may well be the difference of language between the later Indian and the earlier English Act.

It is true that these are not Acts of the same legislature, and that the Indian Legislature and the draftsman whom it employed may have thought it unnecessary to introduce provisions like those contained in paras. 8 and 12 of Part I of the fourth schedule of the English Act, and may have meant no variation from the scheme of the English Act when it and he introduced the words "securities" and spoke of interest on certain securities as being profits from the business. Too much stress, therefore, should not be laid on these differences. At the same time, it is noteworthy that the Indian Act takes notice of the English Act in Sch. I, para. 4; and the Court may come to the conclusion that the reason for the differences between the two Acts is not a mere difference of drafting, but a deliberate variation due to the different conditions under which business is carried on in India and in England.

On the whole, their Lordships think that the Chief Revenue Authority should have been ordered to state a case and they will humbly advise His Majesty that this appeal should be allowed, and that the rule *nisi* should have been converted into an order absolute in the terms of the first alternative expressed in the rule *nisi*, and that the Appellants should have their costs in the High Court and before this Board.

Solicitors: *Messrs. Rawle, Johnstone & Co.* for the Appellants.

Solicitor: *Solicitor, India Office* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 20 OF 1924.

SANDERSON, C. J.
RICHARDSON, J.
1924,
13, February.

THE KARNANI INDUSTRIAL BANK, LTD.
v.
SATYA NIRANJAN SHAW and ors.

Indian Arbitration Act (IX of 1899), sec. 19 —Verbal prayer for time to file written statement if "taking a step in the proceedings."

Verbal prayer by Defendant's Counsel for further time to file written state-

ment in reply to Court's question is "taking a step in the proceedings," within the meaning of sec. 19 of the Indian Arbitration Act.

IVES & BARKER v. WILLANS (1) *explained.*

This was an appeal against the judgment and decree of Mr. Justice C. C. Ghose, dated the 8th of January 1924, passed in the exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

The Advocate-General (Mr. S. R. Das) and *Mr. S. C. Roy* for the Appellants.

Mr. N. N. Sarkar and *Mr. P. N. Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice C. C. Ghose. The order of the learned Judge was made on the 8th of January 1924, whereby he dismissed an application made by the Karnani Industrial Bank under sec. 19 of the Indian Arbitration Act that the suit in question should be stayed.

The circumstances of this case, as far as my experience goes, are certainly out of the ordinary.

It appears that the suit in question was brought by Satya Niranjan Shaw and another for arrears of rent, mesne profits, damages and other reliefs against the Bank which was holding certain premises under a lease granted by the Plaintiffs. The summons was served upon the Defendant Bank and the Bank entered appearance on the 19th of November last year. It then appeared that the Bank had brought a suit against one of the Bank's sub-tenants; and, the learned Judge, apparently thinking that it was desirable that these two suits should be disposed of at or about the same time, made an order that the suit against the Bank by the Plaintiffs and the suit by the Bank against the sub-tenants should be placed in the daily list before the learned Judge to be mentioned. On the 22nd of November those two suits were placed in the learned Judge's daily list; and, then what happened may be taken from the affidavit which has been filed on behalf of the Plaintiffs. Mr. H. D. Bose on behalf of the Plaintiffs mentioned this suit to the Court when Mr. Justice Ghose asked the learned Counsel appearing for the Defendant Bank when his clients would file their written statement, whereupon the said learned Counsel asked for a certain time but the learned Judge directed that the Defendant Bank should file their written statement on Monday following, *i.e.*, on the 26th November and the learned Counsel for the Defendant thereupon pressing for a little longer time, the Court ordered the Defendant Bank to file their written statement by Wednesday following, *i.e.*, on the 28th November and also made a cross order for discovery by Friday following, *i.e.*, to say on the 30th November and also an order for inspection. The learned Judge summarised the proceedings as follows : —"This case was set down on the list on a particular date last month to be mentioned. Counsel on behalf of the present applicant appeared and informed me that no written statement had been filed. Upon that there was a discussion as to how much time was wanted for the purposes of filing the written statement. Learned Counsel asked for a longer time than I was prepared to give and ultimately I allowed a certain period to the applicant to file his

(1) I. R. [1894] 2 Ch. 478

written statement, and there was cross order for discovery."

In my judgment the question in this case depends upon whether the application by the learned Counsel for the Defendant Bank for further time to file the written statement under the circumstances, which I have mentioned, amounted to "taking a step in the proceedings" within the meaning of sec. 19 of the Indian Arbitration Act. The section provides that the party against whom any legal proceedings have been taken may at any time after appearance and before filing a written statement or taking other steps in the proceedings apply to the Court to stay the proceedings. The notice of the application in the present case was served on the 3rd of December and the date for which the notice was given was the 10th of December. I do not see how it is possible for us to hold that the application which the learned Counsel for the Defendant Bank made for further time to file the written statement was not a step in the proceedings. The learned Advocate-General appearing for the Appellant Bank has pointed out that the suit was put on the list at the instance of the learned Judge and it was the learned Judge who in the first instance asked the learned Counsel what time he would require for the written statement. However, if the Bank were intending to object to the jurisdiction of the Court and were intending to make an application to stay the suit on the ground that the matter should be referred to arbitration, the proper answer to the learned Judge's question for the learned Counsel would have been that the Bank did not intend to file any written statement, inasmuch as they were going to apply for a stay of the suit and that they did not desire to take any step in the proceedings. With respect to that the learned Advocate-General has stated that the learned Counsel was not aware of the facts and was not properly instructed. The answer to that is that if that were so, the learned Counsel ought to have applied for an adjournment before taking any step at all, but he did in fact apply for further time to file a written statement. I am unable to say that that was not taking a step in the proceedings. It may be said in a sense that the learned Counsel was unexpectedly put into a somewhat awkward position and that the point is a technical one. On the other hand, the position is governed by the words of the section and, the only question at issue at the present moment is whether the dispute between the parties should be tried by arbitrators or by a Judge of the Court.

For these reasons in my judgment this appeal should be dismissed with costs.

RICHARDSON, J.—I agree.

The point is a technical one and I see no escape from the words of sec. 19 of the Act. The party who appears by Counsel in a suit and applies by such Counsel for time to file a written statement appears to me to be taking a step in that suit. The case differs in that respect from the case of *Ives & Barker* v. *Willans* (1) to which we were referred, where there was no such application. It is quite true that the step here was taken before a copy of the plaint was received; but surely the concise statement of claim which had been received coupled with the notice to quit the premises which had also been received should have put the Defendant Bank on their guard. They knew of course all about the arbitration clause in the lease and, after all, if the point is a technical one, we are not deciding the

(1) L. R. [1894] 2 Ch. 478.

dispute between the parties on the merits; the only question now is whether the dispute should be tried by the Court or by arbitrators.

Messrs. K. K. Dutt & Co., Solicitors for the Appellants.

Messrs. N. N. Sen & Co. Solicitors for the Respondents.

S. N. B.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 1128 OF 1922.

BUCKLAND, J. 1923, 19, July.

ELLEN EVELINE WELLS
v.
JOHN DICKINSON & Co., LD.

Calcutta Rent Act (III, B. C., of 1920), secs. 2, 4 and 15—Furnished premises—Applicability of the Act—Right of the Controller to fix the hire of furniture—Whether the Act determines the agreement by parties—Right to recover agreed rent after rent has been standardised

On 3rd February 1920 the Defendant Company agreed to take the lower flat of a house at Rs. 600 a month including furniture and entered into possession on the 1st June 1920. On 14th October 1920 the Defendant Company applied to the Rent Controller for standardisation of rent and on 30th March 1921 the Rent Controller fixed a standard rent for the premises at Rs. 275 per month including the furniture. The Plaintiff applied to the President of the Tribunal who decided that the Controller had no power in fixing the standard rent to include hire of furniture and fixed it at Rs. 200 per month for the premises unfurnished. Since then rent had been paid at the rate so fixed and the Plaintiff brought this suit to recover the balance of the amount agreed to be payable under the agreement of the 3rd February 1920:

Held—*That the Plaintiff was entitled to the balance.*

The Rent Controller can fix the standard rent of "premises" where the "premises" are comprised in a furnished flat but he has no power to fix the hire of furniture.

Though the Controller or the Tribunal, as the case may be, may make an order standardising the rent to be paid in respect of premises when such premises have been let at a given rent which includes payment for the use of furniture, the parties to the agreement remain under their original liability whatever effect such order may have as between other parties or in other circumstances.

The order does not determine the agreement.

The facts of the case will appear from the judgment of the Hon'ble Mr Justice Buckland.

Mr. T. Ameer Ali for the Plaintiff.

Mr. H. R. Pankridge (with *Mr. Westmacott*) for the Defendant Company.

The JUDGMENT OF THE COURT was as follows:—

BUCKLAND, J.—This is a suit to recover the sum of Rs. 5,860 as rent of a furnished flat in No. 12, Loudon Street and a small amount of Rs. 86-7 which is not in dispute. The material facts as to which also there is no dispute are as follows:—By a letter dated the 3rd February 1920 the Defendant Company agreed to take "the lower flat of the house at the above (12, Loudon Street) address at Rs. 600 a month including furniture" from the 1st of May next till the 31st October 1921. The Defendant Company entered into possession on the 1st June 1920. On the 14th October 1920 the Defendant Company applied to the Rent Controller appointed under the Calcutta Rent Act and on the 30th March 1921

ELLEN EVELINE WELLS *v.* JOHN DICKINSON & CO., LD.

the Rent Controller fixed a standard rent for the premises at Rs. 275 per month including tho furniture. The Plaintiff applied to the Tribunal which decided that the Controller had no power in fixing a standard rent to include hire of furniture and fixed it at Rs. 200 per month for the premises unfurnished. Since that time rent has been paid at the rate so fixed and the Plaintiff claims to recover the balance of the amount agreed to be payable under the agreement of the 3rd February 1920.

This raises an interesting point of law under the Act and the contentions submitted on behalf of the Plaintiff are two :—(1) That the Act does not apply to a furnished flat (or house), and (2) that if the Rent Controller (or Tribunal) has power to fix a standard rent in respect of premises let furnished but upon the basis of their being unfurnished the lessor is still entitled to the full sum agreed upon.

The preamble of the Act states that it is expedient to restrict temporarily the increase of rents in Calcutta. "Premises" are defined by sec. 2 (*e*) as follows :—"'Premises' means any building, or part of a building, or hut let separately for residential, charitable, educational, or public purposes, or for the purpose of a shop or an office, including any land appertaining thereto and let therewith." This section also provides that the expression shall include a room or rooms in a hotel, boarding house or lodging house, but that has no application to this case. Sub-sec. (*f*) defines standard rent in relation to any premises as :—(*i*) The rent at which the premises were let on the 1st day of November 1918, or, where they were not let on that date, the rent at which they were last let before that date and after the 1st day of November 1915, with the addition, in either case, of ten per cent., on such rent; (*ii*) in the case of any premises which were or shall be first let after the 1st day of November 1918, the rent at which the premises were or may be first let.

Then follows a third definition of standard rent by reference to sec. 15 in the following words :—(*iii*) In the cases specified in sec. 15, the rent fixed by the Rent Controller. The three definitions are distinct so far as this section is concerned.

Sec. 15 contains six sub-sections, some of which are again sub-divided, in particular sub-sec. (*3*). Sub-secs. (*1*), (*2*), (*4*), (*5*) and (*6*) are matters of procedure and do not affect the powers of the Rent Controller. Sub-sec. (*3*) supplies the third definition in sec 2 (*f*) (*iii*), where it would more properly find a place. It begins :—"In any of the following cases the Controller may fix the standard rent at such amount as having regard to the provisions of this Act and the circumstances of the case he may deem just."

This allows a discretion to the Controller, the only limits upon which appear to be those imposed by the words quoted and the sub-sections stating when such discretion may be exercised. These are five in number and they state sets of circumstances to which the hard and fast rules provided by sec. 2 (*f*) (*i*) and (*ii*) might not be applicable or appropriate.

Those stated in sub-sec. (*3*) (*b*) alone can have any application to this case. Its terms are as follows :—Where in the case of any premises let furnished, it is necessary to distinguish, for the purpose of giving effect to this Act, the amount payable as rent from the amount payable as hire of furniture.

ELLEN EVELINE WELLS v. JOHN DICKINSON & CO., LD.

The effect of this sub-section will have to be considered, but before doing so I will deal with the first proposition, that the Act does not apply to a furnished flat (or house), for this point is within a narrow compass.

The argument addressed to me on behalf of the Plaintiff is that a furnished flat (or house) is not within the term "premises" as there defined. A flat or house certainly is within the definition, with equal certainty furniture is not, and a "furnished flat" is referred to by learned Counsel for this purpose as though it were a third thing and a "composite article" as he has termed it.

I cannot accept the proposition that a furnished flat is necessarily a distinct, concrete, indivisible thing though it may be so treated either in a statute, as in the case of the English Rent Restriction Act where it is referred to as a dwelling house let at a rent which includes payment in respect of use of furniture, 5 and 6 Geo. V. Cap. 97, sec. 2 (2), 10 and 11 Geo. V. Cap. 17, sec. 12 (2) (*i*), or by agreement between parties where the rent includes a sum for the use of furniture as in *Sutton* v. *Temple* (1), where Lord Abinger, C. B. referred to such an agreement on a contract of a mixed nature for the letting of a house and furniture.

Without some indication that the Rent Act so regards the combination of a flat or house and furniture, I do not think I should be justified in holding that so far as the combination includes "premises," the sections of the Act which refer to "premises," do not apply to a furnished flat or house. In this view the broad contention that no order can be made by the Rent Controller standardizing the rent of "premises" where the "premises" are comprised in a furnished flat falls to the ground. The expression I have employed is equally applicable to the certification by the Controller of the standard rent in cases where sec. 2 (*f*) (*i*) and (*ii*) apply and to cases where he fixes it under sec. 15 (3).

What, however, may be the effect of an order by the Rent Controller standardizing the rent in such circumstances is another matter and presents a problem of which it is not easy to find the solution.

As observed, the Plaintiff's case is that notwithstanding the standardization of the rent of the "premises" she is entitled to recover the whole monthly sum agreed to be paid.

The Defendant Company's contention is that the agreement between the parties is determined by the order of the Tribunal, and the Plaintiff may not recover more for rent of the premises than the sum allowed by that order, which imposes a new obligation on the tenant, who becomes a statutory tenant. This leaves the question of the furniture untouched, for it is indisputable that the Tribunal was right in holding that the Controller had no power to fix the hire of the furniture and it has not been argued to the contrary. In order to provide for this lacuna it is contended that as the parties have not entered into a new agreement as to the furniture, and presumably cannot agree, it is for the Court to assess a reasonable rate at which hire of the furniture shall be paid.

The foregoing argument is based on sec. 15 (3) (*b*). I do not say that the Tribunal (or Controller, who for the present purpose are identical) may not invoke that sub-section when an application is made to standardize the rent of premises let furnished at the time when the application is made. But since no

(1) 12 M. & W. 52, 60 (1843).

order can be made as regards the hire of the furniture the question is what is the effect of an order standardizing the rent of premises let furnished.

If the agreement is determined it would be open to the lessor to remove his furniture. But, though he has submitted that the agreement would be determined, learned Counsel for the Defendant Company would not accept this proposition and contended that the lessor would be under the original obligation to provide furniture, and that in order to arrive at the sum payable for its use the parties would be compelled either to agree or to litigate. In short, the tenant is to have the benefits of the agreement and of the Act and the Court may have to perform the functions of a valuer and make a new contract between the parties.

There is nothing in this or in any other section expressly providing that the agreement between the parties shall be determined. Nor can I construe the Act or the section as so providing by implication. Such a construction could only be placed upon the Act or the section if it were so provided in the clearest language, and the Act must not be taken as meaning more than it says.

Sec. (4) (i), which provides that rent in excess of the standard rent shall, notwithstanding any agreement to the contrary, be irrecoverable has not been referred to, nor could it be without begging the question, for it refers to the rent of the "premises."

The Act creates difficulties of which it provides no solution. Recourse must therefore be had to general principles so far as they do not conflict with the Act and do not make its terms insensible.

The solution I think is to be found in the agreement between the parties. That agreement is such a document as Lord Abinger, C. B. in *Sutton* v. *Temple* (1) described as a "mixed contract," and, as there pointed out, it is only by virtue of such a contract that the obligation to supply goods and chattels suitable to the occupation arises. Learned Counsel's contention that though the agreement is determined by the order of the Tribunal the lessor must leave the furniture involves the same view of the contract. The parties themselves have chosen so to treat the subject-matter of their agreement. Apart from what I have said as to the construction of the Act, the view which parties express in their written contract is one to which effect should be given if that can be done consistently with the words of the Act.

The Tribunal's order relates to the "premises," that is only a part of the subject-matter of the agreement. Though the order of the Tribunal stands, and it may be that in other circumstances advantage could be taken of it, as to which I express no opinion, it is in my opinion ineffective as touching this agreement.

Since this solution discards the only application of sec. 15 (3) (*b*) which learned Counsel has propounded, I propose to test it further by seeing what useful purpose that section may serve.

Comparison between sec. 2 (*f*) (*i*) and (*ii*) and sec. 15 (3) (*b*) leads to the conclusion that the former are not intended to apply to furnished premises, and that where applicable the arbitrary rule supplied by the former is to be followed, and the discretion may be exercised in certain cases where that arbitrary rule is inapplicable. Sec. 15 does not extend the scope of the Act. The Act also appears to regard the rent of premises on 1st November 1918 as the normal rate to be paid.

(1) 12 M. & W. 52, 60 (1843).

ELLEN EVELINE WELLS *v.* JOHN DICKINSON & CO., LD.

I will consider the effect of these sections in four concrete instances.

(A). Premises let unfurnished on 1st November 1918 and let unfurnished at the time when standardization is applied for. This presents no difficulty, and application of the sections is obvious.

(B). Premises let furnished on 1st November 1918 and let unfurnished when standardization of rent is applied for.

If sec. 15 (*3*) (*b*) is intended, as has been argued, to apply to cases where the premises are let furnished at the time, when standardization is applied for, that section would not apply to this case. Nor could the Controller make an order certifying the standard rent in accordance with sec. 2 (*f*) (*i*), for that contemplates the rent of unfurnished premises on 1st November 1918.

Here sec. 15 (*3*) (*b*) could usefully be invoked to ascertain the rent of premises unfurnished on 1st November 1918, and without doing so it is difficult to see how the Controller could proceed at all.

(C). Premises let unfurnished on 1st November 1918 and let furnished when standardization is applied for.

(D). Premises let furnished on 1st November 1918 and let furnished when standardization is applied for.

A comparison of what would occur in these two instances leads to a singular result as regards the suggested determination of the agreement by sec. 15 (*3*) (*b*). In (C) the standard rent would be ascertained automatically by reference to the rent on 1st November 1918. In (D) the standard rent would be a matter of discretion and to fix it the Controller, as in (B), would discriminate between the amount payable as rent and the amount payable as hire of furniture on 1st November 1918, that is to say, only in (D) would he invoke sec. 15 (*3*) (*b*).

Now whatever may be the effect, as regards an existing agreement, of invoking sec. 15 (*3*) (*b*) in fixing the standard rent, there could be no such effect in (C) because in that instance the standard rent would have been certified without reference to that section. Yet in both (C) and (D) the conditions to which the standard rent when certified or fixed have to be applied are the same. Therefore, if the effect of invoking sec. 15 (*3*) (*b*) in fixing the standard rent is to determine an existing agreement to let a furnished house, in (D) such agreement would be determined but in (C) it would not.

This shows that sec. 15 (*3*) (*b*) was not intended to have that effect, for, if it were, it is inconceivable that where the rent of premises let furnished is arrived at through sec. 2 (*f*) (*i*), the Act should have omitted to make a similar provision.

The words "let furnished" in sec. 15 (*3*) (*b*) cannot ordinarily be taken as referable to the time when standardization is applied for. The object of that section is to enable the Controller to fix the standard rent. If a thing has to be measured by a standard, the standard cannot be arrived at from such thing itself. So, to distinguish between the amount payable as rent and the amount payable as hire of furniture at the time when standardization is applied for will not advance the ascertainment of the standard rent. The distinction must be made with reference to some other time. The Act generally takes November 1918 as the appropriate time, though it is not necessarily so as regards sec. 2 (*f*) (*iii*) read with sec. 15 (*3*) (*b*).

This seems to be the proper application of sec. 15 (*3*) (*b*), and if it is taken as referable *to the time* when standardiza-

tion is applied for in order to fix the standard rent it is meaningless.

In my judgment, though the Controller or Tribunal, as the case may be, may make an order standardizing the rent to be paid in respect of premises when such premises have been let at a sum which includes payment for use of furniture, the parties to that agreement remain under their original liability, whatever effect such order may have as between other parties or in other circumstances. The Plaintiff is entitled to succeed and there will be judgment for the sum claimed with costs on scale 2 and interest on judgment at 6 per cent.

Messrs. Leslie & Hinds, Solicitors for the Plaintiff.

Messrs. Eggar & Co., Solicitors for the Defendant Company.

P. K. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 293 OF 1922.

NEWBOULD, J.
B. B. GHOSE, J.
1924,
Heard, 19 and 20, March
Judgment, 20, March.

MAHENDRA NATH SRIMANI, Lessee Claimant, Appellant,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Opposite Party, and other owners Claimants, Respondents.

Calcutta Municipal Act (III, B. C., of 1899), secs 157, 557, cl. (d)—*Acquisition of part of holding, presumption under latter section, if applies—Valuation of holding made before and after the acquisition, difference between, if may be held to be annual value of portion acquired—Valuation at 18 years' purchase.*

Where a small portion of a holding having been acquired by the Calcutta Corporation, the rest of the holding was revalued for purposes of assessment, and it was argued that in view of sec. 557, cl. (d) of the Calcutta Municipal Act (III of 1899, B. C.), the value of the portion acquired should be presumed to be 25 times the difference between the annual values of the holding as assessed before and after the acquisition:

Held—*That the presumption under sec. 557, cl. (d) arises only when the entire holding is acquired and did not therefore apply in this case. But having regard to the provisions of sec. 151 of the Calcutta Municipal Act and the presumption that official acts are properly performed (there being no other evidence), the annual value of the property acquired was the difference between the two annual values assessed by the Municipality, but the presumption under sec. 557, cl.* (d) *not being applicable, the value was assessed at 18 times the annual value, the same number of years' purchase having been allowed in a similar case.*

This was an appeal preferred against the decree of the Special Land Acquisition Judge of Zillah 24-Parganas (F. W. Ward, Esq.), dated the 28th June 1922.

The facts of the case appear sufficiently from the judgment.

Babus Ram Chandra Majumdar and *Bijan Kumar Mukherji* for the Appellant.

Babus Dwarka Nath Chakraburtty and *Surendra Nath Guha* for the Secretary of State.

Babus Nagendra Nath Ghose and *Haradhan Chatterjee* for Claimants, Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against the decision of the Special Land Acquisition Judge of the 24-Parganas in a land acquisition case. A piece of land measuring 9

chattaks 27 sq. ft. was taken from the claimant's premises for the purpose of rounding off the corner between Bowbazar Street and College Street in this town. The Collector valued the land acquired at Rs. 15,000 and houses thereon at Rs. 1,390. On the objection by Mahendra Nath Srimany, the lessee of the premises, reference was made to the Land Acquisition Judge and he supported the Collector's award. Against this decision this appeal has been preferred. The owner of the premises is a Respondent to this appeal, but he has joined forces with the Appellant, and the appeal is really made on behalf of both and court-fees have been paid on the full amount now claimed. There is very little evidence on the record to help us in determining the value of the land. The Appellant relies on the municipal valuation. The entire holding of an area of 1 bigha 4 cottas odd was valued under sec. 151 of the Calcutta Municipal Act, III of 1899, in the year 1917 and the annual value was then assessed at Rs. 11,448. After this land had been acquired, the remaining premises were revalued and the annual value was assessed at Rs. 9,917 in October 1921.

The first contention of the Appellant is that having regard to the provisions of cl. (*d*) of sec. 557 of the Calcutta Municipal Act the market value of the land in this case should be presumed to be 25 times the difference between the annual value assessed in 1917 and that assessed in 1921, or as it is put in another way, having regard to the provisions of this clause the market value of property in 1917 was 25 times Rs. 11,448; in 1921 the annual value of the remainder of the property was 25 times Rs. 9,917. There being no evidence to suggest that there had been any alteration in the value of the land the value of the land acquired must be the difference between these two sums. We are unable to accept this argument as a sound proposition of law. The provisions of cl. (*d*) provide for a presumption and advantage could only be taken of that presumption when facts are proved which make the clause applicable. The presumption, however, only applies to holdings which have been acquired. We cannot therefore apply the presumption either to the original holding or the part of it which has not been acquired. But we think the Appellant has a firmer ground on the second part of his argument. Having regard to the provisions of sec. 151 and the legal presumption that official acts are properly performed the annual valuation made by the Municipality must apparently be equivalent to the profit which the owner of the land would obtain from it. There is no evidence to show that the difference in the annual value of the land was due to any other cause than the reduction of its area by the acquisition of a part of it. It was within the knowledge of the Municipality who have adduced no evidence on this point, if there was any reason why these assessments by them should not represent the annual value of the property to the proprietor in each case. It is true that the Appellant has himself given no satisfactory evidence as to the profit obtained by him by letting the land, but we hold that he was entitled to rely on these valuations of the Municipality which were in his favour. With nothing to rebut the evidence of those admissions we must hold that the annual value of the property acquired was the difference between the two annual values assessed by the Municipality. But since we have held that the presumption under cl. (*d*) of sec. 557 is not applicable the claimant

in the absence of any evidence that 25 years' purchase is a reasonable number of years' purchase to allow is not entitled to be benefited by that figure under the clause. The number of years' purchase which should be allowed when calculating the market value must be based on the evidence adduced in each case. In the present case the only evidence at all as to the number of years' purchase that should be allowed is furnished by a copy of the decision in land acquisition proceedings of land which was acquired for similar purposes at another corner of these cross-roads. In his judgment in that case, Ex. B., the District Judge based his valuation on 18 years' purchase and that decision was accepted by the claimant without appeal. On the evidence therefore we hold that 18 years' purchase should be allowed in the present case.

The result is that this appeal is decreed. In calculating the total compensation to be made in place of the sums of Rs. 15,000 for land and Rs. 1,390 for houses allowed by the Collector the market value of the land and houses will be taken at Rs. 27,558. In addition to this the claimant will get 15 per cent. allowance on this sum and also damages Rs. 1,450 allowed by the Collector. The amount of compensation awarded will be paid to the Appellant lessee and the owner Respondents jointly. The damages awarded by the Collector will be paid to the Appellant lessee alone.

The costs will be given in proportion to the result. The Appellant will get his costs in proportion of the extra amount awarded to the extra amount claimed. The Secretary of State will get his costs in proportion of the amount of the claim now disallowed to the extra amount claimed. The owner Respondents will pay their own costs in both Courts.

The cross-objection is not pressed and is dismissed without costs.

N. G.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORIGINAL DECREE No. 78 OF 1921.

MOOKERJEE, J. RANKIN, J. 1923, 27, March.	JOYGUNNESSA BIBI, Defendant, Appellant, v. MAJILULLAH MAMED PROMANIK and ors., Respondents.

Civil Procedure Code (Act V of 1908), sec. 92—Mahomedan law—Wakf—Mutwali, removal of, ground for—Court's power to appoint new mutwali.

A mutwali *is liable to removal, in a suit under sec. 92 of the Civil Procedure Code of 1908, on the ground of gross mismanagement of the institution which is detrimental to the interests of the endowment, and when the considerations of the welfare of the trust require such removal; and after his removal the Court is competent to appoint persons who are really fit, competent and qualified to hold the office of the* mutwali.

AZIZUR RAHAMAN v. AHIDANNESSA (1), EXP. REYNOLDS (2), MOORE v. M'GLYNN (3), SRINATH v. RADHA NATH (4), IN THE GOODS OF JAMES POWELL (5), GANAPATI AYYAN v. SAVITHRI AMMAL (6), MAYOR, ETC., OF COVENTRY v. ATTORNEY-GENERAL (7) *and* BUCKERIDGE v. GLASSE (8) *referred to and followed.*

(1) F. A No. 164 of 1920, decided on 9th March 1923. Unreported.
(2) 5 Ves 707 (1800)
(3) [1894] 1 Irish Rep. 74.
(4) 12 C. L. R. 370 (1883).
(5) 6 All. H. C. R. 54 (1873).
(6) I. L. R. 21 Mad. 10 (1897).
(7) 7 Brown P. C. 235 (1720).
(8) [1840-41] Cr. & Ph 126; 10 L. J. Ch. 134.

JOYGUNNESSA BIBI v. MAJILULLAH MAMED PROMANIK.

This was an appeal against the decree of G. B. Mumford, Esq., District Judge of Zillah Jalpaiguri, dated the 10th of January 1921.

The Defendant-Appellant and her late husband created *wakf* in June 1898. The husband was the first *mutwali* who held the office till his death in April 1903 when the Appellant became trustee. This suit was brought to remove her from the office on the ground of gross mismanagement of the trust property, and on the ground that the same had been treated as secular properties. The trial Court believing those facts decreed the suit and the Defendant has appealed.

Babus Nakuleswar Mukerjee and *Ramaprosad Mukerjee* for the Appellant.

Babu Atul Chandra Gupta for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decree for the removal of a *mutwali* in a suit instituted under sec. 92, C. P. C. The *wakf* was created on the 10th June 1898 by Sawy Ali and Joygunnessa Bibi. The former became the first *mutwali* and continued to hold office till his death which took place on the 28th April 1903. The latter thereupon became the *mutwali*. It is alleged that during her time the *wakf* estate has practically disappeared, the properties included in the estate have been treated as secular properties not dedicated for charitable purposes, and have actually been partitioned. The lands have also been sold for the personal debt of the *mutwali*. The performance of religious, charitable and educational acts enjoined by the *wakfnama* has ceased, the mosque has fallen into decay and the Madrassa and Fakirkhana no longer exist. In view of these facts, which have been established by the evidence, the District Judge has directed that the *mutwali* be removed and he has also appointed new *mutwalis*. The evidence has been placed before us and we have come to the conclusion that the order for removal must be maintained.

The Appellant is one of the joint founders of the endowment and it has been urged that out of consideration for her feelings, the Court should be reluctant to remove her from the office during her life-time. There is some force in this contention; but it is plain that on account of her age she is no longer able to conduct the management of the *wakf* properties. The fact is that the management has in effect vested in the relations of the Appellant who are not particularly anxious to maintain the *wakf*. In these circumstances, we see no escape from the conclusion that the interest of the endowment, founded by the Appellant herself, requires her removal. It cannot be disputed that a *mutwali* should not be allowed to continue in office if her management of the institution is detrimental to the interest of the endowment. This is not a case of errors and irregularities but rather of gross mismanagement. The principles applicable in cases of this class were explained in *Azizur Rahaman* v. *Ahidannessa* (1). The Court will be guided solely by considerations of the welfare of the trust, and will not hesitate to remove a trustee who has purchased the trust property or concurred in a breach of trust, *Exp. Reynolds* (2) and *Moore* v. *M'Glynn* (3), or has wrongfully alienated trust property, *Srinath* v. *Radha Nath* (4); or has been guilty of wanton waste

(1) F. A. No. 164 of 1920, decided on 9th March 1923. Unreported.

(2) 5 Ves. 707 (1800).

(3) [1824] 1 Irish Rep. 74.

(4) 12 C. L. R. 370 (1883).

JOYGUNNESSA BIBI *v.* MAJILULLAH MAMED PROMANIK.

and neglect of duty, *In the goods of James Powell* (5), *Ganapati Ayyan* v. *Savithri Ammal* (6), *Mayor, etc., of Coventry* v. *Attorney-General* (7) and *Buckcridge* v. *Glasse* (8), or shows a total lack of capacity to manage, *Raja of Kalahasti* v. *Ganapati* (9). The decree of the District Judge for the removal of the Appellant must consequently be confirmed.

We are, however, not satisfied that the persons who have been appointed *mutwalis* are really qualified to hold that office. After enquiry we have come to the conclusion that, in the interest of the endowment, the office of *mutwali* should be vested in two persons, namely, Khasmuddin Pradhan and Abdul Majid Basania who are accordingly appointed *mutwalis*. These gentlemen have expressed their willingness to undertake the management of the endowment, to hold the office of *mutwali*, and forthwith to institute suits for the recovery of the trust estate. They have offered to furnish security to the satisfaction of the District Judge to the extent of Rs. 1,000, such security to be furnished within six weeks from this date; in the meanwhile, they will be allowed to institute suits lest any question of limitation should arise. There will be no order for the costs of this appeal.

H. D. C.

(5) 6 All. H. C. R. 54 (1873).
(6) I. L. R. 21 Mad. 10 (1897).
(7) 7 Brown P. C. 235 (1720).
(8) [1840-41] Cr & Ph. 126: 10 L. J. Ch. 134.
(9) [1918] Mad. W. N. 555.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 83 OF 1924.

GREAVES, J.
DUVAL, J.
1924,
11, April.

ABDUL JABBAR MUNSHI and ors., 2nd party, Petitioners,
v.
MAFIZUDDI SARKER and ors., 1st party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Bengal Alluvial Lands Act (V of 1920, B. C.), sec. 3, if ousts Magistrate's jurisdiction to deal with probable breach of peace in respect of alluvial lands recently reformed—Examination of a Court witness after arguments by both sides finished, how far can be challenged when no objection taken in lower Court

It is open to the Magistrate in the case of alluvial lands recently reformed, where questions of breach of the peace arise, to deal with the matter either under Act V of 1920 (Bengal Alluvial Lands Act), or under the provisions of sec. 145, Cr. P. Code.

RE: WILLIAM BAKER (1) *and other cases referred to.*

Where a Court witness was examined after both sides had closed their cases and finished their arguments, but neither party asked the Magistrate after the said witness was examined to allow further argument:

Held—*That it was too late to raise objections against the procedure by a petition for revision.*

This was a Rule granted against the order of the Sub-Divisional Magistrate of Chandpur, District Tipperah (Mr. R. L. Walker), dated the 17th December 1923.

The facts of the case will appear from the judgment.

Dr. Basak and *Babu Debendra Narain Bhattacharjee* for the Petitioners.

Mr. B. C. Chatterjee and *Babu Bepin Chandra Bose* for the Opposite Party.

(1) 2 Hurlstone and Norman 219 (1857).

ABDUL JABBAR MUNSHI v. MAFIZUDDI SARKER.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This Rule was granted at the instance of the second party in sec. 145 proceedings on three grounds, first, that the provisions of the Bengal Alluvial Lands Act (Act V of 1920) governed the matter and that there was no jurisdiction in the Sub-Divisional Magistrate to deal with the matter under sec. 145; secondly, on the ground that the Magistrate having discarded as unreliable the only evidence on the record erred in making the order which he did finding possession with the first party only on surmise and on the allegation of the first party which was not supported by reliable evidence; thirdly, on the ground that the Magistrate erred in law in examining the *amin* as a Court witness after the close of both parties' case and after arguments had been submitted to him. The dispute in question was with regard to a *char*, *char* Kashim, to the south of which lay another *char*, *char* Umed which was submerged—both *chars* lying in the Meghna river. It appears that there has been a dispute between the Government and the Sukul Babus with regard to the ownership of *char* Kashim which was settled by half of the *char* Kashim, namely, the western half, being relinquished by the Government to Sukul Babus, the eastern portion being retained by the Government as Government *khas mahal* and settled with the Sukul Babus. I will deal with the third ground first. It does not appear that either party asked the Magistrate after the *amin* had given his evidence to allow further argument. This being so, it is too late at this stage to raise the question which is raised by the fifth ground of the petition.

So far as the first point is concerned, that is to say, ground No. 1 of the petition, in our view notwithstanding the argument addressed to us it is open to the Magistrate, in the case of alluvial lands recently reformed, where questions of breach of the peace arise, to deal with the matter either under Act V of 1920 or under the provisions of sec. 145. It was urged before us by the learned Vakil who appears for the second party that in the case of alluvial lands recently formed the provisions of sec. 145 are impliedly repealed by Act V of 1920, and the learned Vakil relied on various authorities where this principle is laid down. Amongst them are *Re: William Baker* (1) and another case, *Pegler* v. *Monmouthshire Ry. Co.* (2) and the case of *Fletcher* v. *Calthorp* (3) and two recent cases, *Fortescue* v. *The Vestry of St. Mathew, Bethnal Green* (4) and *Summers* v. *Holborn District Board of Works* (5). Nobody disputes the proposition for which the learned Vakil was contending that where you have an earlier Act with certain penalties and a subsequent Act with other penalties as a general proposition the earlier statute is repealed by the later statute even if there are no express words in the later statute repealing the former. But I think it is clear if you look at sec. 10 of Act V of 1920 that this negatives any idea of the implied repeal of sec. 145 so far as recently formed alluvial lands are concerned. It is contended that the first part of this section is a mere surplusage, but it seems clear when one reads the words of the section that it does contemplate proceedings under sec. 145 even after the institution of Act V of 1920.

(1) 2 Hurlstone and Norman 219 (1857).
(2) 6 Hurlstone and Norman 644 at p. 653 (1861).
(3) 23 L. J. (M. C.) 49 at p. 53 (1845).
(4) L. R. [1891] 2 Q. B. 170.
(5) L. R. [1893] 1 Q. B. 612.

ABDUL JABBAR MUNSHI v. MAFIZUDDI SARKER.

Moreover I can well conceive that having regard to the provisions of cl. 3 of Act V of 1920 there may well be cases, which are somewhat doubtful as to whether they fall within the provisions of sec 3, and it may be necessary in view of the doubt, if a breach of the peace is apprehended, that the matter should be dealt with under the provisions of sec. 145. The learned Vakil for the second party suggests that so far as cl. 3 is concerned the opinion of the Collector is decisive as to whether they are recently formed lands or not. The section does not make his opinion conclusive and I am not certain that it would not open to argument that he may have formed a wrong opinion as to whether the provisions of sec. 3 are applicable or not. In any case looking at the provisions of Act V of 1920 and specially cl. 10, we think it is clear that there was no implied repeal of sec. 145, so far as alluvial lands recently formed are concerned by Act V of 1920.

The remaining point is ground 4. Apparently, the second party and the first party are tenants of lands in *char* Kashim. *Char* Umed, as I have stated, had disappeared and there was some accretion of land to *char* Kashim. This was claimed by the tenants of *char* Kashim as accretion to their land. Three, however, of the tenants went behind the back of the others to the Government—it being Government *khas mahal* land, and suggested that the accreted land was really *char* Umed and that this land should be settled with them. As a result of this—a survey was held on behalf of the Government, and the other tenants of *char* Kashim in disgust apparently have since these proceedings kept the second party out of *char* Kashim. What is said is that the learned Sub-Divisional Magistrate having suggested that in cases of this kind it was difficult to get any impartial evidence and having impliedly rejected the evidence of the first and second parties and further suggested that the three witnesses whom he named were reliable has subsequently rejected the evidence of these witnesses and arrived at his decision as to possession of the first party upon surmises which he has formed or arrived at. I do not think that the judgment really bears the interpretation sought to be put upon it. It is true that the Magistrate suggests, as must be the case, that the evidence of both the first and second parties is biassed evidence but it does not mean that he necessarily rejected that evidence; and it seems to me that he has arrived at his decision after rejecting the evidence of the three witnesses whom he considers impartial witnesses, and rejected that evidence for the reasons which he has stated and that having done so he has accepted the evidence as to the possession of the first party. This being so there is no ground for our interference on this point.

Under the circumstances the Rule must be discharged.

DUVAL, J.—I agree.

J. N. R. *Rule discharged.*

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

LORD BUCKMASTER.
LORD DUNEDIN.
LORD CARSON.
SIR JOHN EDGE.
LORD SALVESEN.
1923,
Heard, 17 and 19, April.
Judgment, 15, May.

MUSAMMAT JAITI, Appellant,
v.
BANWARI LAL and ors., Respondents.

Hindu law—Mitakshara—Separation by one coparcener—Other coparceners, if remain joint or are

MUSAMMAT JATTI v. BANWARI LAL.

separate—Presumption—Joint family business continued after such separation becomes a statutory partnership—Dissolution, date of, of such partnership—Suit by partner's widow for accounts—Limitation.

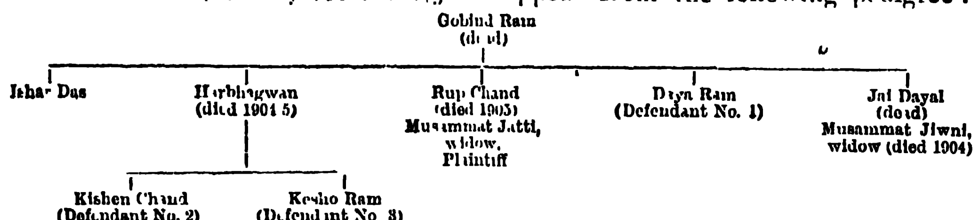
There is no presumption, when one Mitakshara coparcener separates from the others, that the latter remain united. An agreement amongst the remaining members of the joint family to remain united or to reunite must be proved like any other fact.

The family business continued after such separation becomes an ordinary partnership subject to the Contract Act. On the death thereafter of one of the coparceners, the partnership is dissolved, and a right to an accounting arises, so that his widow's suit to enforce the right becomes barred, if not brought within six years, unless the widow has been admitted as a partner to a new partnership, in which case the date of dissolution would be the date of the suit.

This was an appeal from a judgment and decree, dated the 24th December 1917, of the Chief Court of the Punjab, which affirmed a decree, dated the 26th May 1916, of the Senior Subordinate Judge of Amritsar.

The Court of first instance dismissed the suit on the ground of limitation but the Appellate Court without discussing the question of limitation has held that the Plaintiff-Appellant has failed to establish her title to the relief she claims.

The relationship of the parties would appear from the following pedigree :—



Gobind Ram died leaving his five sons who constituted a Hindu joint family governed by the Mitakshara law. Jai Dayal died very young and the remaining four brothers lived together and carried on business jointly at Amritsar.

In or about 1876 the joint family was broken up and the entire assets of the co-parcenary were divided into four equal shares. For the satisfaction of the eldest brother, Ishar Das, his three brothers executed a deed of relinquishment on the 7th Jeth Badi 1933, that is, 15th May 1876.

The deed recited that "we have divided amongst ourselves property, ornaments, clothes, utensils, cash, and all other articles, including business." It specified certain property with which "Daya Ram has no concern," and certain other property "which remains the joint property of Harbhagwan and Rup Lal (alias Rup Chand)," and mentioned others which "still remain joint of all the four co-sharers in equal shares."

The Appellant instituted the present suit on the 5th May 1911 in the Court of the Senior Subordinate Judge of Amritsar.

In her plaint she stated that her husband (who had died in 1905) and his three brothers had separated in or about 1876; that after the severance of the family status and estate her husband and his two brothers, Harbhagwan and Daya Ram, carried on business as tenants in common or partners and that on her husband's death she was admitted into the partnership business. She sued for dis-

MUSAMMAT JATTI v. BANWARI LAL.

solution of the partnership and prayed that a decree for the following reliefs might be passed in her favour against the Defendants :—

(a) For possession, by partition, of one-third of the houses entered in the plans attached to this petition of plaint.

(b) For one-third of the business of the trading shops known as "Har Bhagwan-Rup Chand" and "Rup Chand-Daya Ram" which might be found in the shape of cash and goods after adjustment of account.

(c) If this ordinary bhaiwali (parcenary) were considered partnership it might be dissolved.

(d) The costs of the case might be awarded.

(e) If the Plaintiff were found entitled to any other relief in the opinion of the Court it might be granted.

The Defendants Daya Ram and the sons of Harbhagwan (deceased) filed a written statement denying the Plaintiff's claim. They pleaded amongst other things that, in 1876, only Ishar Das separated from the joint family, leaving the remaining three brothers joint and undivided as before, and that the Defendants succeeded by survivorship on the death of the Plaintiff's husband, Rup Chand, and that the Plaintiff was not entitled to anything beyond maintenance.

The following issues were framed for trial up to the 13th February 1915 :—

(1) Whether after the separation of Ishar Das the remaining brothers continued to be members of joint Hindu family, and whether the parties' family has been a joint Hindu family up to this time?

(2) Did they convert the joint family business into a partnership?

(3) Is the plaint properly stamped?

The third issue was not pressed.

The learned Subordinate Judge placed the onus of proving the first issue on the Defendants and Counsel for the Plaintiff made the following statement on the 9th March 1915 :—

"No evidence is to be produced on behalf of the Plaintiff in respect of issue No. 2. Issue No. 2 is simply a contra issue to No. 1. The Plaintiff will produce rebutting evidence in respect of issue No. 1."

No oral evidence was produced by either party. After examining the documentary evidence the Senior Subordinate Judge delivered judgment on the 26th May 1916. He found the first two issues in favour of the Plaintiff. He held that, as already stated in para. 5, the deed of relinquishment, dated the 15th May 1876, was clear evidence of the severance of the joint family. In regard to the other documents he said as follows :—

"Defendants' own account books show that the three brothers, *i.e.*, Rup Chand, Harbhagwan and Daya Ram, though continued joint in business as partners, became separate in food, lodging and expenses after the separation of Ishar Das—

(a) Accounts were gone into and profits were shown *pro rata* in separate *khatas*, *i.e.*, one-third share of each of the three brothers (*vide* list, p. 15).

(b) Brothers gave neondra on the marriages of the children of each other (*vide* p. 12), death money (*bura din*) on the death of members of each other's family (p. 13), and money drawn by any brother is shown in his own separate *khata* (p. 14). All the abstracts (pp. 12 to 15) are based on the accounts (D. 7 to 11 filed by themselves).

I don't think that such dealings are conceivable in a joint Hindu family of which the idea is that all must earn for

MUSAMMAT JATTI v. BANWARI LAL.

the common weal of the family and never think of his defined share."

"I have therefore not the least hesitation in finding that on the separation of Ishar Das the family of the parties ceased to be a joint Hindu family in the strictest sense of the term; or, in other words, its members ceased to be coparceners. Thus I find the first issue against the Defendants

As to the second issue, there is no doubt that the three brothers allowed their shares to remain in the business ever since the separation of Ishar Das, and the account books of their firm show beyond any reasonable doubt that each brother was entitled to take one-third share of the profits of the business, but the relationship thus created was a partnership as defined in sec. 238, Contract Act, rather than the ancestral business of a joint Hindu family. Punjab Reports 97 of 1910 appears to me to apply to the case fully in this respect"

But the learned Senior Subordinate Judge noticing at the time of writing his judgment that an important issue emerged from the pleadings had not been framed, added the following issue:—

"Whether the Defendant entered into partnership with Defendants Nos. 2 and 3 and the suit is therefore within time on the allegations of Plaintiff?"

On this issue he held the partnership was dissolved in 1905 when the Plaintiff's husband died, and that there was no evidence to establish that the Plaintiff had been admitted into the partnership after her husband's death, and that as the suit had been brought in 1914, *i.e.*, more than six years after her husband's death, it was barred by Art. 106 of the Limitation Act. He therefore made a decree dismissing the Plaintiff's suit with costs.

The Plaintiff appealed from the said decree of the Senior Subordinate Judge to the Chief Court of the Punjab, which delivered judgment on the 24th December 1917 and found the first issue against her, concluding their judgment in the following words:—

"We are of opinion that at the time of his death the Plaintiff's husband was a member of a joint Hindu family of which the other members were the Defendants, and that when he died his undivided share devolved upon the Defendants by right of survivorship. The Plaintiff is not, therefore, entitled to any share in the family property or in the assets of the family business, and her suit must fail. We accordingly maintain the decree of the lower Court and dismiss this appeal with costs."

The Plaintiff thereupon applied for review of the said judgment but the learned Judges of the Chief Court refused her application on the 19th April 1918, and her second application for the same purpose was also rejected.

The Appellant appealed from the said judgment and decree of the Chief Court to His Majesty in Council.

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Appellant.—The Subordinate Judge has rightly held that the joint family ceased to exist after the deed of relinquishment of 15th May 1876.

The question of limitation was not put in issue at the trial and there is no direct evidence on the point.

The evidence on the record does, however, suggest that there was a new partnership on the death of Rup Chand and as long as there was no ouster, limitation cannot run.

Corea v. *Appuhamy* (3).

Mr. A. Majid for the Respondents.—The partnership was dissolved on the

(3) [1912] A. C. 230.

MUSAMMAT JATTI v. BANWARI LAL.

death of Rup Chand and a suit for an account was barred by limitation.

Art. 106, Indian Limitation Act.

[He was stopped.]

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In 1876 four brothers, Ishar Das, Harbhagwan, Rup Chand and Daya Ram, lived as a joint Hindu family and carried on a family business. In that year a deed was executed by which the assets of the family were described and divided, and Ishar Das was finally paid out. Thereafter the business was carried on, but the profits were carried to separate accounts of the three remaining brothers in equal shares.

In 1905 Rup Chand died, leaving a widow who is the Appellant. In 1911, the widow raised this suit against the remaining brother and the sons of the other who had pre-deceased, claiming accounts and payment of one-third of the partnership assets.

The defence put up was two-fold. It was alleged that though in 1876 Ishar Das separated from this joint family, the other brothers remained joint · that in consequence on the death of Rup Chand, the husband of the Plaintiff, she had only the right of maintenance as a Hindu widow, which maintenance she had duly received. Consequently, it was said that assuming that there was a complete separation, the suit was time-barred under Art. 106 of the 1st Schedule of the Limitation Act. The statement of the Plaintiff as to what happened at her husband's death was not expressed with precision, but might be read as an averment that on her husband's death she was admitted to be a partner, her share being the same as that of her deceased husband. The issues as originally framed were only three in number, one of which, being as to the plaint being adequately stamped, may be disregarded. The remaining two were: (1) On the separation of Ishar Das, did not the remaining male members of the family become separate? (2) Did they convert the joint family business into a partnership? The case went to trial and no evidence was produced by the Plaintiff, except the account books of the firm, which showed that after Ishar Das separated the profits of the business were carried to separate shares in the names of the three brothers, and this continued after Rup Chand's death. The learned Senior Subordinate Judge found first, that the deed executed at the separation of Ishar Das showed separation of the whole brothers: that re-union had not been proved and that the joint family came to an end. But finding in the pleading a clear plea to the effect that the suit was time-barred, he added an issue to that effect and decided it in favour of the Defendants.

The Plaintiff appealed, and on appeal the learned Judges of the Chief Court of the Punjab held that in 1876, though Ishar Das had separated, separation had not taken place among the other brothers, and consequently the Plaintiff had only the rights of a Hindu widow for maintenance and could not maintain the suit. They, therefore, found it unnecessary to consider the question as to limitation. The Plaintiff has appealed to the King in Council.

Their Lordships do not find themselves able to agree with the views of the learned Judges of the Chief Court.

The law is well settled by the cases of *Balabux Ladhuram* v. *Rukhmabai* (1) and

(1) L. R. 30 I. A. 130; s. c. I. L. R. 30 Cal. 725; 7 C. W. N. 642 (1903).

Balkishen Das v. *Ram Narain Sahu* (2). Lord Davey remarks in the former case: -

"It appears to their Lordships that there is no presumption, when one co-parcener separates from the others, that the latter remain united. . . . . Their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact."

Their Lordships think that the result is well stated by the learned trial Judge, who says:- -

"There is absolutely no material on the file from which it can be inferred that the three brothers continued united or reunited as co-parcenary members of a joint Hindu family, while Defendants' own books show the contrary . . . . I have therefore not the least hesitation in finding that on the separation of Ishar Das the family of the parties ceased to be a joint Hindu family in the strictest sense of the term; or, in other words, its members ceased to be co-parceners. Thus I find the first issue against the Defendants."

There remains, however, the question of limitation. The position here seems clear. Separation having been effected in 1876, and the business being carried on by the three brothers, the business became an ordinary partnership subject to the Partnership (?) Act. On the death of Rup Chand, the Plaintiff's husband, the partnership was dissolved and a right to an accounting arose. But Rup Chand died in 1905, and this suit was not raised until 1911. It is, therefore, time-barred as a suit for such an accounting. If, however, on Rup Chand's death the widow was admitted as a partner to a new partnership, then the date of dissolution would only be the raising of the suit and no limitation could apply. It is possible to read the averments of the Plaintiff as alleging such a, partnership. But the existence of such a partnership was denied. The case went to trial, and not a scrap of evidence directly proving such an agreement was produced. All that the widow got was a mere allowance of Rs. 51 a month. The fact that Rup Chand's share still continued to be dealt with in the books is no evidence of a partnership with his widow.

Their Lordships think that a perfectly correct view was taken by the learned Subordinate Judge. As, however, the result is the same as if the grounds of judgment of the Court of Appeal had been adopted, the form of judgment which will be appropriate will be simply to dismiss the appeal with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Ranken Ford & Chester* for the Appellant.

Solicitors: *Messrs. Chapman-Walker & Shephard* for the Respondents.

G. D. M.

(2) L. R. 30 I. A. 139, s. c. I. L. R. 30 Cal 738; 7 C W N. 578 (1903).

PRIVY COUNCIL

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD DUNEDIN.
SIR JOHN EDGE.
MR. AMEER ALI.
1923,
Heard, 16, March.
Judgment, 17, April.

BISHWA NATH SINGH, Appellant,
v.
JUGAL KISHORE and ors., Respondents.

Hindu law—Mitakshara—Adoption—Widow, when may adopt without husband's authority—Custom.

According to the law of the Mitakshara as interpreted by the School of Benares, an adoption by a widow of a son to her deceased husband would be invalid if made without authority to adopt given to her by her husband unless such an adoption was authorised by a custom of the family.

BISHWA NATH SINGH *v.* JUGAL KISHORE.

Held, *reversing the High Court, that the custom in this case was proved.*

This was an appeal from a judgment and decree, dated the 4th July 1919, of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree, dated the 10th April 1917, of the Subordinate Judge of Sitapur.

The main question for determination on the present appeal related to the validity of the Appellant's adoption. The Subordinate Judge found on the evidence in favour of the Appellant, but the Appellate Court has held against the adoption on the ground that the evidence upon which the Subordinate Judge relied was not sufficiently strong to establish the family custom alleged by the Appellant.

The facts of the case may be shortly stated as follows :—The litigation relates to a village named Pakauri, which belonged to one Baldeo Bakhsh Singh, who was a Raghubansi by caste, and a zamindar and resident of the village of Bamhnawan in the District of Sitapur. He died in or about 1891 leaving a widow, Musammat Gulab Kuar, who inherited her husband's estate as a Hindu widow and came into possession of the said village of Pakauri. She adopted the Appellant, Bishwa Nath Singh, on the 17th October 1915, as a son to her deceased husband, with the result that the Appellant became the son of his adoptive father from the date of his death.

Long before the adoption the said widow executed a deed of mortgage, dated the 10th September 1891, hypothecating therein the whole of the said village of Pakauri in favour of one Kalka Singh for Rs. 3,000 and interest thereon. The mortgagee obtained a decree for sale of the village on foot of the mortgage, and a proclamation of sale was issued under the provisions of r. 66 of Or. 21 of the Code of Civil Procedure, 1908. But the proclamation of sale stated that the village of Kundri would be sold by auction, and did not specify that the village Pakauri was to be sold. However, on the date fixed for the auction sale, that is, on the 20th April 1915, bids were made in respect of the village Pakauri in three lots of one-third each. It is obvious that the sale of Mauza Pakauri was a nullity.

The Defendants, namely, Balmakund (Defendant No. 2) purchased one-third share of the village, and Qurban Ali (Defendant No. 3) also purchased an one-third share.

The widow, Musammat Gulab Kuar, impugned the validity of the said sale, but by an order, dated the 11th August 1915, the Deputy Commissioner of Sitapur held that her application was barred by [illegible] and that her remedy lay in the insti[illegible] of a regular suit to set aside the [illegible]. The Deputy Commissioner's order was affirmed on appeal by the Commissioner on the 22nd October 1915.

The Appellant (Plaintiff No. 1) and his adoptive mother, the said Musammat Gulab Kuar (Plaintiff No. 2, since deceased), instituted the present suit on the 13th March 1916, in the Court of the Subordinate Judge of Sitapur. In their plaint the Plaintiffs stated "that in accordance with the oral Will of Thakur Baldeo Bakhsh Singh, deceased, and the family custom under which a widow has power to make an adoption without her husband's permission, the Plaintiff No. 2 formally adopted the Plaintiff No 1 on the 17th October 1915." It was also alleged that Musammat Gulab Kuar, Plaintiff No. 2, had no legal necessity to justify the execution of the mortgage, dated the 10th September 1891, hereinbefore mentioned, and that the allegation was therefore not binding on the Appellant.

BISHWA NATH SINGH v. JUGAL KISHORE.

The Plaintiffs also alleged that the auction sale of the two-thirds share of Mauza Pakauri was null and void.

Defendant No. 1, Baryar Singh, was the son of the mortgagee, and Defendants Nos. 2 and 3 were the auction-purchasers of the two-thirds share of the village. The Plaintiffs claimed a decree for possession of two-thirds share of the said village with mesne profits and costs from the Defendants.

The principal Defendants, Nos. 2 and 3, filed a joint written statement denying the Plaintiffs' claim. They questioned the factum and validity of the Appellant's adoption and pleaded, among other things, that the said mortgage had been executed by Musammat Gulab Kuar for legal necessity. Defendant No. 1 adopted almost all the pleas of the principal Defendants. The Subordinate Judge framed a number of issues on the pleadings which are not now material.

The controversy was now practically confined to the first issue, *viz.*, whether there was a family custom under which the Plaintiff No. 2 had authority to adopt a son to her late husband without his authority and in order to prove it the Plaintiffs produced (1) a number of wajib-ul-arzes, and (2) oral evidence of members of the family and caste of Baldeo Bakhsh Singh. The most important wajib-ul-arz was that of the village of Bamhnawan which was owned by the said Baldeo Bakhsh Singh. It was dated the 26th December 1871, and was verified on behalf of the said Baldeo Bakhsh Singh and his brother. It recorded the custom of the family in the following terms:—

"The custom of adoption obtains without restriction as to caste and family. A widow has also the power to adopt whether her husband has or has not left a Will or authority (to that effect), provided there is no legitimate son of her husband."

The remaining wajib-ul-arzes furnished evidence to the same effect.

After examining the whole of the documentary evidence the Subordinate Judge delivered judgment on the 10th April 1917. He found that the family custom on which the Appellant relied was fully established by the evidence, and that the mortgage was not executed by the said widow for any legal necessity. His finding on the first issue may be summarised thus:—

"To sum up the custom recorded in the wajib-ul-arz of all the aforesaid villages, namely, (1) Bamhnawan, (2) Kethura, (3) Ismailpur, (4) Supauli, (5) Deotapur, (6) Kundi, (7) Mandela or Murila, and (8) Rasulpur, is unanimous and invariable so far as the unrestricted power of a Hindu widow to make the adoption is concerned, though there is some variation on some other points relating to the general subject of adoption. This variation on other points cannot affect the custom which validates the adoption by a Hindu widow without the permission of her husband. It will appear from the evidence of the following witnesses of the Plaintiffs that the aforesaid eight villages relate to the family of the Raghubansis to which Thakur Baldeo Bakhsh Singh belonged:—Anrudh Singh, Arjun Singh (P. W. 8), Kokaran Bakhsh, Harpal Singh and Darshan Singh . . . . Arjun Singh (P. W. 8) is a man of the age of 60. His evidence regarding the custom and the wajib-ul-arz is strong and reliable. . . . . . All these (thirteen) witnesses are Raghubansi Thakurs. Guman Singh (P. W. 6), at the beginning of his examination, stated that he could not say if he belonged to the same family of Raghubansis as Baldeo Bakhsh

Bishwa Nath Singh v. Jugal Kishore.

Singh. The rejection of his evidence does not affect the Plaintiffs' case. For there remain other witnesses who belong to that family. They unanimously depose to the custom that a widow among them can make a valid adoption without her husband's permission. Their opinion is admissible under sec. 49 of the Indian Evidence Act. Four instances of the custom are proved from their evidence, namely, (1) Gopal Singh, father of Baldeo Bakhsh Singh, was adopted by the widow of Raghunath Singh, (2) Thakur Parwan Singh's widow (of Kethura) adopted Kedar Singh, who is alive, (3) Umrao Singh's widow (of Rohra) adopted Chandrabhan Singh (P. W. 17), and (4) Thakurain Lachhan Kuar, widow of Sheo Bakhsh Singh (of Supauli) adopted Anrudh Singh (P. W. 5) who is in possession of Sheo Bakhsh Singh's estate to the extent of 9 annas. . . . .

"On the whole, I think the oral and documentary evidence on the record is quite sufficient to prove the custom put forward on the Plaintiffs' side."

In the result the Subordinate Judge made a decree for possession of the two-thirds share of the village in dispute with mesne profits in favour of the present Appellant, and dismissed the claim of Plaintiff No. 2, and from that decree Defendants Nos. 2 and 3 appealed to the Court of the Judicial Commissioner of Oudh.

The appeal was heard by two Additional Judicial Commissioners, who delivered one judgment on the 4th July 1919. They affirmed the view of the Subordinate Judge that the widow Musammat Gulab Kuar had no oral authority from her husband to adopt, but they came to a contrary conclusion on the first issue. They were of opinion that the wajib-ul-arzes of eight villages named by them were irrelevant, and that none of the wajib-ul-arzes could "be relied on as an accurate record of the custom of the family." They agreed with the Subordinate Judge in holding that the principal witnesses called by the Plaintiffs to prove the custom of the family were credible, but they considered that the effect of their evidence fell short of establishing the family custom.

They accordingly allowed the appeal of the Defendants, set aside the decree of the said Subordinate Judge and made a decree dismissing the claim of the present Appellant with costs. The Appellant has now appealed from the said decree of the Additional Judicial Commissioners to His Majesty in Council. The Plaintiff No. 2, Musammat Gulab Kuar, died during the pendency of the appeal in the Court of the Judicial Commissioner of Oudh, and on the application of the Defendants, the former Respondents were brought on the record in her place in spite of the objections of the Appellant as to their being the true legal representatives of the deceased Plaintiff.

Hence the appeal.

Messrs. Dunne, K. C. and *B. Dubé* for the Appellant *ex parte* contended that the family custom was established by the evidence to which their argument was directed.

Their Lordships' Judgment was delivered by

Sir John Edge.—This is an appeal by Bishwa Nath Singh, the surviving Plaintiff against a decree of the Court of the Judicial Commissioner of Oudh, which reversed a decree of the Subordinate Judge of Sitapur and dismissed the suit. The suit is for the possession of a two-thirds share of the village Pakauri in the District of Sitapur.

The other Plaintiff in the suit was Musammat Gulab Kuar, who is now dead. She was the widow of Baldeo Bakhsh

Singh, who died sonless in or about 1891. He was a Hindu and by caste a Raghubansi, and lived in the village of Bamhnawan in the District of Sitapur and owned the village of Pakauri. The widow adopted on the 17th October 1915 the Appellant as a son to her deceased husband, who had given her no authority to adopt a son to him. The question which their Lordships have had to consider in this appeal is whether that adoption was valid, and apparently that was the only question as to which there was a contention in the Appellate Court. The learned Judges of the Appellate Court, in their judgment, said:—

"There are thus two points for decision in this appeal, namely, whether Musammat Gulab Kuar had authority from her husband to adopt, and secondly, whether failing such authority she had a right of (by) custom to adopt without authority from her husband."

The fact of the adoption is not now disputed and is beyond dispute. The family to which Baldeo Bakhsh Singh belonged was subject to the law of the Mitakshara as interpreted by the School of Benares, according to which an adoption by a widow of a son to her deceased husband would be invalid if made without an authority to adopt given to her by her husband, unless such an adoption was authorised by a custom of the family.

The evidence that there was such a custom in this family consisted of statements as to the right of widows to adopt sons to their deceased husbands contained in the wajib-ul-arzes of eight villages which had been recorded in the settlement of 1871, that is, about forty-four years before the adoption in question here. One of those villages was the village of Bamhnawan, in which Baldeo Bakhsh Singh had lived; at least two other of the villages were villages in which he or members of his family were interested as proprietors; and the remaining four villages were villages in which members of his caste had been interested, although their relationship to his family was not proved. There was also some oral evidence of witnesses in support of the custom.

In the wajib-ul-arz of Bamhnawan and in some of the other wajib-ul-arzes it was stated that widows could adopt sons to their deceased husbands without having had the authority of their husbands to adopt. In the other wajib-ul-arzes it was simply stated that widows could adopt. In their Lordships' opinion those statements meant the same thing, that is, that widows could adopt sons to their husbands although they had had no authority from their husbands to adopt; it was so that the Subordinate Judge construed the wajib-ul-arzes, and he found that the custom was proved. The Appellate Court was of opinion that the mere statement in a wajib-ul-arz that a widow could adopt meant that a widow, who had the authority of her husband to adopt, could make an adoption to him, and consequently held that the statements as to the custom were not consistent and that the custom was not proved. It did not occur to the learned Judges of the Appellate Court that if the statement that a widow could adopt meant that she could adopt if she had had the authority of her husband to adopt, the statement was not a statement of a special family custom, and was unnecessary, as it would be merely a statement of a right which a Hindu widow of a sonless Hindu enjoys everywhere in India, except possibly in families governed by the law of the Mithila School.

Their Lordships are of opinion that the custom was proved and that the adoption of the Appellant was valid. It may be mentioned that the learned Judges of the

BISHWA NATH SINGH *v.* JUGAL KISHORE.

Appellate Court did not doubt the credibility of the witnesses as to the custom, whose evidence the Subordinate Judge has accepted as true, but they thought that it had not been proved that these witnesses belonged to the family to which Baldeo Bakhsh Singh had belonged.

This appeal has been heard *ex parte*, no Respondent having appeared. As the appeal has been heard *ex parte* the Counsel for the Appellant has drawn their Lordships' attention to the fact that the learned Judicial Commissioners have not in their judgment expressed a finding on the seventh ground of the appeal to their Court, which was as follows :—" 7. That the lower Court should have held that the deed, dated the 10th September 1894, was executed for legal necessity." The deed of the 10th September 1894, was a mortgage of the village Pakauri granted by the widow while she was in possession of a Hindu widow's interest in the estate. On that mortgage a decree for sale was made and at the sale the two-thirds share in the village now claimed by this Appellant was purchased by some of the Defendants to this suit. The Subordinate Judge had found in this suit that the mortgage was not made for necessity. The learned Judicial Commissioners said in their judgment that : " They (the Defendants) denied the adoption and they denied the widow's power to adopt. They also pleaded that even if the adoption was proved, it could not affect the interest acquired by the purchasers before the adoption. On this last pleading no issue was framed and nothing has been said in argument in appeal. It must therefore be taken to have dropped." The question as to whether the mortgage was or was not granted for necessity was involved in the question as to whether the purchasers at the sale under the decree had acquired title by their purchase. In their Lordships' opinion the learned Judicial Commissioners were under the circumstances justified in holding, as they did, that the only question which remained for them to decide in the appeal was the question as to the validity of the adoption.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the Court of the Judicial Commissioner should be set aside with costs, and the decree of the Subordinate Judge should be restored and affirmed.

Solicitors : *Messrs. Barrow, Rogers* & *Nevill* for the Appellant.

G. D. M.

CIVIL APPELLATE [illegible]

[illegible]PPEAL F[illegible]

No. [illegible]36 OF 1922

AND

REV. No. 729 OF 1922.

WALMSLEY, J.
MUKERJI, J.
1924,
Heard, 7 and 8, February.
Judgment, 14, February.

KALIMUDDI AHAMMAD,
Defendant No. 4,
Appellant,
v.
ASHAKUDDIN and ors.,
Plaintiffs, Respondents.

Civil Procedure Code (Act V of 1908), Or. 9, r. 13 and sec. 2 2)—Decree contested against some Defendants and ex parte *against others—Appeal by former and application to set aside by the latter—Appeal dismissed owing to Appellant's failure to substitute heirs of a deceased Respondent—Dismissal, if decree—First decree, if merged in it—Trial Court's power to entertain application for revival after dismissal of appeal.*

Pending an appeal to the High Court by a contesting Defendant against a preliminary decree for partition, another Defendant against whom the decree had been passed ex parte *applied in the lower Court to set aside the decree under Or. 9, r. 13 of the Civil Procedure Code. No steps to*

KALIMUDDI AHAMMAD *v.* ASAHAKUDDIN.

substitute the legal representatives of a deceased Respondent having been taken in the appeal, it was dismissed as against them, and it was also dismissed as against the other Respondents on the ground that the appeal was not properly constituted as to parties:

Held—*That the trial Court had jurisdiction to deal with the application under Or. 9, r. 13 after the dismissal of the appeal by the High Court in the above manner:*

That whether the decision of the High Court amounted to a decree or not, it was not a decree in which the trial Court's said ... *ed so as to supersede the*
" There are thu
in this appeal, na...
G..lab Kuar had au... *The whole object of*
...opt, and secondl... *in sec. 2 (2) of the*
the ...ty s... *seems to be to classify orders in*
adopt w... *determine whether an appeal or*
bar... *certain cases a second appeal lies therefrom.*

The order dismissing the appeal against the heirs of the deceased Respondent was a dismissal for default but the order dismissing the appeal on the ground that it was not properly constituted was a decree.

Authorities dealing with the question of the merger of an ex parte *decree in the decree of the Appellate Court discussed.*

This was an appeal preferred on the 5th of September 1922 against the order of the Subordinate Judge of Bogra, in Zillah Pabna and Bogra (Babu Krishna Kumar Sen), dated the 7th of July 1922.

The facts of the case will appear from the judgment.

Babu Atul Chandra Gupta for the Appellant.

Babus Bansorilal Sarkar, Gunoda Charan Sen and *Someshwar Proshad Mukherji* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The circumstances which have led up to the present appeal are as follows :—A partition suit was instituted on 20th December 1918 against several Defendants, among whom the present Appellant was No. 4. Two of the Defendants contested the suit and on 22nd September 1919 a preliminary decree for partition was made on contest against two of the Defendants and *ex parte* against the others. The present Appellant did not appear at all in the first Court, and he is one of those against whom the decree was made *ex parte*. On 17th December 1919 the first Defendant alone preferred an appeal against the decree to this Court, and three days later, on 20th December, the Appellant presented an application to the trial Court under Or. 9, r. 13 of the Civil Procedure Code. This application was kept pending until after the disposal of the appeal preferred by the first Defendant.

The fate of that appeal was this : One of the Respondents died, and as the Appellant did not take proper steps to bring her heirs on the record the appeal was dismissed as against them ; and then as against the others it was held that in the absence of the heirs of the deceased Respondent the appeal could not proceed : it was accordingly dismissed. This was on 5th January 1922.

Then the record was returned to the lower Court, and the Appellant's application came on for hearing. On 8th April 1922 a petition of compromise between the Plaintiff and the Appellant was presented, and in accordance therewith the Court ordered that the suit should be restored to its original number as against Defendant No. 4 in regard to three only of the plots mentioned in the plaint,

RAM CHANDRA SA[illegible] KASEM KHAN.

and Molla's Contract Act, p. [illegible] ec. 251, Indian Contract Act. *Russo [illegible]nese Bank* v. *Liyam Sam* (23), *The B[illegible]k of Australasia* v. *Thomas Chaplian Breillat* (1) and *In re Agriculturist Cattle Insurance Company* (24).

Babu Mahendra Nath Ray for the Defendant No. 2 contended (1) that money was borrowed by Defendant No. 1 in his personal capacity. See paras. 13 and 14 of the plaint and Plaintiff's evidence, p. 25, line 15. Sec. 251 therefore had no application. The wordings of the section and the illustrations show that the section applies only where loan is taken as a partner: sec. 251 will not for the same reason help the Plaintiff.

(2) Cls. 4 and 6 imposed a restriction on the borrowing power of the Defendant No. 1. The debt was unnecessary. Business could be carried on with moneys received from the Railway Company on bills. Further loan was not required in the usual course of carrying on the business. The Defendant No. 2 was not hence liable.

The Defendant No. 1 was not represented.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiffs in a suit for recovery of money. The claim has been decreed against the first Defendant but dismissed against the second. The question in controversy now is, whether the Plaintiffs are entitled to a decree against the second Defendant, and if so, for what amount.

The Plaintiffs are money-lenders. The first Defendant is a contractor. Among various works which he had undertaken, he had in hand a contract under the Bengal Nagpur Railway Company in connection with what is known as the Kharagpur Line Sub-Division. In this business, the second Defendant was his partner under a deed executed on the 28th June 1920, though the partnership had commenced on the 28th March 1920. The partnership was dissolved by a consent decree on the 16th June 1922, in a litigation between the Defendants. The Plaintiffs seek to recover from the Defendants three sums of money for three successive periods. The first period covers the time between the 11th January 1920 and the 28th March 1920, that is, the period immediately antecedent to the formation of the partnership between the Defendants. The second period covers the time between the 3rd April 1920 and the 12th June 1920. The third period covers the time between the 14th June 1921 and the 25th September 1921. The second and the third periods, it will be observed, are subsequent to the formation of the partnership between the Defendants. The Plaintiffs, however, have distinguished between the two periods on the ground that it was not till the 13th June 1921 that they became aware of the existence of the partnership. It is plain that as regards the small amount claimed in respect of the first of these periods, the second Defendant cannot be held liable, because at that time there was no partnership between the two Defendants. We are consequently concerned with the sums claimed in respect of the second and the third periods.

The case for the Plaintiffs is that the contract business already mentioned was carried on by the first Defendant on behalf of the partnership, that in order to enable him to carry it on he took loans from the Plaintiffs on promissory notes

(1) 6 Moo. P. C. 152 (193); 79 R. R. 24 (1847).
(23) [1910] A. C. 174.
(24) L. R. 5 Ch. App. Cas. 725, 738 (1870).

RAM CHANDRA SAHU *v.* KASEM KHAN.

and that the sums so borrowed were in fact applied for the partnership concern. These allegations, however, have not been made out; the evidence was not specifically directed to these points, and, it seems, their significance and importance were not fully realised. The accounts which were produced at a very late stage of the proceedings could not be scrutinised in the original, as they were written in characters difficult to decipher, and when the translations were placed in the hands of the Court, it was impossible to deal with the question satisfactorily. Apart from this, the grounds assigned by the Subordinate Judge for dismissal of the suit against the second Defendant are open to criticism and there has consequently been considerable discussion at the Bar as to the liability of a dormant partner.

Sec. 251 of the Indian Contract Act which furnishes the guiding principle applicable to questions of the power of a partner to bind his co-partners, is in these terms: "Each partner who does any act necessary for or usually done in carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose." There is an exception to this rule formulated in the following terms: "If it has been agreed between the partners that any restriction shall be placed upon the power of any of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement."

This section enunciates the law substantially in the same way as in the judgment of the Judicial Committee in *Bank of Australasia* v. *Breillat* (1).

(1) 6 Moo. P. C. 152 (193); 79 R. R. 24 (1847).

"The general power of partners in ordinary trading partnerships, and the restrictions upon such powers, appear to us to be stated with great accuracy by Mr. Justice Story in his treatises on Partnership, and on Agency, and we willingly adopt his language. In the latter of these works, Chap. VI, secs. 124 and 125, the law is thus stated. Sec. 124—Every partner is, in contemplation of law, the general and accredited agent of the partnership; or, as it is sometimes expressed, each partner is *proepositus negotiis societatis;* and may, consequently, bind all the other partners by his acts, in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, cheques and other negotiable paper, in the name and on account of the partnership (sec. 125). The restrictions of this implied authority of partners to bind the partnership are apparent from what has been already stated. Each partner is an agent only in and for the business of the firm; and, therefore, his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm, bind it, when the other party to the transaction is cognisant of, or co-operates in, such breach of duty.

"That in ordinary trading partnerships, the power of borrowing money for partnership purposes exists, and that bills or notes given by one of the partners in the partnership firm, for money so borrowed,

RAM CHANDRA SAHU v. KASEM KHAN.

will bind the firm, is too clear to require any authority. It is treated as clear law from the case of *Lane* v. *Williams* (2) to that of *Thicknesse* v. *Bromilow* (3)."

It has been argued that the deed of partnership, dated the 28th June 1920, contained clauses which brought the case within the exception to sec. 251 of the Indian Contract Act. Our attention has been specially drawn to cls. 4 and 6. Cl. (4) provides "that the entire capital of the said work is of the first party." Cl. (6) provides "that the first party shall supply all funds required for the purpose of carrying on and completing the work already in hand or any new work in the said Sub-Division that may be given to the second party by the B. N. Ry. Co." We are of opinion that these clauses have not the restrictive effect attributed to them. There are, besides, materials on the record to show that the second Defendant, who had advanced the capital at one stage, declined after a time, to find the necessary funds and thus rendered it necessary for the first Defendant to raise money in order that his obligations to the B. N. Ry. Co. might be fulfilled. We need not consequently rely upon the theory favoured in *Paterson* v. *Gandasequi* (4), namely, that the case of "a dormant principal may be assimilated to that of a dormant partner, where, though the party furnishing goods to the ostensible partners intended, at the time, to give credit only to them, yet he may afterwards pursue his remedy against that dormant partner when discovered. A dormant partner is sued on the ground of agency; he is liable on a contract relating to the firm made in the ostensible partner's name alone, because he is taken to have adopted the name of the ostensible partner as his own, for the purpose of such contracts, so that, when the ostensible partner signs his name to such contracts, he signs a word, the meaning of which comprehends not himself alone, but his partner also." This doctrine does not assist us in the solution of the questions involved in this case. Here the problem to be explored is, whether the loans were taken by the first Defendant in his capacity as partner, and the difficulty is increased where, as in the case before us, the borrower who is a partner in one concern has in hand at the same time various other businesses in which he has no partners. The substance of the matter is that the Plaintiffs are not entitled to succeed merely upon proof that the monies taken from them by the first Defendant were in whole or in part applied for the benefit of the partnership concern; the liability of the second Defendant as his partner extends only to sums borrowed by him in his capacity as a member of the firm. We may usefully re-call here passages from two well-known cases.

In *Nicholson* v. *Ricketts* (5), Cockburn, C. J., observed as follows: "In order that one member of a partnership may bind another, by drawing or accepting a bill, he must have authority, either express or implied by law, so to do. In ordinary cases of commercial partnership, there is no need of express authority, the law implying an authority from the fact that the drawing and accepting bills is part of the ordinary course of such a partnership. So again, in partnership not strictly commercial, if it is obvious from the nature of the partnership or

(2) 2 Vern 277.
(3) 2 Cromp. & Jr. 425; 37 R. R. 752 (1832).
(4) 15 East. 62; 13 R. R. 368 (1812).
(5) 2 E. & E. 497, 524; 119 R. R. 816, 831 (1860).

RAM CHANDRA SAHU *v.* KASEM KHAN.

from the particular purpose to which the bills are to be applied, that the drawing of bills is essential, there, also, the law implies an authority to each partner to draw them."

To the same effect is the observation of Cleasby B. in *Holme* v. *Hammond* (6): "In the common case of a partnership, where, by the terms of the partnership, all the capital is supplied by A and the business is to be carried on by B and C in their own names, it being a stipulation in the contract that A shall not appear in the business or interfere in its management, that he shall neither buy, nor sell, nor draw nor accept bills, no one would say that, as among themselves, there was any agency of each one for the others. If, indeed, a mere dormant partner were known to be a partner, and the limitation of his authority were not known, he might be able to draw bills and give orders for goods which would bind his co-partners, but, in the ordinary case this would not be so, and he would not in the slightest degree be in the position of an agent for them."

We are not unmindful of the decision of Wills, J., in *Watteau* v. *Fenwick* (7), where it is said that in the case of a dormant partner it is clear that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. In that case, the Defendants were the undisclosed principals of a hotel manager who had in fact no authority to buy any goods (except a limited class) for the use of the business from any one but the Defendants themselves. The Plaintiff gave credit to the manager alone and supplied goods not within the excepted class. In these the Officiating Second Presidency Magistrate of Calcutta on the 12th June 1923 of an offence under sec. 409, I. P. C., that is to say, of criminal breach of trust as an attorney in respect of certain books and furniture left with notwithstanding that the Plaintiff supposed himself to be dealing with a principal. The objection that in such a case there is no holding out at all and therefore no question of apparent authority was met by the analogy of a dormant partner. But the question remains, is a dormant partner liable merely because he is an undisclosed principal? Is it not rather because he is, by the partnership contract, liable to the same extent as the known partners? The decision in *Edmunds* v. *Bushell* (8) is equally open to doubt, and the dictum of Wills, J., in *Watteau* v. *Fenwick* (7) was in fact doubted by Lord Lindley in his classical treatise on Partnership. It is further worthy of note that though the case was followed in *Kinahan & Co., Limited* v. *Parry* (9), the decision in the latter case was reversed on appeal on the ground that there was no evidence to show the existence of any agency in fact; *Kinahan* v. *Parry* (10). It is plain that the view taken by Wills, J., is not in conformity with sec. 5 of the Partnership Act, 1890, which is only declaratory of the previous law. The terms of that section may be usefully re-called here: "Every partner is an agent of the firm and his other partners for the purpose of business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which

(6) L. R. 7 Exch. 218 at p. 233 (1872).
(7) [1893] 1 Q. B. 345, 349.

(7) [1893] 1 Q. B. 345, 349.
(8) L. R. 1 Q. B. 97 (1865).
(9) [1910] 2 K. B. 389.
(10) [1911] 1 K. B. 459.

RAM CHANDRA SAHU *v.* KASEM [illegible]N.

will bind the firm, is too clear [illegible] any authority. It is treated as [illegible] from the case of *Lane* v. *Williams* [illegible] that of *Thicknesse* v. *Bromilow* (3). [illegible]

It has been argued that the deed [illegible] partnership, dated the 28th June 19[illegible] that [illegible] know or believe him to be a partner."

It is thus clear that the ultimate use, by a firm, of money borrowed by a partner individually on his own credit does not make the firm liable for the loan. The circumstance that the firm obtains the benefit of a transaction entered into by one of its members, as pointed out by Rolfe, B. in *Beckham* v. *Drake* (11) may show that he entered into the contract as the agent of the firm. But the fact is no more than evidence that this was the case, and the question upon which the liability or non-liability of the firm depends is, not whether the firm obtained the benefit of the contract, but did the firm by one of its partners or otherwise enter into the contract. Illustrations of this doctrine are furnished by the decisions in *Emly* v. *Lye* (12), *Bevan* v. *Lewis* (13), *Smith* v. *Craven* (14), *Hawtayne* v. *Bourne* (15), *Burmester* v. *Norris* (16), *Ricketts* v. *Bennett* (17), *Re: Worcester Corn Exchange Co.* (18) and *Fisher* v. *Tayler* (19). In all these cases, the firm got the benefit of the money borrowed and yet was held not liable to repay it. It was ruled in substance that the firm had not entered into any contract, express or implied, with the person dealing with the partner in question and did not incur any obligation towards that person by reason of the circumstance that it got the benefit of what he had done. The principle was applied by the Supreme Court of Canada in *Shaw* v. *Cadwell* (20); there it was ruled that where one member of a partnership borrows money upon his own credit by giving his own promissory note for the sum so borrowed, and he afterwards uses the proceeds of the note in the partnership business, of his own free will, without being under any obligation to or contract with the lender so to do, the partnership is not liable for the loan. This fundamental principle has been overlooked by the Court below. The case has not been approached from the correct standpoint, and it is consequently impossible for us to pronounce judgment on the materials on the record.

The result is that the decree of the Subordinate Judge, in so far as it dismisses the suit against the second Defendant, must be discharged and the case remanded to him for retrial against that Defendant on the lines indicated. The parties will be at liberty to adduce fresh evidence. As the Plaintiffs are in a large measure responsible for the course the trial took, they must pay the second Defendant Rs. 300 on account of costs in this Court. The costs in the lower Court will be in the discretion of that Court.

This judgment will not affect the decree obtained by the Plaintiffs against the first Defendant.

H. D. C.

(11) 9 M. & W. 99; 60 R. R. 678 (1841).
(12) 15 East. 7; 13 R. R. 347 (1812).
(13) 1 Simon 376; 27 R. R. 205 (1827).
(14) 1 Cr. & J. 500; 35 R. R. 764 (1831).
(15) 7 M. & W. 595; 56 R. R. 806 (1841).
(16) 6 Exch. 796 (1851).
(17) 4 C. B. 686; 72 R. R. 691 (1847).
(18) 3 DeG. M. & G. 180; 98 R. R. 98 (1853).
(19) 2 Hare. 216; 62 R. R. 84 (1843).
(20) 17 Sup. Ct. Can. 357 (1889).

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 472 OF 1923.

GREAVES, J.
PANTON, J.
1924,
5, March.

HARRY JONES,
Appellant,
v.
THE KING-EMPEROR,
Respondent.

Indian Penal Code (Act XLV of 1860), sec. 409, charge under, if lies when the accused still retains dominion over the property—Civil or Criminal Court, matter whether for, where evidence discloses a bona fide *claim by the accused to the property.*

Usually in a case under sec. 409, I. P. C., the property in question is no longer existent or has passed from the dominion of the accused, but where the accused still retains dominion over the property and has some claim to it, even if it turns out not to be sustainable in law, there is no offence under sec. 409 unless the claim is merely a pretence and not bonâ fide.

In a case like the above the matter is one for the Civil Court and the investigation should not ordinarily be undertaken by a Criminal Court where the accused cannot give evidence and where material witnesses, living far away, cannot be examined on commission as can be done in civil suits.

This was an appeal preferred on the 10th August 1923 against the conviction and sentence passed by the Second Chief Presidency Magistrate (Mr. K. B. Das Gupta) on the 12th June 1923.

The facts will fully appear from the judgment.

Mr. Remfry and *Mr. Pugh* and *Babu Satindra Nath Mukherjee* for the Appellant.

Mr. Mingell and *Babus Kanaidhan Dutt* and *Sudhansu S. Kar* for the Complainant.

Mr. K. N. Chowdhury for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The Appellant before us was convicted by the Officiating Second Presidency Magistrate of Calcutta on the 12th June 1923 of an offence under sec. 409, I. P. C., that is to say, of criminal breach of trust as an attorney in respect of certain books and furniture left with him as the complainant's attorney for safe custody when the complainant left for England in the month of May 1904. The Appellant was sentenced to imprisonment until the rising of the Court and to pay a fine of Rs. 500.

The books and furniture to which the charge relates were seized in the top flat at 9/3 Middleton Row on the 19th November 1922 in pursuance of a search directed by the Magistrate and the books and furniture so seized were directed by the Magistrate to be returned to the complainant. The Magistrate's judgment and the charge contain references to other furniture also handed over in May 1904 by the complainant to the Appellant; this furniture and the books and furniture comprised in the charge are said to have been in the complainant's house No. 85, Upper Circular Road, at the time the complainant left for England and some of the furniture other than that comprised in the charge, is said to have been sold by the complainant but nothing turns on this as there is no charge in respect of this and matters with regard thereto may have been adjusted between the complainant and the Appellant as there were other monetary transactions between them. We are only concerned with the specific books and articles seized at 9/3 Middleton Row referred to in the charge which are set out in Exs. 4 and 5 which were lists attached to the complaint which bears date the 17th November 1922. The case has unfortunately been encumbered with evidence and references with regard to monetary dealings between the complainant and

HARRY JONES *v.* THE KING-EMPEROR.

the Appellant extending from 1904 to 1922; we have nothing to do with these matters as they are not included in the charge and we do not propose to go into them.

The charge is somewhat curiously framed. As already stated the petition of complaint bears date the 17th November 1922, by which date the offence complained of must have been complete, yet the charge of criminal breach of trust is placed between the 9th September and the 30th November 1922, that is to say, during a period which ends 13 days after the complaint was laid.

Whether the charge is altogether bad on this account is a matter upon which I feel some doubt. In May 1901 the complainant was about to proceed to England to study medicine. He and the Appellant at that time were close friends as evidenced by the correspondence and there is no doubt that the complainant's affairs were considerably involved. Some arrangement was come to at this time between the complainant and the Appellant whereby in consideration of the assignment by the complainant to the Appellant of certain properties the Appellant was to pay the complainant a certain allowance during his stay in England and thereafter an allowance at a lesser rate during the rest of his life. Whether the arrangement was a device to protect the complainant's properties from his creditors or not it is impossible to say upon the materials before us nor is it necessary for us to decide this in the present case.

Prior to his departure for England, namely, on the 18th May 1904 (which is I think the correct date and not 1902 as appears in my copy), the complainant purported to sell to one Fredrick Palmer absolutely in consideration of a sum of Rs. 3,000 his household furniture, goods and chattels at 85, Circular Road, being everything in the house and compound except horses and carriages which had been already sold. This document is Ex. 8 and it comprises the books and furniture now in dispute. The consideration purports to have been paid by a cheque on Grindlays drawn by the Appellant in favour of the complainant. The Magistrate has accepted the prosecution case that this was merely a paper transaction and that no property passed and he has characterised the defence of the Appellant that this was a genuine sale as false. The defence story is that when Palmer left India in 1909 the Appellant and one Hyam took over this and other investments from Palmer and that they ultimately finally settled up this and other transactions by payment of a lump sum to Palmer. Messrs. Sanderson & Co. acted for Palmer in this settlement and their books show that a settlement was come to and a lump sum paid but there are no details of the settlement to corroborate the story of the Appellant that he paid Palmer for the furniture, books, etc., comprised in Ex. 8. Since we first heard the matter a cable had been produced purporting to come from Palmer in answer to one sent by the Appellant but it does not carry matters any further. The inference which I should draw from the cable is that Palmer either does not know or does not remember anything of the transaction to which Ex. 8 relates and the cable sent by the Appellant is, to say the least, disingenuous, indeed I am almost inclined to call it dishonest.

If the story of the Appellant is true as to the settlement with Palmer he became in 1909 the absolute owner of the books and furniture in dispute.

HARRY JONES *v.* THE KING-EMPEROR.

In 1914 the complainant returned to India for a short time and apparently as a result of conversations between him and the Appellant a letter was written to him by the Appellant which is Ex. 6. It is dated the 3rd December 1914 and is, omitting formal parts, as follows :—

"I shall let you have whenever you want your furniture, etc., which I am storing for you at Park Row and which I showed you the other day. If anything happens to me they will be handed over to you by my successors."

The complainant finally returned from England in, I think, 1922 and on the 7th February 1922 the Appellant executed in his favour a charge on his outstandings, Ex. 1. Part of the consideration therefor is expressed to be the sale of some of Appellant's furniture.

During 1922 correspondence passed between the complainant's solicitors and the Appellant with regard to the disputes between them in the course of which it transpired that the books and furniture now in dispute were with Mr. C. A. Jones, the brother of the Appellant, and on the 11th October 1922 a letter Ex. 29 was written by Mr. C. A. Jones' legal advisers stating that he had certain books and furniture which were taken over by him from the Appellant and that he had no knowledge as to whether any of them belonged to the complainant but that if the complainant obtained a letter from the Appellant specifying the particular books and furniture which were the Appellant's property and authorising him to make them over he would be glad to do so. On the 24th October, however, (see Ex. 20) Mr. C. A. Jones declined to make them over on the ground that the Appellant did not admit the claimant's claim to any of the articles. On the 30th November after the search the Appellant

p[illegible] in a petiti[illegible] Ex. 43 submitting that the complainant ha[illegible] no claim whatever to an[illegible]y of the propert[illegible] seized, all of which the Appellant [illegible]imed. I have tried t[illegible] disentangle from the large number of documents and papers exhi[illegible] in the case many of which have nothing to do with the charge the matters which relate to the charge before us and the facts and documents above set forth are, I think, all the material which is before us relating to the books and documents which are in the issue.

The Magistrate, as I have stated, has found that the Palmer transaction was a mere paper transaction and I think there is a good deal to support this view both from the surrounding circumstances and from the letter of the 3rd December 1914 above referred to. It is not, however, satisfactory to have a [illegible] of this nature decided in criminal proceedings and, with all respect to the Magistrate, as soon as Ex. 8 was produced which on the face of it shows a sale of the books and furniture in issue to Palmer I think the case should have been stopped and the parties referred to the Civil Court which is the proper tribunal to decide a matter of this kind. There is no doubt that the Appellant has been at a great disadvantage in dealing with the matter and furnishing an explanation, if explanation there be. In the first place he could not give evidence on his own behalf and after all an examination by the Magistrate under sec. 342 and the filing of a written statement are very sorry substitutes in a matter of this nature for oral evidence in the witness box by the person primarily concerned. Again in a civil action there would be discovery of documents which naturally assists in bringing to light all letters and documents having any bearing on the question in issue; the

HARRY JONES v. THE KING-EMPEROR.

absence of this is not co[...] by the piece-meal prod[...]ing from 19[...] exhibits furthering t[...]ing to do with [...]se or that of the [...] are not included [...]is case it was v[...] clear. [...] the [...] we do not propose to [...]ompensated for [...]ction of selected [...]he prosecution ca[...] accused. Again in th[...]

The charg[...]al to the Appellant to [...] [...]Futh about Ex. 8 and for [...]dence [...]ose to get Palmer's evide[...]eans of transaction to which Ex. [...] recourse happened some 20 years ag[...] expedient Palmer left India in 1909. [...]ssible to get circumstances in a civil suit [...] evidence in the would have been available [...] a commission: in a crimin[...] could not be had to an[...]ely a paper transac- and it may hav[...] been [...] circumstances probably Palmer here [...] give h[...] [...]nce under sec. 409, but Police Court.

If Ex. 8 was [...]at was [...]nk free from doubt as it tion I think th[...] study [...] all along there has been disclose an [...] this is not [...]tant at that [...] handing over the property [...] curious th[...]lenced [...] by the complainant. Usually [...] difficult[...] there is n[...] under sec. 409 the property is [...]imed [...] affairs we [...]er existent or has passed from [...] case [...] arrange[...] dominion of the accused but here (see [...]ng [...] betwe[...] [...]9) all that was required was a letter lant [...] sig[...] the Appellant agreeing to his brother [...] handing over the books and furniture. A[...] and in Ex. 43 the Appellant while still claiming them offers to return them for peace and quiet which would indicate that the dominion over them is still with him. Does not this suggest that rightly or wrongly the Appellant considered that notwithstanding his letter of 3rd December 1914 he still had some claim to the books and furniture and if he had some claim, even if it turns out not to be sustainable in law, there is no offence under sec. 409 unless the claim is merely a pretence and not *bonâ fide*.

We think under the circumstances set forth above that the matter is one for the Civil Court and that an investigation into whether a transaction was *benami* or not, should not ordinarily be undertaken by a Crimiual Court. The appeal [...]dingly succeeds and we set aside [...] conviction and sentence passed upon [...] accused and direct the fine, if paid, to [...] refunded. The Magistrate's order with regard to the books and furniture is also set aside as the rights of the claimant and of the Appellant as to these must be decided by a Civil Court which in accordance with the view expressed in this judgment is the proper forum to decide the questions which arise with regard to their ownership.

J. N. R. *Appeal allowed.*

PRIVY COUNCIL

[APPEAL FROM PATNA.]

LORD SHAW. LORD CARSON. SIR JOHN EDGE. MR. AMEER ALI. SIR LAWRENCE JENKINS. 1923, Heard, 16 and 18, November. 18, December.	RAGHUNATH PRASAD SAHU, Appellant, v. SARJU PRASAD SAHU and ors., Respondents.

Indian Contract Act (IV of 1872), sec. 16—Lender and borrower—Interest stipulated, unconscionable—Undue influence, if to be presumed therefrom—Lender being in a position to dominate borrower's will to be proved first—Construction of statute.

The mere fact that a bargain appears to be unconscionable does not, under sec. 16 of the Contract Act, raise the presumption that the contract was induced by undue influence so as to cast upon the lender the onus of proving that there was no undue influence. The initial fact of the lender being in a position to dominate the will of the borrower must be first

RAGHUNATH PRASAD SAHU v. SARJU PRASAD SAHU.

established before such a presumption will arise from the unconscionable nature of the bargain.

SAMUEL v. NEWBOLD (5), *a decision on the English Moneylenders Act, 1900, is no authority on the construction of the Indian Contract Act.*

ABDUL MAJEED v. KHIRODE CHANDRA PAL (4) *overruled.*

This was an appeal from a decree, dated the 9th December 1920, of the High Court at Patna which varied a decree, dated the 25th September 1917, of the Court of the Subordinate Judge of Arrah.

The Defendant-Appellant, a man of considerable property, raised money on mortgage ostensibly for the purpose of defending himself against criminal proceedings which had been instituted against him by his father.

The mortgage was executed on the 27th May 1910 and stipulated for the payment of compound interest at the rate of 2 per cent. per mensem with yearly rests.

The relevant provision in the deed and the circumstances in which it was entered into are fully set out in the judgment of the Judicial Committee.

The suit was instituted by the mortgagees for the recovery of the full amount due under the mortgage on the 16th August 1916. On the 25th September 1917, the Subordinate Judge passed a decree in favour of the Plaintiffs, but considered that the rate of interest stipulated for in the deed raised a presumption of undue influence. In his opinion the agreement to pay compound interest was harsh and unconscionable and he accordingly allowed only simple interest at the rate of 2 per cent. per mensem. On appeal the High Court (Das and Adami, JJ.) varied the decree and allowed the Plaintiffs interest at the rate of 24 per cent. per annum with yearly rests, the period of redemption to be six months from the date of the High Court decree.

Messrs. L. DeGruyther, K. C., H. N. Sen and *A. Majid* for the Appellant.—The evidence shows that the transaction was unconscionable and the interest exorbitant. The Appellant was in need of ready cash to defend himself against criminal proceedings, but he had a vested interest in the property. The security was large and valuable and the risk negligible.

[SIR L. JENKINS.—The property was owned jointly by the mortgagor and his father. It might [illegible] involved a good deal of litigation [illegible] the mortgagee could get a division by metes and bounds, a point which he was [illegible] to take into consideration.]

The Appellant was in a condition of helplessness and undue influence may be presumed from the mere relationship of the parties to the transaction.

Abdul Majeed v. *Khirode Chandra Pal* (4).

Once that presumption arises the onus is on the Respondents to rebut it. This they have failed to do.

The Appellant was "dominated" within the meaning of sec. 16 of the Indian Contract Act, 1872, as amended by Act VI of 1899.

Reference was also made to *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh* (1), *Raja Muneshar Bakhsh Singh* v. *Shadi Lal* (2), *Sundar Koer* v. *Sham Krishen*

(4) I. L. R. 42 Cal. 690: s. c. 19 C. W. N. 809 (1914).

(5) [1906] A. C. 461.

(1) L. R. 33 I. A. 118: s. c. 10 C. W. N 849 (1906).

(2) L. R. 36 I. A. 96: s. c. I. L. R. 31 All. 386: 13 C. W. N. 1069 (1909).

(4) I. L. R. 42 Cal. 690: s. c. 19 C. W. N. 809 (1914).

RAGHUNATH PRASAD SAHU v. SARJU PRASAD SAHU.

(3), *Lala Balla Mal* v. *Ahad Shah* (6) and *Poosathurani* v. *Kannappa Chettiar* (7).

Messrs. A. M. Dunne, K. C. and *S. Hyam* for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree, dated the 9th November 1920, of the High Court of Judicature at Patna, which varied a decree, dated the 25th September 1917, of the Subordinate Judge of Arrah.

The suit is for recovery of the amount of principal and interest due by the Appellant to the Respondents (the Plaintiffs) under a mortgage date the 27th May 1910. The Subordinate Judge gave decree in the mortgage suit but only allowed simple interest. The High Court allowed compound interest.

The substantial question raised on the appeal is whether the Appellant, in the circumstances proved in the case, fell within the protective provisions of sec. 2 of the Indian Contract (Amendment) Act, 1899. It may be convenient to set that section out in full :—

"2. Sec. 16 of the Indian Contract Act, 1872, is hereby repealed, and the following is substituted therefor, namely :—

"16.—(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

"(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(3) L. R. 34 I. A. 9; s. c. I. L. R. 34 Cal. 150; 11 C. W. N. 249 (1906).

(6) 23 C. W. N. 283 (P. C.) (1918).

(7) L. R. 47 I. A. 1: s. c. I. L. R. 43 Mad. 548 (1919).

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

"(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

"Nothing in this sub-section shall affect the provisions of sec. 3 of the Indian Evidence Act, 1872."

It is in the view of the Board by that section that the question arising between these parties falls to be settled, and not by reference to the legislation of other countries, *e.g.*, the English Moneylenders Act. The statute to be here construed is the Indian Contract Act as amended. It is accompanied with danger to invoke as authority in an Indian case expressions which merely connote the principles which underlie a particular English statute, and form a guide to its interpretation. As will be seen this general observation is required by reason of the citation of certain authorities alluded to in the judgment of the Subordinate Judge and referred to in the argument before their Lordships' Board.

The Appellant is a member of a joint undivided family owning a property of considerable value including *inter alia* 186 villages, assessed to revenue for about Rs. 17,000 annum.

The mortgage is dated the 27th May 1910. It is for the sum of Rs. 9,999 borrowed from the Plaintiffs. The rate of interest is covered by the following provision :—

RAGHUNATH PRASAD SAHU v. SARJU PRASAD SAHU.

"I, the declarant, do promise that I shall pay interest on the said debt at the rate of 2 per cent. per mensem on the 30th Jeth of each year. In case of non-payment of the annual interest, the interest will be taken as principal and interest will run thereon at the rate of 2 per cent. per mensem, that is, interest will be calculated on the principle of compound interest."

There can be no question that these terms were high: if payment was not made the sum due on the mortgage would speedily mount up. By the decree of the High Court which was pronounced on the 9th November 1920, it is seen that the original debt of Rs. 10,000 had reached, with interest and costs calculated up to the 8th May 1921, more than a lac of rupees, *viz.*, Rs. 1,12,885. In eleven years the stipulation for interest at 24 per cent. compound had magnified the sum covered by the mortgage more than elevenfold. It is upon these facts, coupled with one other about to be mentioned, that the Appellant takes his stand.

The statement in the defence admits that at the time of the execution of the mortgage the Defendant was owner of one half of a valuable joint family property. The owner of the other half was his father. Father and son had quarrelled. Serious allegations are made by the son against the father; whereas it appears that the father had instituted criminal proceedings against the son. Shortly before the date of the mortgage the Defendant had borrowed Rs. 1,000 from the Plaintiffs so as to enable him to defend himself in these criminal proceedings. It is alleged that they caused him great mental distress, and that he required more money to conduct his litigations. That is the story.

Evidence was taken in the case. It is sufficient to say that the Defendant gave no evidence at all. It is quite plain that no Court can accept a story thus unproved by its author as establishing a case either of mental distress or of undue influence under the Indian Contract Act. The only case which the Appellant has is the case derived from the contents of the mortgage itself.

It is argued with force that these are unconscionable, and that it is the duty of the Court in India to step in either to rescind the contract or to rectify the bargain. It was the latter course which was argued for in the present case. In support of this argument much reliance was placed upon the judgment pronounced by Lord Davey in *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh* (1).

Before, however, addressing themselves to the authorities cited their Lordships think it desirable to make clear their views upon, in particular, sub-sec. 3 of sec. 16 of the Contract Act as amended. By this sub-section three matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, *viz.*, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of

(1) L. R. 33 I. A. 118: s. c. 10 C. W. N. 849 (1906).

RAGHUNATH PRASAD SAHU v. SARJU PRASAD SAHU.

these parties. Were they such as to put one in a position to dominate the will of the other? Having this distinction and order in view the authorities appear to their Lordships to be easily properly interpreted.

In the judgment of this Board in *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh* (1) the outstanding effect was that the borrower who mortgaged the estate was actually, at the date of the transaction, under the control of the Court of Wards. He was treated, to use the language of Lord Davey, as "under a peculiar disability" and placed in a position of helplessness, and the lender was proved to have been aware of that and therefore, in a position to dominate the borrower's will. On p. 126 Lord Davey thus expressed the Boards' view :—

"Their Lordships are of opinion that although the Respondent was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the Respondent for some fifty years, was aware of it. They are therefore of opinion that the position of the parties was such that Auseri Lal was 'in a position to dominate the will' of the Respondent within the meaning of the amended sec. 16 of the Indian Contract Act. It remains to be seen whether Auseri Lal used that position to obtain an unfair advantage over the Respondent."

This case was followed in terms in the case of *Raja Muneshar Bakhsh Singh* v. *Shadi Lal* (2) in which the bond in suit was given by a talukdar in Oudh without the knowledge and consent of the Court of Wards after his estate had been placed under it. In these circumstances the former case was followed, and Lord Collins expressed the opinion of the Board to be that they

"are satisfied that in this case also the borrower was placed in such a condition of helplessness that the lender was in a position to dominate his will and that he used that position to obtain an unfair advantage over the Appellant."

It is sufficient to say that the borrower in the present case was *sui juris*; had the full power of bargaining and of burdening his estate, that his estate was not under the Court of Wards and that he lay under no disability. With regard to his helplessness nothing whatsoever is proved in the case except the bare fact that he being a man of wealth as owner of one-half of certain joint family property wished to obtain and did obtain certain monies on loan. The only relation between the parties that was proved was simply that they were lender and borrower.

It is an entire mistake to represent the decisions of this Board as being wanting in light upon the last mentioned case. For in *Sundar Koer* v. *Sham Krishen* (3) the exact point was referred to by Lord Davey in the course of the judgment read by him :—

"There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money. The learned Counsel for the Appellant argued that the mortgagees were thereby placed in a position 'to dominate the will' of the mortgagor, and cited a recent decision of this Board—*Dhanipat Das* v. *Raja Maneshar Bakhsh Singh* (1). In that case, however, the borrower was 'a disqualified proprietor' under the Oudh Land Revenue Act, 1876, and his estate was under the manage-

(1) L. R. 33 I. A. 118: s. c. 10 C. W. N. 849 (1906).

(2) L. R. 36 I. A. 96: s. c. I. L. R. 31 All. 388; 13 C. W. N. 1069 (1909).

(3) L. R. 34 I. A. 9: s. c. I. L. R. 34 Cal. 150; 11 C. W. N. 249 (1906).

RAGHUNATH PRASAD SAHU *v.* SARJU PRASAD SAHU.

ment of the Court of Wards, and it was on that ground that their Lordships held that the borrower was under a peculiar disability and the position of the parties was such that the lender was 'in a position to dominate his will.' There is nothing of that kind in the present case, and their Lordships are not prepared to hold that urgent need of money on the part of the borrower will of itself place the parties in that position."

This precisely fits the situation of these parties. It has not been proved—it might be said that it has not even been attempted to be proved—that the lender was in a position to dominate the will of the borrower.

In these circumstances, even though the bargain had been unconscionable (and it has the appearance of being so) a remedy under the Indian Contract Act does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation. In the present case, for the reasons stated these stages are not reached.

Their Lordships think it right to observe that the judgment now pronounced is not in accord with the principles laid down by the Appellate Civil Court of Calcutta in *Abdul Majeed* v. *Khirode Chandra Pal* (4) that "where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate." Their Lordships think this decision to be wrong. There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will. Their Lordships are further of opinion with reference to the citation of *Samuel* v. *Newbold* (5) that that case does not form any authority in the construction of the Indian Contract Act. The case was determined under the Moneylenders Act, 1900, as it expressly bears. The issue was thus stated by Lord Macnaghten :—

"It seems to me that the construction of the Moneylenders Act, 1900, is plain enough, and that the evidence before their Lordships is more than sufficient to show that this case is within the mischief which the Act was designed to remedy."

In the view of the Board cases of that character form no precedent for a decision of the present appeal which is rested on another and very differently worded statute.

Their Lordships are of opinion that the decree of the High Court should be varied by allowing compound interest on the principal at the rate of 2 per cent. per mensem from the date of the execution of the bond until 25th September 1917, and thereafter simple interest at the rate of 6 per cent. per annum up to the date of realization, and that in other respects the decree of the High Court should be affirmed, and they will humbly advise His Majesty accordingly.

The Appellants will pay the costs of the appeal.

Solicitors : *Messrs. Chapman Walker & Shephard* for the Appellant.

Solicitors : *Messrs. Barrow Rogers & Nevill* for the Respondents.

G. D. M.

(4) I. L. R. 42 Cal. 690 : s. c. 19 C. W. N. 809 (1914).

(5) [1906] A. C. 461.

PRIVY COUNCIL.

[Appeal from the Judicial Commissioner of Oudh.]

Lord Buckmaster.
Lord Dunedin.
Lord Carson.
Sir John Edge.
Lord Salvesen.
1923,
15, May.

Raja Mohammad Mumtaz Ali Khan, Appellant,
v.
Mohan Singh, Respondent.

Limitation Act (IX of 1908), sec 28—Tenant in possession asserting a higher title as against landlord—Prescription—Higher title, if may be acquired by lapse of time—Landlord, if bound to sue for declaration, when possession remained on some footing.

A person who is, in fact, in possession of land under a tenancy or occupancy title cannot, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged (the possession remaining all the while on the same footing), obtain a title as an under-proprietor to the land. Sec. 28 of the Limitation Act has no application to such a case.

Leave to appeal to His Majesty in Council having been granted only upon the footing that the directions as to payment of costs in the Courts below should not be varied in any event, the Judicial Committee reversed the decrees of the Courts below except in so far as they dealt with the payment of costs.

This was a consolidated appeal by special leave from decrees, dated the 30th July 1915, of the Court of the Judicial Commissioner of Oudh, Lucknow, affirming decrees of the Court of the District Judge, Gonda, dated the 27th October 1913, which affirmed decrees of the Court of the Munsif of Utraula, dated the 31st July 1913.

The suits out of which the appeal arose were instituted by the Respondents against the Appellant for a declaration that the Plaintiff was an under-proprietor of the villages in suit situated in the Appellant's taluqa.

The plaints alleged that after a decision of the Revenue Board in 1893, the Plaintiffs had continued in possession for more than 12 years on the basis of under-proprietary rights and as the Defendant (the Appellant) did not get a declaration made that the Plaintiffs' rights were not under-proprietary but those of a simple tenant, the Plaintiffs had fully acquired under-proprietary rights.

The written statements denied that either of the Respondents was an under-proprietor or that either of them had ever established his claim of under-proprietorship. The Munsif held that the Respondents had no under-proprietary rights but that they had become under-proprietors by prescription, and he passed decrees accordingly. On appeal to the District Judge these decrees were affirmed and appeals to the Court of the Judicial Commissioner were likewise dismissed.

Messrs. L. DeGruyther, K. C. and *J. M. Parikh* for the Appellant (*ex parte*) referred to Syke's Taluqdari Law of Oudh and Circular No. 20 of 1863, paras. 4 and 12 and Circular No. 24 of 1863.

The Courts below have held that the Respondents have in fact no under-proprietary right but that such right has been acquired by prescription.

[Lord Dunedin.—Is it not rather limitation than prescription?]

Mr. DeGruyther, K. C.—The Indian Limitation Act gives title at the end of the period.

The payments that were made to the Appellant must have been made as rent relative to simple tenancy, not payment as under-proprietors because no under-proprietary right was recorded.

RAJA MOHAMMAD MU... MOHAN ... WIHAN SINGH.

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Their LORDSHIPS' JUDGMENT was delivered by

LORD SALVESEN.—The Appellant in these two appeals which have been consolidated was the Defendant in a separate suit brought by each Plaintiff (Respondent) for a declaration to the effect that he was an under-proprietor of certain land situated in the village of Badhia Farid. This village forms part of the estate called the Bilaspur estate in the Gonda District of Oudh. The Munsif's Court granted to each Plaintiff a declaratory decree in terms of the Plaintiffs' crave; these decrees were affirmed in appeal and the Defendant obtained special leave to appeal to His Majesty in Council. There is no distinction between the two cases so far as the points in controversy are concerned and they may, therefore, be treated as one.

There has, unfortunately, been a considerable amount of litigation between the Defendant and the Plaintiffs who have the use or occupation of the land described. As far back as the year 1891 the Defendant issued notices of ejectment

...lusion which they did that there was ...*â facie* evidence on which they were undetled to maintain the state of posses- Act, until the rights of the parties had two declared in a competent Court.
title. ...ere remains, however, the other ques- ceedi on which the Courts below have de- contd against the Defendant. The essen- that ground of judgment is contained in a tion le sentence of the judgment of the under ial Commissioner where he says: proceeае has been continuous possession of nounнid in the assertion of an under-pro- Boartary right which is adverse to the land- The o proprietary title and I agree, there- that thwith the lower Court that these Defendant have a good title by prescrip- of the Plaintiffs be ...
of the decision, to put i on is, of course, when in answer to a notice of ...gs for the an occupier pleads that he has an ... in proprietary right in his holding, it is sufficient for him to satisfy the Board of Revenue that there is reasonable ground for presuming that he is not an ordinary statutory tenant under the Rent Act in order to obtain cancellation of the notice.

It is plain from the considered judgment of the Board of Revenue that they were of opinion that a *primâ facie* case had been made out by the Plaintiffs. The judgment was based on previous proceedings which had taken place between the Defendant and certain persons in occupation of the land in question in whose right the present Plaintiffs now are. In 1871 these persons had claimed in the Settlement Courts sub-settlement of the village. Their claim was rejected, but in rejecting it the Settlement Court of first instance gave them a proprietary decree in respect of "sir." This decree was appealed to the Commissioner's Court by which the decree was wholly set aside; not, however, on the merits of the title to settlement or to "sir" but on a technical ground. The case was sent back for

(1) 8 Oudh Cases 80 (1904).
(2) Unreported.

PRIVY COUNCIL.

[Appeal from the Judicial Commission of Oudh.]

N v. Mohan Singh.

Lord Buckmaster.
Lord Dunedin.
Lord Carson.
Sir John Edge.
Lord Salvesen.
1923,
15, May.

Raja Mohammad Mumtaz Ali Khan
Appellant,
v.
Mohan Singh
Respondent.

Limitation Act (IX of 1908), sec 28—Tenant in possession asserting a higher title as against landlord—Prescription—Higher title, if may be ...n made by lapse of time—Landlord, if bound to ... declaration, when possession remained on ... footing.

A person who is, in fact, in p... of land under a tenancy or ... title cannot, by a ... judicial proceeding ... or twelve ... ars ...

...opped ...favour ...at the ...nce had ... the ...cation ...ment, ... their ...proper ...en made ...itle so ...dence, ...brought ...rgument in ... under-proprietors ... a decree in their favour ...ent Court prior to a given ... must be presumed to have abandoned or lost any rights which they might previously have possessed. This is scarcely to be wondered at in view of the fact that while the Revenue Court was the only one which was competent to deal with a notice of ejectment it had no jurisdiction to determine proprietary rights.

After the decree of cancellation of the notice of ejectment, both parties remained quiescent until 1905, when the Defendant instituted a suit against the Plaintiffs in the Court of the Munsif of Utraula alleging that they were merely tenants and claimed possession of the lands in their occupation. The Plaintiffs resisted the suit, but on 20th September 1905, the Munsif granted a decree in favour of the present Appellant. An appeal was taken to the Court of the Judicial Commissioner of Oudh, which on 8th August 1906, held that the suit, being for recovery of possession, would not lie in a Civil Court, and dismissed the same. This proceeding need not be further referred to beyond showing that the Defendant then maintained the same position as he took up when he served notices of ejectment upon the Plaintiffs.'

In 1910, the tenants fell into arrears of the money payment (to use a neutral term) which they had hitherto been making in respect of the lands in question, and the Defendant sued them in the Rent Court for arrears of rent, claiming interest thereon under sec. 141 of the Oudh Rent Act. It may be noted that one of the differences between an under-proprietor and an occupancy tenant having a more or less fixed tenure is, that the former is not liable to pay interest on arrears of rent. The Plaintiffs in the present case took this point and contested their liability to pay interest. On 31st May 1910, however, the Rent Court held that the Plaintiffs were not under-proprietors, and treating them as tenants allowed the claim for interest and decreed the suit.

The decision in this case led to the institution of the present suits which were brought in the beginning of 1913 in the Court of the Munsif of Utraula. In his petition of plaint each Plaintiff narrated the previous proceedings, and prayed that a declaratory decree be passed in his favour to the effect that he was under-proprietor of the lands which he occupied in the village of Badhia Farid. He maintained his suit upon two grounds—first, that he and his ancestors had been throughout under-proprietors and as such had been in possession of the lands for many years; and second, even if he failed to establish this, that he had continued in possession for more than twelve years after the date of the decree cancelling the notice of ejectment and had thus by prescription acquired under-proprietary rights.

The only issue in the suit was: Is the Plaintiff under-proprietor of the plots in

suit? The Munsif decided that the Plaintiff had no under-proprietary rights but that he had become under-proprietor by prescriptive possession; he therefore decreed the suit with costs. The Defendant appealed to the Court of the District Judge of Gonda, who agreed with the Court below and dismissed the appeal. The Defendant next appealed to the Court of the Judicial Commissioner of Oudh who affirmed the judgment on the same grounds and dismissed the appeal.

As all these Courts were of opinion that each Plaintiff had failed to establish the under-proprietary rights which he claimed, and as no appeal has been taken on behalf of either, and he has not appeared before the Board in the present appeal, it is not necessary to consider the grounds upon which the learned Judges reached a result on which they were all agreed. That this result was amply warranted appears, however, from the only document of title that has been produced in the case. That document is the wajib-ul-arz of the village of Badhia Farid, the date of which is stated to be approximately 1873. An extract from this document contains the following "Para. 12 relating to under-proprietary rights" and states categorically "In this village there is no under-proprietor." In view of this document and in the absence of anything evidencing proprietary rights in favour of the Plaintiff the Board think that there cannot be any doubt as to the correctness of the decision arrived at under this heading by the Courts below. This becomes all the clearer when the history and terms of the Oudh Settlement Acts are examined. If this document had been produced in 1893 when the Defendant (Plaintiff?) sought and obtained the cancellation of the ejectment notice it may well be that the Revenue Board would not have reached the conclusion which they did that there was *primâ facie* evidence on which they were entitled to maintain the state of possession until the rights of the parties had been declared in a competent Court.

There remains, however, the other question on which the Courts below have decided against the Defendant. The essential ground of judgment is contained in a single sentence of the judgment of the Judicial Commissioner where he says: "There has been continuous possession of the land in the assertion of an under-proprietary right which is adverse to the landlord's proprietary title and I agree, therefore, with the lower Court that these Plaintiffs have a good title by prescription."

The assertion relied on is, of course, that contained in the proceedings for the cancellation of the notice of ejectment in 1893, and as there has been no judicial challenge of this assertion by the landlord within twelve years of the date when it was made, it is immaterial to consider from what date prescription would run, and whether the period of limitation applicable be twelve or six years.

The Board are unable to hold that the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor. It is true that the Defendant might, if he had chosen, have at once instituted proceedings for a declaratory decree that the Plaintiff was not an under-proprietor, but such a course was equally open to the Plaintiff. Each party had had his supposed rights judicially challenged by the other, the Plaintiff by the notice of ejectment, of which he had obtained cancella-

RAJA MOHAMMAD MUMTAZ ALI KHAN v. MOHAN SINGH.

tion, the Defendant by the assertion in the proceedings for cancellation of the notice for ejectment that he was not liable to be ejected because of his rights as under-proprietor. The Board, however, do not consider that it was the duty of either party to institute such a suit if they were content that possession should remain on the same footing as before the notice of ejectment was served. They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation. It is notorious that in actions for rent or enhancement of rent or for ejectment the persons in possession are prone to maintain rights which they do not possess, and if for any reason, as in the present case, no judicial determination is arrived at, but the parties continue on the original footing, the mere lapse of so short a period as six or twelve years (which might be amply explained upon other grounds) would deprive the landlord of his proprietary rights unless in the meantime he had brought a declaratory suit to settle once and for all the terms on which possession was held. The case might have been different if, in addition to the judicial assertion by the Plaintiff there had been any change in the money payment which he thereafter made to his landlord. There is, however, no suggestion that the same money payment which had been made before the notice of ejectment was not continued thereafter. The possession by the Plaintiff therefore remained on precisely the same footing as at the time when he was held by the Court to have merely an occupancy title, the precise nature of which it is not necessary to consider in this case.

Reference was made to the Limitation Act IX of 1908 and especially to sec. 28 which is as follows:—

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished." This section appears to have no application to the present case, for the Appellant through his Counsel did not maintain that he could institute a suit for possession of the village in question, or treat the Plaintiffs as if they had merely been squatters, and the Board were not referred to and are not aware of any other section which would have the effect of extinguishing a right of property which is vested in one person and transferring it by the mere lapse of time to the person actually in possession.

Special leave to appeal was granted only upon the footing *inter alia* that the directions as to the payment of costs in the Courts below should not be varied in any event and that the Appellant should pay the Respondents costs. Their Lordships will humbly advise His Majesty that the decrees be reversed, except in so far as they deal with the payment of costs, and that the suits be dismissed. As the Respondents have not appeared there will be no order as to the costs of the appeals.

G. D. M.

[CIVIL REVISIONAL JURISDICTION.]

REV. NOS. 886 TO 888 OF 1923.

NEWBOULD, J.
B. B. GHOSE, J.
1924,
1, April.

BARADA PRASAD ROY CHOWDHURY, Objector, Petitioner,
v.
FOIJUDDI HALDAR and ors., Applicants, Opposite Party.

Bengal Tenancy Act (VIII of 1885), sec. 170, cl. (3)—Transferee of whole or part of non-transferable occupancy holding, if has an interest voidable on the sale and if entitled to deposit.

A transferee of the whole or a part of non-transferable occupancy holding not recognised by the landlord is not entitled to make a deposit under sec. 170, cl. (3) of the Bengal Tenancy Act. The interest of such a transferee passes by the sale and is not voidable on the sale.

NALINI BEHARY ROY *v.* FULMANI DASI (3), MAHAMMAD ISMAIL *v.* SATYES CHANDRA SIRKAR (4) *and* KUMAR NARENDRA NATH MITTER *v.* ABDUL MOLLA (5) *followed.*

TARAK DAS PAL *v.* HARISH CHANDRA BANERJEE (1) *and* AHAMADULLA CHOWDRY *v.* PRAYAG SAHU (2) *not followed.*

These were Rules preferred against an order of the Munsif, 4th Court, Diamond Harbour (Amrita Lal Banerjee, Esq.), dated the 12th June 1923, in the matter of sec. 115 of the Code of Criminal Procedure, 1908.

The facts material to this report are as follows :—

The Petitioner landlord obtained rent decrees against his recorded tenants in respect of non-transferable occupancy holdings and in execution of those decrees advertised the holdings for sale. The Opposite parts of ... who were in ... landlord applied ... d on behalf of the Petitioner ... amounts in Court ... st of the applicants ... of the Bengal Tenancy ... dable on the sale ... site Party in Rule No. 886 ... t entitled to application filed before the Munsif ... ed before the raiyats of the Petitioner sold 17 ... terest and odd of the holding to one Pitamb... d Baur, and sold the rest of the holding 10 bighas and odd to the Opposite Party, and that the raiyats were no longer in possession. In the other two Rules Nos. 887 and 888 the Opposite Parties claimed to be part transferees from the raiyats. In No. 888 the Opposite Party claimed to have purchased the portion in execution of a mortgage decree.

(1) 17 C. W. N. 163 : s. c. 16 C. L. J. 548 (1912).

(2) 20 C. W. N. 39 : s. c. 22 C. L. J. 106 (1914).

(3) 16 C. W. N. 421 : s. c. 15 C. L. J. 388 (1912).

(4) 26 C. W. N. 170 (Short Notes) (1922).

(5) 27 C. W. N. 175 (Short Notes) (1923).

The Petitioner objected to the deposits. The Munsif, by his orders, dated the 13th June 1923, allowed the deposits.

The following portion of his judgment will be found material :—

"In Bengal the authoritative judicial view seems to be that a purchaser, in part or whole, of a non-transferable occupancy holding is entitled to make a deposit under sec. 170, cl. (3) of the Bengal Tenancy Act [*Tarak Das Pal* v. *Harish Chandra Banerjee* (1) and *Ahamadulla Chowdry* v. *Prayag Sahu* (2)]. There is, however, a ruling recently reported in the note part of the Calcutta Weekly Notes (Vol. 26, p. clxx) which lays down that a purchaser of an entire holding cannot make the deposit. As the case is not fully reported it is not possible to say whether its facts or those of the other two cases mentioned before resemble the facts of the case under consideration. There is nothing in this new ruling as reported to affect the right of a purchaser of a part."

(1) 17 C. W. N. 163 : s. c. 16 C. L. J. 548 (1912).

(2) 20 C. W. N. 39 : s. c. 22 C. L. J. 106 (1914).

RAJA MOHAMMAD MUMTAZ ALI v. FOIJUDDI HALDAR.

tion, the Defendant by the ... of the proceedings for cancellatis the landlord for ejectment that hese three Rules. ejected because ...handra Sen Bahadur prietor. T...emendra Chandra Sen) for sider th...er.

to ... C. Maity (with Babu Kanaidhan ...) for the Opposite Party in No. 886.

Babu Jotis Chandra Guha for the Opposite Party in No. 888.

Rai Surendra Chandra Sen Bahadur for the Petitioner.—An unrecognised transferee of a non-transferable occupancy holding either of the whole or a part is not entitled to make a deposit under sec. 170, cl. (*3*) of the Bengal Tenancy Act. In Rule No. 886, the entire holding had been sold by the raiyat, and the applicant was a transferee of a part. In the other two Rules Nos. 887 and 888, there was a transfer for a part by the raiyat who was in possession of the other part.

To determine the right of a person who is not a judgment-debtor to make the deposit, the true rule, I submit, is this: If such a person has an interest voidable on the sale, he is entitled to make a deposit. According to sec. 159 a purchaser takes the tenure or holding free from incumbrances. An incumbrance is defined in sec. 161: an incumbrance is to be avoided or annulled under sec. 167. Therefore, I submit, it is only the incumbrance-holders whose interests are voidable on the sale who are entitled to make a deposit. So, in determining the right of a person entitled to make a deposit, it is to be seen whether he has any incumbrance within the meaning of sec. 161. A sale is not an incumbrance [see *Abdul Rahman* v. *Ahmadar Rahman* (6) and *Tamijuddin* v. *Khoda Nawaz* (7)].

(6) I. L. R. 43 Cal. 558: s. c. 19 C. W. N. 1217 (1915).
(7) 14 C. W. N. 229 (1909).

The interest of a purchaser of a non-transferable occupancy holding not recognised by the landlord, passes by the sale in execution of the decree obtained by the landlord against the tenant. The auction-purchaser at such a sale gets the holding; the interest of both the tenant transferror and the transferee is extinguished on the sale. The interest of such a transferee, therefore, is not voidable on the sale, and he is not entitled to make the deposit under sec. 170, cl. (*3*) of the Bengal Tenancy Act. I submit there is no difference between the case of a transferee of the entire holding and that of a portion. The same principle applies to both cases.

I rely upon the following cases:—*Nalini Behary Roy* v. *Fulmani Dasi* (3), *Mahammad Ismail* v. *Satyesh Chandra Sirkar* (4), *Kumar Narendra Nath Mitter* v. *Abdul Molla* (5), *Radhabinode Mandal* v. *Nitai Chand Sant* (8) and *Mahadeo Lal* v. *Langat Singh* (9).

The cases of *Tarak Das Pal Chowdhury* v. *Harish Chandra Banerjee* (1) and *Ahamadulla Chowdry* v. *Prayag Sahu* (2) cited by the lower Court no doubt have taken a different view. The case of *Sahdeo Singh* v. *Kuldip Singh* (10) fully reported in 27 I. C. 424, which was a case of part transfer is also against me but I ought to point out that this case was decided on the same date and by the same Judges who decided the case of *Ahamadulla Chowdry* v. *Prayag Sahu* (2). Further, I ought to

(1) 17 C. W. N. 168: s. c. 16 C. L. J. 548 (1912).
(2) 20 C. W. N. 39: s. c. 22 C. L. J. 106 (1914).
(3) 16 C. W. N. 421: s. c. 15 C. L. J. 388 (1912).
(4) 26 C. W. N. 170 (Short Notes) (1922).
(5) 27 C. W. N. 175 (Short Notes) (1923).
(8) 38 C. L. J. 147 (1923).
(9) [1917] Pat. 169; 2 P. L. J. 457 (1917).
(10) 18 C. W. N. 219 (Short Notes) (1914).

point out that the cases of *Tarak Das Pal* v. *Harish Chandra Banerjee* (1) and *Ahamadulla Chowdry* v. *Prayag Sahu* (2) were considered in the case of *Mahammad Ismail* v. *Satyes Chandra Sirkar* (4) and subsequent cases and were not followed.

I submit that the cases which lay down that the unrecognised transferee of a non-transferable occupancy holding is not entitled to make the deposit have taken the correct view.

Mr. S. C. Maity for the Opposite Party in No. 886.—I submit that the Opposite Parties, as transferees of non-transferable occupancy holdings, have interests in the holdings that are voidable on the sale and are therefore entitled to make the deposits under sec. 170, cl. (3) of the Bengal Tenancy Act. I rely upon the cases in *Tarak Das Pal* v. *Harish Chandra Banerjee* (1) and *Ahamadulla Chowdry* v. *Prayag Sahu* (2). Having regard to the conflict of decisions on the point I submit that the question should be referred to a Full Bench.

The JUDGMENT OF THE COURT was as follows :—

These three Rules were obtained by the landlord who has obtained decrees for rent and put them into execution. Applications were made by purchasers of portions of the holdings for deposit of the decretal amount under sec. 170 (3) of the Bengal Tenancy Act. The decree-holder objected that the applicants had no right to make the deposit under the provisions of that section. The learned Munsif overruled the objection of the decree-holder and directed that the applicants were entitled to make the deposit under the law.

It is contended on behalf of the Petitioners that the interest of the applicants in the holdings is not voidable on the sale and therefore they were not entitled to make the deposit. It is not denied before us that the applicants have an interest in the holdings which are sought to be sold in execution of the rent decree. But the contention is that the interest of the applicants would pass by the sale and it is not such an interest as should be considered as " voidable on the sale." There has been some conflict of decisions in this Court on that point. The learned Munsif relied on the case of *Tarak Das Pal* v. *Harish Chandra Banerjee* (1) and the case of *Ahamadulla Chowdry* v. *Prayag Sahu* (2) in support of the proposition that these persons were entitled to make the deposit under sec. 170 (3) of the Bengal Tenancy Act. The cases to the contrary which we need refer to are the case of *Nalini Behary Roy* v. *Fulmani Dasi* (3), the case of *Mahammad Ismail* v. *Satyes Chandra Sirkar* (4) and the case in which judgment was delivered by one of us [*Kumar Narendra Nath Mitter* v. *Abdul Molla* (5)]. In the case of *Tarak Das Pal* v. *Harish Chandra Banerjee* (1) on which the Counsel for the Opposite Party mainly relies, it is stated that the interest of an unrecognised purchaser of a non-transferable holding is an interest which is voidable on the sale. The contention that was raised on behalf of the landlord in that case is mentioned at p. 165 of the Report and it was that the interest is extinguished on the sale and cannot therefore be described

(1) 17 C. W. N. 163 : s. c. 16 C. L. J. 548 (1912).
(2) 20 C. W. N. 39 : s. c. 22 C. L. J. 106 (1914).
(4) 26 C. W. N. 170 (Short Notes) (1922).

(1) 17 C. W. N. 163 : s. c. 16 C. L. J. 548 (1912).
(2) 20 C. W. N. 39 : s. c. 22 C. L. J. 106 (1914).
(3) 16 C. W. N. 491 : s. c. 15 C. L. J. 888 (1912).
(4) 26 C. W. N. 170 (Short Notes) (1922).
(5) 27 C. W. N. 175 (Short Notes) (1923).

as voidable on the sale. This contention was overruled as it was held that the contrary proposition had been laid down in some of the cases mentioned in the judgment. It would, however, appear on examination of the cases cited that this point has not been considered in any of the cases in the view that has been presented before us. The position is this: After the transferee has been recognised by the landlord a decree obtained against the transferee would not bind the transferee and therefore the interest of the transferee would not be affected by the sale. Such a transferee would not therefore necessarily come within the provisions of sec. 170 (3) of the Bengal Tenancy Act. Where the transferee of a non-transferable holding has not been recognised by the landlord a decree obtained against the tenant transferror would be binding on the unrecognized transferee, and in execution of the decree the interest of the transferee would also pass along with the interest of the transferror and the auction-purchaser gets the interest of both the persons, the transferror and the transferee, who were interested in the holding. It can therefore hardly be said that the interest of the transferee is one which is voidable on the sale and therefore upon the terms of the section it would appear that such transferees are not entitled to make the deposit under sec. 170 (3) of the Bengal Tenancy Act. It is unnecessary for us to express any opinion whether they would be entitled to make any deposit under the Rules laid down in Or. 21 of the Code of Civil Procedure.

We are asked on behalf of the Opposite Party, having regard to the conflict of decisions, that this question should be referred to a Full Bench. But the view we now take has been taken generally in a number of cases and those cases being more recent than the case of *Tarak Das Pal* v. *Harish Chandra Banerjee* (1), we do not think that it is necessary to make any reference to a Full Bench. Furthermore both of us agree with the reasoning in the decision of one of us, *Kumar Narendra Nath Mitter* v. *Abdul Molla* (5) mentioned above. The case of *Ahamadulla Chowdry* v. *Prayag Sahu* (2) merely follows the decision in *Tarak Das Pal* v. *Harish Chandra Banerjee* (1).

The Rules are therefore made absolute and the order of the learned Munsif is set aside. Having regard to the circumstances of the case we make no order as to costs.

The record will be sent down at once.

H. C. S.

CIVIL REVISIONAL JURISDICTION.]

REV. No. 1317 OF 1923.

MUKERJI, J. 1924, 14, March.	JADAB CHANDRA SANTRA, Defendant, Petitioner, v. GOPAL CHANDRA DEBNATH, Plaintiff, Opposite Party.

Bhagdar, if tenant—*Suit for bhag paddy and straw, if maintainable in Small Cause Court—Small Cause Courts Act (IX of 1887), Sch. II, cl.* (8).

Where a suit was instituted in the Small Cause Court for recovery of money due as price of the Plaintiff's half share of the paddy and straw grown by the Defendant who held the land on taking a settlement from the Plaintiff with the stipulation that he would deliver half share of the produce to the Plaintiff:

(1) 17 C. W. N. 163: s. c. 16 C. L. J. 548 (1912).

(2) 20 C. W. N. 39: s. c. 22 C. L. J. 106 (1914).

(5) 27 C. W. N. 176 (Short Notes) (1923).

JADAB CHANDRA SANTRA *v.* GOPAL CHANDRA DEBNATH.

Held—*That the suit was maintainable in the Small Cause Court, as there was nothing in the plaint to suggest that the Defendant was a tenant.*

The expressions "settlement" and "holding the land" may be consistent with either view of the Defendant's status. The words "promise" and "stipulation" point more to a mere contract than to a contract of tenancy.

KADE MANDAL *v.* AHADALI MOLLA (3), SHAIKH POKHAN *v.* RAJANI KAMAL CHUCKERBUTTY (4), SHOMA MEHTA *v.* RAJANI BISWAS (1) *and* LALJI PANDEY *v.* BRAHMADEO PANDEY (2) *referred to.*

This was a Rule issued against the decision of the Munsif, 3rd Court, Burdwan, exercising Small Cause Court powers, dated the 24th September 1923.

The facts of the case will appear from the judgment.

Babu Narendra Nath Chaudhuri for the Petitioner.

Babu Narendra Nath Dalal for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The question which arises in this Rule is whether the Small Cause Court had jurisdiction to try the suit. The Plaintiff instituted the suit for recovery of a sum of Rs. 49 alleged to have been due as price of *bhag* paddy and straw. The plaint alleged that the land had been settled with the Defendant in the month of Jaistha and the Defendant had stipulated to deliver to the Plaintiff by the month of Falgoon a half share of the paddy and straw that would be grown on the land, and in case of default would be liable to deliver 25 per cent. more as *bridhi* or interest in accordance with local usage; that the Defendant, in accordance with the aforesaid promise or stipulation, after having taken settlement of the land cultivated the land and grew paddy and straw of which the quantities were also stated and the price of half thereof was claimed together with interest as aforesaid. One of the objections taken in the written statement was that the suit was one for rent and so was not within the cognizance of the Small Cause Court. The Opposite Party in an affidavit filed in this Court has stated that this objection was not pressed at the hearing of this suit. This however is a question affecting the jurisdiction of the Court and there can be no waiver in a matter of this description.

The answer to this question would depend upon the determination of the question as to whether the Petitioner under the terms of the contract with the Opposite Party was a tenant or a servant, and in determining that question, the terms of the agreement and the whole of the circumstances must be taken into consideration.

On behalf of the Petitioner reliance has been placed upon the decisions of this Court in *Shoma Mehta* v. *Rajani Biswas* (1) and *Lalji Pandey* v. *Brahmadeo Pandey* (2) and upon the allegation in the plaint that the land had been settled with the Defendant and on the Plaintiff's evidence to the effect that it was so settled and on the finding of the Judge that the Defendant held the land. On behalf of the Opposite Party the cases of *Kade Mandal* v. *Ahadali Molla* (3) and *Shaikh Pokhan* v. *Rajani Kamal Chuckerbutty* (4) were relied upon.

(1) 1 C. W. N. 55 (1893).
(2) 16 C. W. N. 89 (1911).
(3) 14 C. W. N. 629 (1910).
(4) 23 C. W. N. 614 (1919).

(1) 1 C. W. N. 55 (1893).
(2) 16 C. W. N. 89 (1911).
(3) 14 C. W. N. 629 (1910).
(4) 23 C. W. N. 614 (1919).

JADAB CHANDRA SANTRA *v.* GOPAL CHANDRA DEBNATH.

It is unnecessary to refer to earlier cases which deal with this point, as most of them have been elaborately discussed in the judgment of this Court in the case of *Lalji Pandey* v. *Brahmadeo Pandey* (2). As observed by Mookerjee, J., in that judgment there is no real conflict in the decisions bearing upon this question and the real question to be determined first is whether the Defendant is a tenant or not. With regard to this matter each case will depend on its own facts.

In the case of *Shoma Mehta* v. *Rajani Biswas* (1) the judgment proceeded upon the assumption that the suit is one for recovery of produce rent. In the case of *Kade Mandal* v. *Ahadali Molla* (3) the contract alleged in the plaint made the *bargadar* a servant. In the case of *Lalji Pandey* v. *Brahmadeo Pandey* (2) the distinguishing features were that the claim was in respect of crops for 4 years and the claim was explicitly described as the *malik's* share; and these features enabled the Court to pronounce on the status of the Defendant as that of a tenant. In the case of *Shaikh Pokhan* v. *Rajani Kamal Chuckerbutty* (4), the *kabuliyat* was described as one for agricultural labour for cultivating in partnership the *khas khamar* land, the executant stipulated that every year before growing crops he would ask the grantor which kind of paddy was to be grown on which land, and shall grow paddy according to the grantor's desire, and further agreed to take the whole of the paddy to the grantor's house for threshing and that he shall get the remaining paddy (after delivery of the grantor's share) as remuneration for cultivation seeds, looking after the labour instead of money in cash. This unmistakeably showed that the executant of the *kabuliyat* was a servant.

In the present case the distinguishing features of the cases noted above are entirely absent. The plaint on the face of it is for recovery of price of a share of paddy and straw. The expressions "settlement" and "holding the land" may be consistent with either view of the Defendant's status. If it was a tenancy, the period for which it was to last is not stated. The words "promise" and "stipulation" are used, which point more to a mere contract than to a contract of tenancy. On the face of this plaint therefore there was nothing to suggest that the Defendant was a tenant.

If therefore the Petitioner's case was that he was one and on that ground the Court had no jurisdiction, it was for him to bring before the Court materials which would have proved the same. This he has not done. The Rule, therefore, must be discharged with costs, hearing fee one gold mohur.

H. C. S. *Rule discharged.*

(1) 1 C. W. N. 55 (1893)
(2) 16 C. W. N. 89 (1911).
(3) 14 C. W. N. 629 (1910).
(4) 23 C. W. N. 614 (1919).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 197 OF 1924.

GREAVES, J. DUVAL, J. 1924, Heard, 9, April. Judgment, 16, April.	DWARKADAS HARIDAS, Petitioner, *v.* MR. AMBALAL GANPATRAM, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs 54, 60 and 61—Magistrate giving bail and ordering person arrested by police under sec. 54 to appear in another Court after 10 days, legality and propriety of—Indian Penal Code (Act XLV of 1858), sec 409, proper forum for trial of an offence under — Criminal Court not to try cases of a civil nature.

A commission agent in Calcutta of a limited company in Ahmedabad was charged in a Magistrate's Court in

DWARKADAS HARIDAS v. MR. AMBALAL GAINI

Ahmedabad with having committed the offence of criminal breach of trust in respect of sale proceeds of certain bales of goods, and was arrested in Calcutta on the 5th March 1924 by a C. I. D. Officer of Poona under the provisions of sec. 54, Criminal Procedure Code. On the 6th March the C. I. D. Inspector produced him before the Chief Presidency Magistrate, Calcutta, asking he might be forwarded to the Magistrate in Ahmedabad. The Chief Presidency Magistrate granted the accused bail and directed him to appear in Ahmedabad Court on the 16th March:

EMPEROR.

Held—*That the Chief Presidency Magistrate was not right in acting as he did upon the mere statement of the investigating Police Officer but should have required him to produce a warrant from Ahmedabad, releasing the prisoner in the meantime on bail to appear when called on before himself.*

Though under sec. 54 of the Criminal Procedure Code a Police Officer may arrest without warrant in the case of a cognizable offence, under sec. 60 he is bound without unnecessary delay to take or send the person arrested before the Magistrate and under sec. 61 this must be done within 24 hours. The precautions laid down in these sections seem to be designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however incomplete the information may be.

That the charge under sec. 409, I. P. C., was triable only in Calcutta where the offence alleged under sec. 409, I. P. C. was committed.

Where the dispute is of a civil nature it should be litigated in the Civil Court and not in the Criminal Court.

ants of the Watan lands by adverse possession against the Respondents' father Ramchandra.

That claim was founded on the following facts which had been admitted or concurrently found.

On the 15th March 1853 Venkatrao Narayan Deshpande, the grandfather of the Respondents and son of the then Watan- ... any of these rules. ... lease the Watan land ... the ancestor of the ... yearly rent

R. 16 of Part II is, so far ... follows:—"No motor vehicle ... driven at a greater speed than (2) ten ... hour, if a heavy motor car, and 8 miles ... hour, if the axle weight of any axle of the heavy motor car exceeds six tons or if it draws a trailer. ... was ...

In the case of The ... death ... The emperor ... think, as I have already said, that the ... of the Chief Presidency Magistrate ... wrong and I think that he should have refused to act upon the mere statement of the investigating Police ... but required him to produce a ... from Ahmedabad, releasing ... in the meantime on bail to appear when called on before himself. If ... been adopted it is accom... safeguards, for the ... have had to satisfy ... warrant of the ... and that it ... tried in ...

petition ... or March ... General of ... Investigation Dept. ... Presidency against ... Calcutta. Ambalal Gaini ... tor of Police of the C. I. D. ... directed by the Deputy Inspector of Police, C. I. D., Poona, to get ... registered at Ahmedabad and to ... gate into the matter. Ambalal Gaini ... ram had the complaint recorded in the Police Station of Kalupur in Ahmedabad City and took up the investigation. The complaint was filed by the complainant as representative of the limited company and on its behalf. The complaint alleged that Dwarkadas had been acting since 1920 as commission agent of the limited company and that as such he was entrusted with yarn and cloth bales belonging to the company for sale at Calcutta, that he was responsible for the value of the

JADAB CHANDRA SANTRA v. GOPAL CH ANPATRAM.

It is unnecessary to refer to earlier sue to which deal with this point, as mo old them have been elaborately discuss ied the judgment of this Court in the ed *Lalji Pandey* v. *Brahmadeo Pande* 2ho 'As observed by Mookerjee, J., ave judgment there is no real conflict tes decisions bearing upon this question as to the real question to be determined first ly whether the Defendant is a tenant or nca- With regard to this matter each case ales depend on its own facts. 23rd

In the case of *Shoma Mehta* v. *Ru* ub- *Biswas* (1) the judgment proceeded upne the assumption that the suit is ones in recovery of produce rent. In the ca *Kade Mandal* v. *Ahadali Molla* (2) was contract alleged in the plaint made value *bargadar* a servant. In the case of *Lalji* *Pandey* v. *Brahmadeo Pandey* (2) the dis- tinguishing features were that the and was in respect of crops for 4 years and re- claim was explicitly described e person *malik's* share; and these feat e the bales the Court to pronounce on every and that Defendant as that of that the contract case of *Shaikh Pokh* ged for 300 bales and *Chuckerbutty* (4) e revised rates but that cribed as one used to give the name of cultivating ing party, that the accused *khamar* presented that the contracting every refused to take delivery and that he aslist sell by public auction or private contract and that he subsequently report- ed having effected private sales of 313 bales and public auction of 5 bales, that the accused according to his accounts had received Rs. 2,53,314-2-0 for the 595 bales and had remitted Rs. 1,86,296-4-9 only, that on the 13th February 1923 the accus- ed sent what purported to be a copy of the original contract signed by one Ram Chandra Baijnath. The complaint fur- ther alleged that in July 1922 there was no such firm in Calcutta and that it was a fictitious name and that the accused had put forward a bogus contracting party and thereby induced the company to revise and reduce its rates. The complaint then charges dishonest and fraudulent mis- appropriation by the accused of a sum of Rs. 67,017-13-3 admitted by the accused in his accounts to have been received and charges him with an offence under sec. 409 of the Indian Penal Code and with such other offences as might be disclosed in the evidence and asks for seizure of the books of account relating to the sales and of other books and documents bearing on the case, for the arrest of the accused in respect of an offence under sec. 409, I. P. C. and that a Police Officer may be deputed to Calcutta for the purpose.

Ambalal Ganpatram states that in the [illegible] course of the investigation he examined the complainant, Lalbhai Tricumlal and other witnesses at Ahmedabad and the correspondence and accounts. On the 1st March he obtained a search warrant from a first class Magistrate at Ahmedabad for the books, documents, etc., and came to Calcutta and in execution thereof took charge of the books, etc., from the house and office of Dwarkadas after making a search list and arrested Dwarkadas under the provisions of sec. 54, Cr. P. Code, on the 5th March and produced him on the 6th before the Chief Presidency Magis- trate asking that he might be forwarded under proper escort to the 1st class Magistrate, Ahmedabad.

In making the application Ambalal Gan- patram produced a letter in the following terms :—

To

The Chief Presidency Magistrate,
Calcutta.

Sir,

I have the honour to report that the accused Dwarkadas Haridas who is want-

ed in the marginally noted* case of Kalupur Police Station in Ahmedabad City was arrested by me at Nos. 167 and 168, Lower Chitpur Road last night at 9-36 P.M. I therefore produce the accused before your honour and pray that he may be forwarded to the 1st Class Magistrate of Ahmedabad under proper escort.

I have the honour to be,
Sir,
Your most obedient servant,
(Sd.) Ambalal Ganpatram,
Inspector, C. I. D., Poona.
6th March 1924.

Dwarkadas applied for bail to the Chief Presidency Magistrate who made the following order on the 6th March.

"Accused Dwarkadas Haridas. Petition for bail filed. Grant bail Rs. 50,000 to appear before the 1st class Magistrate, Ahmedabad on 16th March 1924. Sec. 409, Cr. P. C."

I do not think that the Chief Presidency Magistrate was right in making this order. There is no doubt that under sec. 54 of the Criminal Procedure Code a Police Officer may arrest without warrant in the case of a cognizable offence but under sec. 60 he is bound without unnecessary delay to take or send the person arrested before the Magistrate and under sec. 61 this must be done within 24 hours. The precautions laid down in these sections seem to me designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however incomplete the information may be. The order of the

* Emperor v. Dwarkadas Haridas. Charge—criminal breach of trust as an agent in respect of Rs. 73,018-13-8. Sec 409, I. P. C. Case No. 30 of 1924 of P. S. Kalupur forwarded.

(Sd.) L. N. BIRD,
Dy. Com. D. D.,
6-3-24.

ants of the Watan lands by adverse possession against the Respondents' father Ramchandra.

That claim was founded on the following facts which had been admitted or concurrently found.

On the 15th March 1853 Venkatrao Narayan Deshpande, the grandfather of the respondents and son of the then Watan... purported to lease the Watan land ... any of these rules.

R. 16 of Part II is, so far ... the ancestor of the ... follows:—"No motor vehicle ... yearly rent ... driven at a greater speed than (2) ten ... hour, if a heavy motor car, and 8 miles ... hour, if the axle weight of any axle of the heavy motor car exceeds six tons, or ... it draws a trailer." ... was ... n the case of The ... death. The emperor ... on which the ... death ... relies the

think, as I have already said, that the order of the Chief Presidency Magistrate was wrong and I think that he should have refused to act upon the mere statement of the investigating Police Officer but required him to produce a warrant from Ahmedabad, releasing Dwarkadas in the meantime on bail to appear when called on before himself. If this course had been adopted it is accompanied by various safeguards, for the Police Officer would have had to satisfy the Court issuing the warrant of the nature of the offence charged and that it could be enquired into and tried in Ahmedabad. The Court would have to so decide bearing in mind the provisions of sec. 117, Cr. P. Code which provides that every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

Various other questions were raised before us—notably that the facts show that the whole matter was really a civil dispute and not of a criminal nature. I think there is considerable force in this contention having regard to the previous

MADHAVRAO WAMAN SAUNDALGEKAR v. RAGHUNATH VENKATESH DESHPANDE.

afterwards apparently allowed Appaji to *resume* possession pending negotiations for some fresh agreement.

These negotiations, however, failed and on the 16th May 1887 Ramchandra executed a permanent lease in favour of one Sintre and put him in possession of the property. Sintre continued in possession till about December 1890 when one Nana Patil got possession as purchaser of a decree obtained against Ramchandra.

Thereafter there was or purported to be a reference to arbitration between Gundo, Appaji's son Waman (Appaji having died), Sintre and Nana Patil and the arbitrators awarded that possession should be given to Waman Appaji on his making certain payments to Sintre and others. The Respondents' father was not a party to the reference, but was stated to have intimated to the arbitrators that he was willing to accept Waman Appaji as tenant if he agreed to pay the yearly rent of Rs. 36 and a *nazarana*; and thereafter he appears to have accepted rent from Waman Appaji till his death on the 29th October 1902.

Thereafter his sons, the Respondents, refused to accept rent from Waman and after his death from his sons and on the 22nd October 1914 instituted the present suit for the recovery of the land in question.

The Appellants put in a written statement claiming to be permanent tenants by adverse possession and issues were raised but the only issue material to this appeal is that of adverse possession.

The trial Judge on the 9th September 1916 dismissed the suit with costs. "It is undisputed," he said, "that the land sued for is a Deshpande Watan Inam. There is no doubt that the original grantor had only a life interest in it and had no power to lease it beyond his life-time. Plaintiffs' grandfather who passed the lease of 1853 died in 1864-5 and Plaintiffs' father had 12 years from that time for disputing the lease. Not having done so the Plaintiffs' right of disputing the permanent lease is barred."

In the earlier part of his judgment as to the facts the Subordinate Judge held on the admission of Waman Appaji before the arbitrators that the Appellants' family had been dispossessed by Sintre, but stated that there was no documentary evidence to corroborate the assertion of Respondents that their family was in possession about 12 years before 1887. This had, however, also been admitted by Waman Appaji before the arbitrators and was recorded in their award.

From this decree the Respondents appealed and the High Court allowed their appeal and gave them a decree for possession and for mesne profits to be ascertained in execution.

In their judgment they stated that if as they assumed Gundo stood in the shoes of the Watandar the agreement with him was a fresh agreement which stopped adverse possession from running; they also held that there was actual ouster of Appaji by Ramchandra and a fresh tenancy created between them soon after 1882. Again they found that the Appellants had in 1891 recognised the right of Ramchandra to let the land to Sintre and bought up his rights: they held therefore that no case of adverse possession had been made out.

After this judgment had been delivered the Appellant applied for a review on the ground *inter alia* that the suit was barred by sec. 4 of the Revenue Jurisdiction Act, X of 1876, by a resolution of Government, but the resolution relied on proved to be merely a resolution approving a recommendation of the Commissioner that an

MADHAVRAO WAMAN SAUNDALGEKAR v. RAGHUNATH VENKATESH DESHPANDE.

order of the Collector evicting the Appellants under sec. 12 of the Watan Act should be set aside and an order of the District Deputy Collector refusing to interfere as sec. 9 of the Hereditary Offices Act under which his interference was applied for was not imperative. The application was accordingly dismissed on the 17th February 1919.

Hence this appeal.

Sir Geo. Lowndes, K. C. and *Kenworthy Brown* for the Appellants. It is admitted that the Appellants have been in possession since 1891 and the onus is on the Respondents to show that they have been in possession within the last 12 years.

Art. 142, Indian Limitation Act, IX of 1908, sec. 28

[LORD PHILLIMORE. It is not clear that possession was adverse.]

From 1861 to 1892 no rent was paid Payments to Gundo were no payments to the Watandar. The payments to Gundo were under an agreement with him that the Appellants were permanent tenants.

No payments were made to Ramchandra except specifically on the claim of permanent tenure.

Adverse possession commenced as soon as there was on the part of a Watandar other than the original grantor an immediate right of possession.

Tekait Ram Chunder Singh v. *Sm. Madho Kumari* (4). A Watandar represents the whole estate sufficiently for adverse possession to run against each succeeding holder of the Watan.

Radhabai v. *Anantrao* (3), *Rama* v. *Shamrao* (2) and *Trimbak Ramchandra* v. *Shekh Gulam Zilani* (5).

The Appellants have in fact been in possession on a customary tenure prior to 1853 and the grant then only ratified a tenure which already existed.

Reference was also made to *Padapa Bin Bhujangapa* v. *Swamirao Shriniwas* (1).

Mr. E. B. Raikes for the Respondents. A Watandar cannot create any interest in a Watan estate to endure beyond his life and the Appellants never became permanent tenants.

The receipt of rent by Ramchandra is only referable to a new tenancy created by him and ending at his death.

Except that this is a Watandar and not a *shebait* this case is on all fours with *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (6).

The Appellants' possession was never adverse.

The decision in *Trimbak Ramchandra* v. *Shekh Gulam Zilani* (5) was based on an erroneous interpretation of *Radhabai* v. *Anantrao* (3).

The Plaintiffs could not have sued earlier as no suit will lie to set aside a mere assertion.

Nilmony Singh v. *Kalee Churn* (7).

The evidence shows that the Appellants have been twice evicted so that their possession has not been continuous.

Sir G. Lowndes, K. C. in reply.—*Vidya Varuthi Thirtha* v. *Balusami Ayyar* (6) is on quite a different footing.

(1) L. R. 27 I. A. 86 at p. 90: s. c. I. L. R. 24 Bom. 556; 4 C. W. N. 517 (1900).

(2) 7 Bom. L. R. 135 (1904)

(3) I. L. R. 9 Bom. 198 at pp. 212 223 (F. B.) (1885).

(4) L. R. 12 I. A. 188 (1885).

(5) I. L. R. 34 Bom. 329 (1909).

(6) L. R. 48 I. A. 302: s. c. 26 C. W. N. 737 (1921).

(7) L. R. 2 I. A. 83; 23 W. R. L. R. 382 (1874).

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MADHAVRAO WAMAN SAUNDALGEKAR v. RAGHUNATH VENKATESH DESHPANDE.

A Watandar unlike a *shebait* represents the estate and holds the whole estate as against the next Watandar.

Furthermore the bar of limitation there was under Art. 134 or alternatively under Art. 144.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE. The suit in which this appeal has arisen was brought on 22nd October 1914, in the Court of the First Class Subordinate Judge of Belgaum by Watandars for the ejectment of the Defendants from service Watan lands in Mauza Bhivashi in Taluka Chikodi in the District of Belgaum, and for mesne profits. The Defendants are not Watandars, nor is any one of them a Watandar of the Watan. The Defendants Nos. 1 to 4 in their written statement allege that they, from before 1853, acquired adversely to the family of the Plaintiffs a right to the possession of the lands in question as permanent tenants, and enjoyed that right for more than 12 years before suit in the life-time of the father of the Plaintiffs, and that "the cause of action arose in the year 1865, when the Plaintiffs' grandfather died." The title, if any, of the other Defendants depends on the title of the Defendants Nos. 1 to 4.

The facts of the case will be briefly stated presently, but in order to see whether under those facts the defence of adverse possession is maintainable, it is necessary to bear in mind what the law as to the alienation by a Watandar of his service Watan lands was, in 1853, and has been down to the institution of this suit.

Reg. XVI of 1827 was passed by the ... of Bombay in Council on the no power to lea... 1827. Before that Regula- ... a Watandar could, apparently without the sanction of the Government, assign or mortgage his service Watan lands and could grant, to any one a permanent lease of them, but the effect of secs. 19 and 20 of that Regulation was to prohibit, in the interests of the State, all such Watandars from alienating in any way the service Watan lands which they held as Watandars. Secs. 19 and 20 of that Regulation applied to the lands in suit. Secs. 19 and 20 of that Regulation continued in force until they were repealed by Bombay Act III of 1874, but the repeal of those sections by Act III of 1874 did not make valid any alienation of service Watan lands which had been prohibited ... Reg. XVI ... 1827 (*Padapa Bin Bhujangapa* v. *Swamirao Shrinivas* (1)). Sec. 5 of Bombay Act, III of 1874, now applies to the lands in question. That section is as follows:—

"V. No Watandar shall, without the sanction of Government, sell, mortgage, or otherwise alienate or assign any Watan or part thereof or interest therein to any person not a Watandar of the same Watan."

That section of Bombay Act, III of 1874, was passed, as was sec. 20 of Reg. XVI of 1827, in the interests of the State and not in the interests of the Watandars only. The granting by a Watandar of a right of permanent tenancy in lands of his Watan would undoubtedly be an alienation within the meaning of sec. 20 of Reg. XVI of 1827.

The facts of the case may be briefly stated as follows. The lands in suit are service Watan lands, and were in the possession of Appaji, who was the grandfather of the Defendants Nos. 1 and 2 and the uncle of the Defendants Nos. 3 and 4. In 1853, Appaji held those lands and other service Watan lands of the Watan as a tenant of Venkatrao, the

(1) L. R. 27 I. A. 86 at p. 90: s. c. I. L. R. 24 Bom. 556; 4 C. W. N. 517 (1900).

MADHAVRAO WAMAN SAUNDALGEKAR v. RAGHUNATH VENKATESH DESHPANDE.

Watandar, at a yearly rent of Rs. 42. Venkatrao was the grandfather of the Plaintiffs. Some of these lands which Appaji held as a yearly tenant were, in or before 1853, taken by the Government for the purpose of making a public road, and consequently Appaji and Venkatrao agreed to re-adjust the rent by reducing it to Rs. 36 a year. That agreement was embodied in a document which was signed by Venkatrao on the 15th March 1853. That document, as translated, is as follows :—

"Shri,

"In the service of Rajashriya Virajit Rajmanya Rajashri Appajipant Appa Saundalgekar residing at Nipani

"Profound salutations of *protege* Venkatrao Narayan Deshpande, Prant Kagal. Special representation is as follows Further Our Deshpandki land measuring 15 bighas, situate in Mouze Bhiyshi, Prant aforesaid, stands in the name of Ti. Rajeshri Dajipant Baba, and I am the owner of the same. So from before the said land has been given you for cultivation for a fixed rent of Rs. 42 forty-two in Panali coin and at the time of survey a road is shown in the said land and in it some land was covered by the road. Therefore Rs 6 six out of the said amount of rent are remitted to you and the said land is given you for cultivation by fixing a rent of Rs. 36 thirty-six in Panali coin per year. So from the Fasli year 1262 (1852-1853) you should pay every year thirty-six rupees the amount of said rent by four instalments, and you should cultivate the land permanently. In the interval we shall never interfere with the land (that is) with you. After you, your heirs also should pay the amount of rent according to the said agreement and permanently enjoy the land. We are entitled to receive the amount of rent of the land and we are not at all entitled to take away the land from you and you should not give it up. Neither we nor our heirs will put forth any obstructions to act according to the agreement The agreement is duly given in writing as above. Date 15th March

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a permanent tenant, and thereupon the Court, on the 20th June 1870, ordered that the landlord's interest in the lands should be sold without affecting Appaji's interest as a permanent tenant. At the sale, in execution of his decree, Gundo became the purchaser. It is not necessary to consider whether the Court had any power to order that sale.

On the 17th January 1872, it was agreed between Gundo and Appaji, by registered document, that Appaji, as the permanent tenant of the lands in suit, should pay to Gundo the Rs. 36 rent and for 20 years an additional sum of Rs. 42 a year. The Rs. 36 and Rs. 42 were paid yearly from 1872 to 1890 to Gundo by Appaji and after his death by his son Waman, who was the father of the Defendants Nos. 1 and 2.

MADHAVRAO WAMAN SAUN'7, Ramchandra,
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fee of Court. The payments so ordered were made by Waman. From 1895 to 1902 Waman paid the rent of Rs. 36 a year to Ramchandra. In Ramchandra's receipts for those payments he acknowledged that Waman held the lands as a permanent tenant. In the record-of-rights of 1911-12 the Defendant No. 1 was entered as the permanent tenant of the lands. Upon the death of Ramchandra the Defendants tendered to the Plaintiffs the rent of Rs. 36 yearly as their rent as permanent tenants, but the Plaintiffs refused to receive the money so tendered. Ramchandra died on the 29th October 1902, and the Plaintiffs succeeded him as the Watandars. Upon the facts which have briefly been stated being proved the Subordinate Judge found that the evidence in favour of the permanent tenancy alleged by the Defendants Nos. 1 to 4 was overwhelming. He stated in his judgment that :-

"It is undisputed that the land sued for is a Deshpande Vatan (Watan) Inam. There is no doubt that the original grantor (Venkatrao) had only a life interest in it and had no power to lease it beyond his lifetime Plaintiffs' grandfather (Venkatrao), who passed (granted) the lease of 1853, died in 1864 5, and the Plaintiffs' father (Ramchandra) had 12 years from that time for disputing the lease. Not having done so, Plaintiffs' right of disputing the permanent lease and of claiming possession is barred *Rama v. Shamrao* (2); *Radhabai v. Anantrar* (3)."

The Subordinate Judge gave the Plaintiffs a decree for six years' rent at the rate of Rs. 36 a year, amounting to Rs. 216, and otherwise dismissed the suit with costs.

From that decree the Plaintiffs appealed to the High Court at Bombay. The appeal was heard by Sir Basil Scott, C. J., and Mr. Justice Hayward. Those learned Judges stated that : "The only question which really arises in this appeal is whether the Defendants can claim to have established a right to a permanent tenancy by adverse possession." They held that adverse possession commenced to run on the death of Venkatrao, but they referred to the agreement of the 17th January 1872, between Gundo and Appaji, and holding that Gundo, after the purchase by him in 1870, represented the Watandar so far as these lands in question are concerned, they decided that it was impossible to hold that adverse possession in favour of the person claiming to be a permanent lessee continued to run after that agreement. If that decision were correct, as to which it is not necessary for their Lordships to express any

(2) 7 Bom. L. R. 135 (1904).
(3) I. L. R. 9 Bom. 198 (F. B.) (1885).

opinion, Appaji and his son Waman were not holding adversely from January 1872, until 1894. Those learned Judges also held, and their Lordships think rightly, that there had been two breaks in the alleged adverse possession within 12 years of the death of Venkatrao, but they do not base the advice which they will give to His Majesty upon that fact. Those learned Judges, in conclusion, stated in their judgment that: "It appears to us, therefore, that the Defendants cannot, on a review of the occurrences during the life-time of the Plaintiffs' father (Ramchandra), contend that there has been any continuous adverse possession for 12 years until the Plaintiffs' father's death in 1902, which would entitle them to claim to occupy the land in suit as permanent tenants. It is not disputed that since 1902 the Plaintiffs declined to accept rent from the Defendants, and that their suit has been filed within 12 years of their father's death. For these reasons we set aside the decree of the Lower Court and pass a decree in favour of the Plaintiffs for possession and mesne profits of the land in the occupation of the Defendants," with all costs. From that decree this appeal has been brought by the Defendants Nos. 1 to 4. The other Defendants are nominal Respondents to this appeal; they have not appeared.

One of the authorities upon which the Subordinate Judge relied for his decision that the suit of the Plaintiffs was barred by limitation was *Radhabai and Ramchandra Konher* v. *Anantrao Bhagvant Deshpande* (3). That was a Full Bench decision of the High Court of Bombay in which Sir Charles Sargent, C. J., delivered the leading judgment. The judgments of the late Sir Charles Sargent always deserve and receive careful consideration by the Board. The material point of that decision, so far as it has a bearing on the present case, is briefly stated in the head-note to the report of that case thus:—

"Held (1), that, in the absence of fraud and collusion, adverse possession for twelve years during the life-time of one holder of service Vatan lands is a bar to succeeding holders"

The lands there in question were service Watan lands, to which sec. 20 of Reg. XVI of 1827 applied. The Plaintiff there sued for the possession of service Watan lands and for mesne profits. The Defendants claimed to be in possession of the lands under a grant of 1838 to them of the lands made by the Plaintiffs' grandfather, who was, at the time of the grant, the Watandar, and they pleaded limitation by adverse possession; the adverse possession relied upon by the Defendants being apparently their having continued in undisturbed possession for a period of 12 years after the death of the grantor. The Plaintiff's case was that his grandfather, the grantor, had no power to make a grant of the lands except for his life-time and that his (the Plaintiff's) father had no authority to allow the lands to continue in the possession of the Defendants. Sargent, C. J., and Mr. Justice Nanabhai Haridas had referred three questions to the Full Bench. It is only necessary to refer to the first of those questions which was: "1. Whether adverse possession for 12 years during the life-time of one holder is a bar to succeeding holders." The Full Bench decided that in the absence of fraud and collusion, the first question should be answered in the affirmative, leaving what is to be considered an adverse possession to be determined in each

(3) I. L. R. 9 Bom. 198 (F. B.) (1885).

MADHAVRAO WAMAN SAUNDALGEKAR v. RAGHUNATH VENKATESH DESHPANDE.

particular case. The question and answer to it of the Full Bench would, when looked at in ignorance of the facts of the case, appear to be general and not confined to a case of an absolute assignment of service Watan lands by a Watandar to a stranger, who alleged that he had obtained title by 12 years of undisturbed possession. It is necessary to see what that answer to the first question really meant. And for that purpose, it is, in their Lordships' opinion, necessary to see what the alienation then in question really was. It was not an alienation by a lease of a permanent tenancy to a tenant of the Watan; it was a sale and absolute assignment to a stranger to the Watan and to the family of the Watandar, followed by a period of 12 years after the death of the grantor, during which the stranger assignee was allowed by the successors of the Watandar grantor to continue in undisturbed possession of the Watan lands. In either case the grant would be beyond doubt an alienation which was prohibited by sec. 20 of Reg. XVI of 1827, but having regard to the facts of the case which was before Sir Charles Sargent, C. J., and Mr. Justice Nanabhai Haridas, which justified their order of reference to the Full Bench, all that the Full Bench can be taken as having decided was that a stranger to the Watan, who had got possession of service Watan lands by an absolute assignment to him by a grantor, who was at the time of the grant the Watandar, could successfully defend a suit for possession of those lands by a subsequent Watandar by proving that after the death of the grantor he had been in undisturbed possession of the lands for a period of 12 years. A careful consideration of Sir Charles Sargent's judgment, as given in *Radhabai* v. *Anantrav* (3), shows that he was considering the question referred to the Full Bench from the point of view of the grantee having been a stranger to the Watan. It is not necessary for their Lordships to decide in this case whether the answer of the Full Bench, limited as it must have been to the case of a stranger to the Watan, setting up as a defence, 12 years' adverse possession, was or was not correct, although they are constrained to say that it is somewhat difficult to see how a stranger to a Watan can acquire a title by adverse possession for 12 years of lands, the alienation of which was, in the interests of the State, prohibited. Their Lordships may say, further, that if it was necessary for them to decide whether the answer of the Full Bench to the first question referred to that Bench was or was not correct it would be necessary for them to consider whether the Secretary of State for India in Council, as representing the interests and rights of the Crown in service Watan lands, was not a necessary party to a suit in which a stranger claimed that he was entitled to those lands by a right of adverse possession.

In the present case the defence of 12 years' adverse possession as permanent tenants is set up by persons who and their predecessors-in-title, always claimed to be and were tenants of service Watan lands, and in the opinion of their Lordships neither the Defendants nor their predecessors-in-title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the Watandars from whom they held the lands.

Their Lordships will humbly advise

(3) I. L. R. 9 Bom. 198 at p. 210 (F. B.) (1885).

MADHAVRAO WAMAN SAUNDALGEKAR *v.*

His Majesty that this appeal should be dismissed with costs.

Solicitor: *Mr. Edward Delgado* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 150 OF 1922.

SUHRAWARDY, J. GRAHAM, J. 1924, Heard, 16 and 17, April. Judgment, 9, May.	JNANENDRA NATH MUSTAPHI, Defendant, Appellant, *v.* DUKHIRAM SANTRA, Plaintiff, Respondent.

Under-raiyat, interest of, if transferable in law—Acquisition of occupancy right by an under-raiyat—Transferability of under-raiyat's interest with landlord's consent—Evidence Act (I of 1872), sec. 115, estoppel, subsequent act or word, if can constitute—Decree for joint possession, if an appealable grievance.

The Bengal Tenancy Act has taken away an under-raiyat's right of acquiring a right of occupancy under any condition except by local usage or custom, and he is no better than a tenant-at-will with no tangible interest in the land except that of holding it till the end of the agricultural year.

There is ample authority for the view that the right of an under-raiyat is not transferable.

AKHIL CHANDRA *v.* HUSAIN ALI (6), AMIRANNESSA *v.* JINNAT ALI (7) *and several other cases referred to.*

One of the ordinary incidents of a transferable interest is its heritability, but the interest of an under-raiyat is not heritable.

(6) 16 C. W. N. 246: s. c. 18 C. L. J. 262 (1913).

(7) I. L. R. 42 Cal. 751: s. c. 19 C. W. N. 48; 20 C. L. J. 548 (1914).

SAHA BANIK.

made it must be s..
eight annas. It has al... in the old
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a stamp of eight annas. It is, therefor..
.. clear that a document which purports to
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..l that there is to arbitration should be
it.. that the interest ..ment, in my opinion,
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gi..rently that there is no difference differ-
sai..ls transferability between an occu- ..to
lord right and the right of an under-
W In support of this view he has
cree upon sec. 183, Bengal Tenancy
who ..ch enacts that an under-raiyat
should ..ustom or usage acquire right of
decree. He has therefore come to
This ..ision that the interest of an
11th No.. is transferable with the con-
the Sub.. landlord and that consequent-
Zillah .. the landlord can question
Chatter..y of the transfer. On the facts
modif.. case he has held that the Defen-
Court.. purchasers of the under-raiyati
Kh..ecution of their decree for rent
..st Tushtu which, according to him,
lo..d the right, title and interest of the
cha..ent-debtor, cannot question the
the under-ra.. of the under-raiyati or the
under-raiyati by private purchase from
tion of a rent ..ndlords they are en-
by the Defen.. one of the Defendants,
Mustaphi. Plain.. 3, the Appellant has
the present suit ..sted the suit, he has
and for recovery ..nst him and decreed
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raiyati was not af.. The learned vakil
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Court dismissed the ..ment and urged
Appellate Court allow.. der-raiyat is trans-
by right of purcha.. of the raiyat.
raiyat. The present ..y of the land laws
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..ultural land into

(11) I. L. R. 31 Cal. 75.. 479 (F. B.) (1904).

MADHAVRAO WAMAN SAUNDA[...] v. SUDHANSU BADANI DEBI.

...e discretion of the particular case. The *...y to amend its decree* wer to it of *...ought to its notice that the* when loc[...] *...oes not agree with the judgment.* facts *...e only exception to this general rule is where owing to third parties being affected it may be inequitable to order an amendment.*

This was a Rule issued on the 20th November 1923, calling on the Opposite Party, the Plaintiff and the Defendants Nos. 1 to 7, to show cause why the decree passed by the first Court should not be amended in the manner proposed in the petition.

The facts of the case will appear from the judgment.

Babu Jitendra Kumar Sen Gupta for the Petitioner.

Babu Nripendra Chandra Das for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

SUHRAWARDY, J. This Rule was issued on the Opposite Party to show cause why the decree passed in suit No. 41 of 1919 in the Court of the first Subordinate Judge of Dacca should not be amended as prayed in the petition. The suit was a partition suit and on the 10th April 1919 the Subordinate Judge of Dacca passed a decree in it. There was an appeal to the District Judge by a party other than the Petitioner and the Defendant No. 7. The decree of the first Court was affirmed on the 7th August 1920. There was a second appeal to this Court which was dismissed under Or. 41, r. 11 on the 14th March 1921. The decree was executed and possession was delivered to the different parties on the 8th February 1922. It is stated that the Petitioner at that time discovered the mistake, namely, the omission of a certain direction in the decree and he applied on the 18th July 1922 to the Court of the Subordinate Judge of Dacca for its amendment. That application remained pending till the 9th June 1923, when it was dismissed on the ground that the application should have been made to this Court, the original decree having merged in the decree of this Court in the second appeal. Hence the Petitioner moved this Court and obtained the present Rule. The defect in the decree complained of is this. The Petitioner was the Defendant No. 8 in the Court below. In the partition suit a Commissioner was appointed: and the parties by mutual consent agreed to the allotments made by him. The real dispute in the present matter lies between Defendant No. 8 who is the Petitioner and the Defendant No. 7 who is the contesting Opposite Party. The two plots allotted to these two Defendants are contiguous. It was agreed that Defendant No. 8 (the Petitioner) should give a road over his plot No. 8 to Defendant No. 7 and in exchange get a two feet wide strip of land from east to west being the northern portions of Plot No. 7 which was allotted to Defendant No. 7. All these terms are embodied in the judgment. The decree, however, though it mentions that a way will be kept over Plot No. 8 for access to Plot No. 7 from the north, does not mention of the 2 cubits wide strip of land to be allotted to Defendant No 8. The Defendant No. 8 has accordingly applied to have that clause inserted in the decree and thus make it conform to the judgment.

It is not seriously disputed that there has been this omission: but it is argued by Defendant No. 7 that the amendment shall not be allowed at this stage, first, because it is not proved that he had consented to the giving up of this strip of

CHANDRA KUMAR MUKHOPADHYA *v.* SUDHANSU BADANI DEBI.

land and secondly, because his right to appeal from the amended decree will now be barred. I do not think that these considerations ought to prevail against a plain duty of the Court. The real question that arises in this case is that, conceding that the decree is at variance with the judgment, whether it is in the discretion of the Court, considering the length of time after which the application for amendment is made and the other circumstances, to refuse to bring it into conformity with the judgment. The learned vakil for the Petitioner contends that when it is discovered that the decree does not agree with the judgment, it is the duty of the Court to amend the decree so as to bring it into conformity with the judgment. In my judgment that is the true view of the law. A decree has been defined in sec. 2 of the Code of Civil Procedure as the formal expression of an adjudication which completely determines the right of the parties with regard to the matter in controversy in the suit. This formal expression of adjudication means that the decree is a concise statement of the adjudication of the rights of the parties by the Court as expressed in the judgment. A decree, therefore, does not and cannot travel beyond or short of the judgment and must follow it. The law with regard to amendment of decree was expressed in sec. 206 of the Code of 1882. That section was in these terms: "If the decree is found to be at variance with the judgment or if any clerical or arithmetical error be found in the decree, the Court shall of its own motion or on that of any of the parties amend the decree so as to bring it into conformity with the judgment or to correct such error." It made it obligatory on the Court, if there is any variance between judgment and decree, to bring them into conformity. That section in the old Code was split up and its several parts embodied in different sections of the new Code. The first portion of the section made it obligatory that the decree should conform to the judgment and is reproduced in r. 6, Or. 20. The latter portions of the old section is re-enacted in sec. 152 of the present Code. The power of the Court to amend the decree is not confined to provisions of Or. 20, r. 6 or to sec. 152, for it is a matter within the inherent jurisdiction of the Court and it may be exercised under sec. 151 which, however, does not restrict the illimitable inherent jurisdiction of the Court as is observed in the cases of *Brijratan* v. *Jaynarain* (1) and *Harmange Singh* v. *Ram Gopal Achari* (2).

It is, however, urged that sec. 152 gives the Court a discretion to allow or not an application for amendment of a decree. In my opinion, this is not the correct reading of the section. It no doubt says that when a clerical or arithmetical mistake is discovered in the decree, the Court may at any time correct it. The word "may" in the section does not make it discretionary with the Court to order the correction but merely enlarges the power of the Court by providing that such correction can be done "at any time;" or in other words, the section simply emphasises that no lapse of time would disentitle the Court to make the correction. As has been observed, the intention of the law is to make it obligatory upon the Court whenever any such mistake is discovered to correct it and sec. 152 merely emphasises that duty of the Court by saying that it may be done at any time without limitation. This view, namely, that it is the

(1) I. L. R. 37 Cal. 649 (1910).
(2) 20 C. L. J. 18 (1918).

duty of the Court to amend the decree when it is brought to its notice that it does not agree with the judgment, is supported by a number of cases of which reference may be made to the cases of *Shivapa* v. *Shivapa Lingapa* (3), *Kalu* v. *Latu* (4), *Menat Ali* v. *Amdar Ali* (5), *Basanta Kumar Bose* v. *Khulna Loan Co.* (6) and *Surendra Nath* v. *Girija Nath* (7). The only exception to this general rule is that the Court will refuse to make the amendment where it offends against the principles of equity; for instance, it may not be desirable to amend the decree where the interest of a third party (who may be a *bonâ fide* transferee for valuable consideration) may be jeopardised. *Henry William Halton* v. *Hugh Harris* (8). A reference to the reported cases on this point shows that amendment has been allowed even long after the passing of the decree without limit of time. I am therefore of opinion that the decree should be amended by inserting the following words: "Defendant No. 8 will get a space of 2 cubits road throughout the entire length of Plot No. 7 and contiguous to Plot No. 8 in consideration of the space that he shall have to keep open for ingress and egress to and from Plot No. 7 over the land of Plot No. 8."

Both parties further pray that another omission in the decree should also be supplied by inserting the words: "The eastern boundary of Plot No. 8 may fluctuate but the way must always be 2 cubits broad from its eastern limit whatever that may be" after the direction about the keeping of a road 2 cubits

(3) I. L. R. 11 Bom. 284 (1886).
(4) I. L. R. 21 Cal. 259 (1893).
(5) 9 C. W. N 605 (1905).
(6) 19 C. W. N. 1001 (1914).
(7) 15 C. L. J. 658 (1911).
(8) [1892] A. C. 547.

broad from Plot No. 7 northwards over the eastern limit of Plot No. 8. These words should also be inserted.

This Rule is accordingly made absolute. In the circumstances of this case we make no order as to costs.

GRAHAM, J.—I agree with my learned brother that this Rule should be made absolute. It has not been disputed that the decree is not in conformity with the judgment. Under Or. 20, r. 6 of the Code the decree must be in conformity with the judgment and it is the duty of the Court to see that there is such agreement. No question of limitation arises and under sec. 152, C. P. C., an omission of this nature in the decree can be corrected by the Court at any time. There are reported cases in England where such amendment has been made after the lapse of many years. Where property has changed hands subsequent to the passing of the decree and delivery of possession, other considerations arise. But this is not a case of that nature. I agree that the omission ought to be rectified by amending the decree so as to bring it into conformity with the judgment.

H. C.

[CRIMINAL REVISIONAL JURISDICTION.]

JURY REF. No. 2 OF 1924.

GREAVES, J. DUVAL, J. 1924, 20, March.	THE KING-EMPEROR v. GOLAM KADER and ors., Accused.

Criminal Procedure Code (Act V of 1898), sec. 307, when High Court will interfere with the verdict of the jury in a reference under—"Verdict of the jury, if patently unreasonable," is the real test to be applied

In a reference under sec. 307 of the Criminal Procedure Code against the verdict of the jury, the High Court has to consider the evidence that was before the

THE KING-EMPEROR *v.* GOLAM KADER.

jury and the view of the Sessions Judge and also the view of the jury and arrive at its own conclusion upon the case. The real test to be applied is to see whether it can be said that the verdict was so unreasonable that the jurors could not have arrived at that verdict. The High Court will not interfere against the verdict of the jury unless it can be said that it was not possible for the jury to have arrived at the verdict at which they arrived.

This was a Reference by the Sessions Judge of Chittagong, under sec. 307 of the Criminal Procedure Code, against an unanimous verdict of the jury.

The facts of the case will appear from the judgment.

Mr. Langford James, Babus Debendra Narain Bhattacharjee, Charu Chandra Sen, Debendra Chandra Pal and *Krishta Kisore Basak* for the Accused.

Babus Panchanan Ghose and *Jyotish Ch. Guha* for the Complainant.

Mr. Khundkar, Officiating Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is a Reference by the Sessions Judge of Chittagong. Twenty persons were charged with offences under sec. 147 of the Indian Penal Code. Four of them 1, 2, 17 and 18 were further charged with offences under sec. 302 of the Indian Penal Code and there was a further charge under sec. 149 read with sec. 302 against all the 20 persons. The trial took place before a jury between the 10th and the 19th of December last year, and the jury by an unanimous verdict found the accused not guilty on the 19th December, giving them, so we understand, the benefit of the doubt. Under the circumstances the Sessions Judge who has disagreed with the unanimous verdict of the jury has made this Reference to us under the provisions of sec. 307 of the Code of Criminal Procedure. It is necessary, therefore, for us to consider the evidence that was before the jury and the view of the Sessions Judge and also the view of the jury and after having done so to arrive at our own conclusion upon the case. The facts of the case are succinctly set forth both in the second paragraph of the letter of Reference and also in the charge to the jury under the heading "prosecution case." I need only deal very shortly with the facts. The prosecution case is that on the 8th of July last year, one Bangshi Dey, a tenant of Prasanna and two other persons, labourers of Prasanna, were transplanting paddy in a large *char* lying to the west of the village Gahira which was in the possession of Prasanna, and his brother, Hara Kumar and Nishi, brothers of Prasanna, were watching the transplanting of the paddy. Then it is said that a large number of men armed with *lathis* came from the east and that the five men, Hara Kumar, Nishi, Bangshi and the two labourers ran away towards the west. It is said that near the *darga* of one Har Chundra Das, who was also a tenant of Prasanna, the five persons who were flying were intercepted by a party of men who were coming from the north-west. The two labourers effected their escape and it is said that the other three were surrounded and that Hara Kumar was struck on the head with a *lathi* by two of the accused, Azizar Rahaman and Golam Kader. According to the prosecution case Hara Kumar fell down as the result of the blows and Bangshi tried to protect him by interposing his body and received a number of blows. The prosecution evidence states

THE KING-EMPEROR *v.* GOLAM KADER.

that despite this, various other blows were aimed by various members of the attacking party upon the prostrate body of Hara Kumar. Nishi is also said to have been beaten by the rioters and three other persons who arrived to see what was happening are said to have received injuries and another brother of Prasanna, Nabin, is said to have been struck by the rioters as they were dispersing. Hara Kumar was carried home. The occurrence took place in the evening and at about 9 o'clock in the night Hara Kumar and Nishi were taken in a *sampan* and information was sent to Prasanna who was in Chittagong where he was employed as a pleader's clerk. Prasanna left Chittagong on the following morning, that is, on the 9th of July. On his way he met his brothers in the *sampan* and he took them to a *ghat* near the thana which is at a place called Anwara. At 2 P.M. next day the 9th July the first information was lodged by Prasanna. All the accused were named in that information. On Prasanna lodging the first information a Sub-Inspector went from the thana to the *ghat* and inspected the injuries of Hara Kumar and Nishi. After this was done Hara Kumar and Nishi were taken to Chittagong where Hara Kumar died of the injuries early in the morning of the 10th. The *post mortem* examination of Hara Kumar disclosed two wounds on the top of his head and a fracture of the frontal bone in five segments and the view of the Civil Surgeon was that the injuries on the head were sufficient by themselves to cause death. The dispute in respect of which the rioting is said to have taken place arose about the possession of this *char*. Prasanna and his brothers claimed it and Prasanna had recently obtained a decree with regard to certain plots in the *char* in sec. 145 proceedings to which Azizar Rahaman, one of the accused, was a party. Azizar Rahaman had started a title suit in respect of two of these plots and a *kabuliyat* had been executed by Azizar and his co-sharers in favour of one Umed Ali and ten others of the accused are said to have executed *kabuliyats* in favour of Umed Ali in respect of the disputed land. The prosecution's suggestion is that behind Umed Ali was one Khan Sahed Abdul Rahaman Dovasha, a well-known merchant of Chittagong and this person is said to have instigated the attack. The defence story is not very clear and apparently the suggestion was that Nishi and Hara Kumar and others, when they were going to break down a hut which had been erected by Umed Ali or Abdul Rahaman on the southern extremity of the *char*, were driven off and beaten by Umed Ali's men. No evidence was called on behalf of the defence and the defence story can only be gathered from the line of cross-examination that was followed with regard to some of the witnesses. A very large body of witnesses were called on behalf of the prosecution, many of whom purported to be eye-witnesses of the occurrence. Amongst them are prosecution witness No. 2, Bacha Mia, prosecution witnesses Nos. 3, 4, 5, 6 and 7. The other eye-witnesses are prosecution witnesses Nos. 9, 10, 11, 13 and 16 and in addition to these there are other witnesses who speak to having seen some occurrence from a distance. Most, if not all, of the eye-witnesses identified all the accused though it is true that prosecution witness No. 8 says in the Sessions Court that Azizar and Golam were not present on the occasion although before the Magistrate he stated that Azizar and Golam gave the blows. Prosecution witness No. 7 also says that Azizar was

THE KING-EMPEROR *v.* GOLAM KADER.

not present. As the learned Judge pointed out to the jury the majority of the prosecution witnesses were either relatives or tenants or labourers of Prasanna and his brothers. There are one or two or possibly more persons who may be said to be entirely independent but it is not unnatural that a greater number of the prosecution witnesses are connected with Prasanna in one or other of the ways I have mentioned. There is no doubt that reading the evidence as it has been read to us there does seem an almost overwhelming case made out on the part of the prosecution against these accused. What therefore we have got to consider is whether the jury were entirely unreasonable in giving the benefit of the doubt, as they did to the accused and whether it was impossible for the jury to arrive at any other conclusion reasonable than that the guilt of the accused had been brought home to them. Various points were urged by the learned Counsel who appeared on behalf of the accused in support of the view that the verdict of the jury was not an unreasonable verdict and that accordingly we should not interfere with it.

First, he refers to the fact that according to the evidence the assault on Hara Kumar was made by at least 15 people and that yet according to the medical evidence only two blows were found on Hara Kumar's head and one slight abrasion on another portion of his body. Certainly we think that this is a fair comment because on reading the evidence we find that many blows are said to have been rained upon Hara Kumar by some of the accused after he had fallen down as a result of the first two blows. The evidence is that Azizar and Golam struck him first and that after that no less than 13 persons struck him and yet according to the medical evidence as we have already stated there were only three actual blows, according to the Doctor's view, that can be traced on the person of Hara Kumar. Then again so far as Nishi is concerned it is stated in the evidence that he was struck by no less than 11 people. But if you consider the evidence of the Doctor, so far as Nishi is concerned, you will find that he says that Nishi had a bruise on the eye-lid of the right eye and a contusion on the left fore-arm and further injuries, all of which were slight except the one on the head.

Then it is further urged that there was evidence before the jury that other persons, as I have already indicated, were injured in the affray and that yet the injuries of none of them were of sufficient gravity to demand examination by a Doctor.

Then it is urged that a certain number of witnesses, five I think it is said, went back to some extent in the Sessions Court upon the evidence that they had given before the Magistrate and emphasis was laid on the fact that prosecution witness No. 25, who had given a long and a coherent story as to the connection of Abdul Rahaman Dovasha with the attack before the Magistrate, stated nothing whatsoever with regard to this in his evidence in the Sessions Court.

Then stress is laid on the fact that although there were other brothers of the two injured men who were at the place of the occurrence at the time it happened no information was given at the thana until nearly 24 hours after the occurrence, although the thana was only 10 miles away and could be easily reached by a *sampan* by the river Sangu.

Then some point was made with regard to the exaggerations that are said to

THE KING-EMPEROR *v.* GOLAM KADER.

have appeared in the evidence with regard to the fact that the accused were armed with *daos* and *kirchis*. It is said that reference to this appears in the first information and that it is not borne out by the evidence of the witnesses and reference was also made to the picturesque figure who is said to have appeared with a *lathi* in one hand and a *dao* on the other.

Then some point was made with regard to the scene of the occurrence which was placed by the prosecution on Plot No. 2775 which is said to have been a plot which was not claimed by any of the accused.

Further stress is laid on the fact that I have already mentioned that the witnesses were tenants or labourers of Prasanna and that the Judge himself in his letter of reference says that the prosecution witnesses are not free from the charge that some of their evidence was tutored evidence.

Lastly, stress was laid on the point that a considerable number of witnesses were named in the first information including the names of the two Chowkidars, none of whom were called at the trial of the case.

It is necessary to see in the light of these suggestions whether we can say that the verdict of the jury was so unreasonable that seven reasonable men could not have arrived at that verdict, for it seems to us that that is the real test that we have got to apply We are not able to say that it was not possible for the jury to have arrived at the verdict at which they have arrived. We have read the evidence and considered it in the light of the criticisms that have been directed against it and we are of opinion that it is full of exaggerations and that it may well be that the jury taking this view may have said to themselves that it was not safe to convict the accused upon the evidence which was clearly exaggerated and therefore untrustworthy. This being so, it seems to us that we should not be justified in accepting the reference and interfering with the verdict of not guilty at which the jury have arrived. The accused are acquitted.

DUVAL, J.—I agree.

J. N. R.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 696 OF 1923.

GREAVES, J. PANTON, J. 1924, 20, February	BAHERUDDY SIKDAR, Appellant, *v.* THE KING-EMPEROR, Respondent.

Criminal Procedure Code (Act V of 1898), secs. 476, 467A—Forged document produced in Court—Person not party to the proceeding and not producing the document, complaint by Court against, if maintainable—Penal Code (Act XLV of 1860), sec. 193.

A person who possibly forged a document which was produced in Court cannot be proceeded against under sec. 467A, Cr. P. C., if there be no grounds for supposing that he did so for the purpose of using it in Court and there is nothing to show that it was he who used the document in Court.

This was an appeal against an order of the Sessions Judge of Bakarganj making a complaint against the Appellant Baheruddy Sikdar under sec. 193, I. P. C. and other appropriate sections in exercise of his powers under sec. 476A of the Amended Criminal Procedure Code.

The facts of the case were briefly these :—

Sheikh Salimuddi and Sheikh Alimuddi, brothers of the present Appellant, were tried before the Assistant Sessions Judge

BAHERUDDY SIKDAR *v.* THE KING-EMPEROR.

of Barisal for forcibly cutting and taking away paddy from the field of the complainant Sheikh Iasin and causing grievous hurt. The defence was that the disputed land belonged to the Appellant Baheruddy, and one *kabuliyat* and one mortgage bond purported to have been executed by Baheruddy in favour of the complainant, and two *dakhilas* purported to have been granted by the complainant in favour of the Appellant Baheruddy were exhibited. The prosecution challenged these documents as forgeries. The jury found the accused guilty and they were convicted.

Complainant applied for the prosecution of the Appellant Baheruddy for forgery but the learned Sub-Divisional Magistrate held that the case could not proceed without sanction. Thereupon the Complainant applied for sanction against the Appellant Baheruddy before the learned Assistant Sessions Judge who issued notice but in the meantime the learned Assistant Sessions Judge having been transferred the learned Sessions Judge granted sanction and made the complaint under sec. 476A of the New Criminal Procedure Code. The Appellant was neither a party nor a witness in the case tried by the learned Assistant Sessions Judge.

Babu Jatindra Nath Sanyal for the Appellant.

Mr. Khondkar for the Crown.

Babus Suresh Chandra Talukdar and *Mahendra Kumar Ghose* for the Complainant.

Babu Jatindra Nath Sanyal for the Appellant argued that the learned District Judge had no jurisdiction to make complaint against the Appellant who was neither a party nor a witness in the case before the learned Assistant Sessions Judge. Whatever might have been the law under the old Code, under the new Code the law was quite clear and the Appellant could not be said to have committed any offence in or in relation to a proceeding before the learned Assistant Sessions Judge as contemplated by sec. 476, Criminal Procedure Code. Under the old Code also complaint could not be made against any person who was neither a party nor witness, *Re : Kalluru Ramalingam* (1) though there might be some cases in which a contrary view was taken. The section should be strictly construed, *Jadunandan* v. *Emperor* (2). Again the offence alleged to have been committed will not come within sec. 193, I. P. C. for it cannot be said that the Appellant fabricated these documents for the purpose of using them in a Court of law.

Mr. Khondkar for the Crown argued that it is not necessary that the person against whom a complaint is made under sec. 476 should be either a party or a witness to the proceeding in relation to which the offence is committed. The requirements of the law will be satisfied if the commission of the offence is brought to the notice of the Court in or in relation to a proceeding in that Court. Cites *Akhil Chandra* v. *Queen-Empress* (3).

The Appellant fabricated these documents for the purpose of using them in a Court of law to prove his title and the documents were actually used before a Court of law. Therefore sec. 193, I. P. Code will apply.

Babu Jatindra Nath Sanyal was not called upon to reply.

The JUDGMENT OF THE COURT was as follows :—

PANTON, J.—This is an appeal under

(1) I. L. R. 40 Mad. 100 (1916).
(2) I. L. R. 37 Cal. 250 : s. c. 14 C. W. N. 330 (1909).
(3) I. L. R. 22 Cal. 1004 (1895).

BAHERUDDY SIKDAR *v.* THE KING-EMPEROR.

sec. 476B of the Code of Criminal Procedure against an order of the learned Sessions Judge of Bakarganj, dated the 24th of September 1923 in which he made a complaint to the District Magistrate of an offence under sec. 193 of the Indian Penal Code, and any other appropriate sections, alleged to have been committed by the present Petitioner Baheruddy Sikdar in relation to a trial before the Assistant Sessions Judge of Bakarganj. These offences are said to have been committed in respect of certain documents which were filed by the defence in the trial before the Assistant Sessions Judge. They are a *kabuliyat*, a mortgage bond and some other documents.

Various grounds have been urged before us for holding that the order of the learned Sessions Judge was not in accordance with law. It is, however, unnecessary to go into all the points raised by the learned vakil for the Appellant because we think that the appeal must succeed upon one single ground and that is that there is no ground for supposing that Baheruddy committed any offence of the nature referred to in sec. 476 in or in relation to a proceeding in any Court. It may possibly be the case, but as to this we express no opinion, that Baheruddy forged these documents, but there is nothing at present before us nor was there anything before the learned Judge, so far as I can see, to suggest that he did so for the purpose of using them in the Court of the Assistant Sessions Judge, nor is there anything to show that it was he who used these documents in that Court. In these circumstances we think that the appeal must succeed and that the order of the learned Sessions Judge must be set aside and his complaint withdrawn.

GREAVES, J. I agree.

S. C. C.

PRIVY COUNCIL

[APPEAL FROM BOMBAY.]

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD PARMOOR.
1923,
Heard, 8, June.
Judgment, 28, June.

PHIROZSHAW BOMANJEE PETIT, Appellant,
v.
BAI GOOLBAI and ors., Respondents.

Apportionment of income from immoveable property, shares, securities and debts—Whether such income accrues de die in diem—*Law applicable*

The settlor conveyed properties, consisting of land and immoveable properties, shares, bonds and securities and outstanding debts due to the settlor to trustees on trust inter alia, *to receive the rents and profits and after making certain other payments, to make over the balance of income to the settlor himself during his life and after the settlor's death to other beneficiaries. After the testator's death, the question arose between the executors of the testator's Will and the beneficiaries under the trust deed, whether or not the income should be treated as accruing* de die in diem, *continuously, and be apportioned as such:*

Held—*That the English Apportionment Act of 1870 not being applicable, the older English law as it stood apart from the statute governed the case, according to which the income from the properties other than the debts was* primâ facie *only apportionable if an intention to make it so was clearly discoverable in the trust deed, while the income arising from the debts was apportionable.*

In order to have the result of varying the rights defined by the general law, such directions would have to be clear and unambiguous.

This appeal was from a decree of the High Court, dated the 31st March 1919, passed in an appeal from a decree of that

Court in its Original Jurisdiction, dated the 1st July 1918 and which so far as is material for this appeal, affirmed that decree.

Those decrees were made on the hearing of an originating summons taken out for the determination of the construction of a certain settlement, dated the 1st August 1913, by the Respondents Nos. 1-4 as the trustees thereof.

That settlement was made by one Bomanjee Dinshaw Petit (who had since died on the 17th December 1915) and it affected property of great value. The Respondents Nos. 5-8 were the executors of the settlor and had proved his Will and the 9th Respondent was his widow.

Respondents Nos. 10 and 11 were beneficiaries under the said settlement. The Appellant was one of the executors and one of the residuary legatees under the Will.

By the settlement in question the settlor in effect reserved to or settled on himself a life interest in the settled properties, and gave the income thereof for 13 months after his death to certain persons, and disposed of the subsequent income to certain other persons. The settled properties were (a) immoveable properties specified in Sch. I of the settlement, (b) shares with a few securities specified in Sch. II thereof and (c) outstandings due to the settlor specified in Sch. III thereof.

The questions arising in this appeal were—

(1) Whether the rents of the settled immoveable properties for the month of December 1915, and the dividends of the settled shares subsequently declared for the last six months of 1915 were apportionable between the executors of his Will and the beneficiaries under the settlements so that the former took the proportion of such renfment the settlor had conaccrued before the 17tnt of property to the when the settlor died : *alia*, and so far as

And (2) whether the rèses of the questtled immoveable propertiive the rents month of January 1917, and thg certain dends declared for the first six montbalance the year 1917 were apportionable betweuring the persons entitled to the income accru- es ing during the first thirteen months after the settlor's death and those entitled to the income accruing thereafter.

The determination of the questions involved the construction of cls. 1 and 4B of the settlement.

Cl. 1 of the settlement after providing that the trustees should get in the rents, dividends, interest and other income of the settled properties—thereinafter called the said income—and make certain payments thereout proceeded as follows: "And" (the trustees) "shall in the next place pay the balance of the income to the settlor for and during the remainder of his life and down to his death."

The material part of cl. 4B of the settlement was as follows: "Within thirteen months after the settlor's death the said trustees shall from and out of the said income accruing within the first thirteen months after the settlor's death (which would have been paid to the settlor if alive) pay to the said Bai Goolbai if she shall survive the settlor from time to time in such sums as the said Bai Goolbai may reasonably require and the state of the said income in the hands of the said trustees shall permit the total sum of Rs. 80,000 in order to enable her to carry on all the household expenses for that period (which expenses were specified in some detail) provided also that the trustees shall divide the remainder of the said balance of the said income arising or accruing during the first thirteen months

sec. 476B of the Cod'which shall be left dure against an_rcout of the said sum Sessions Judgamongst the said Bai Gool-24th of Septgir Bomanjee Petit, Dhunji-a complhanjee Petit and Phirozshaw an offjee Petit in equal shares."

Doubts having arisen as to the construction of the settlement the trustees on the 17th July 1917 took out the originating summons in which this appeal is made making the executors of the Will and all the beneficiaries under the settlement parties. The first two questions on the summons raised the two points already stated.

The summons was heard by a single Judge of the High Court who by his decree of 1st July 1918 decided that the settlor's estate was not entitled to any portion of the rents of the settled properties for December 1915 or of the dividends on the settled shares for the last six months of 1915 and that the trust estate was entitled to the whole of such dividends. In the same way he decided that no part of the rents of the settled properties for January 1917 and of the dividends on the settled shares for the first six months of the year 1917 was payable to Bai Goolbai and the other persons who were named at the end of cl. 4B of the settlement. The learned Judge did not deliver any formal judgment or give any reasons for this decision.

The Appellant appealed from this decree and the Respondents Nos. 5-9 supported the appeal on the two points in which they were interested but the Division Bench which heard the appeal confirmed the decree on both points on the 31st March 1919.

Their judgment on these points was as follows:—"We are of opinion that the decision was right. Under cl. 1 the settlor is to receive the balance of income represented by rents, profits and produce dividends, interest and income, whether arising from the lands or the shares, securities and sums mentioned in the schedules or the investments for the time being representing the same respectively or any of them or any part thereof, all which rents, profits, produce dividends, interest and income are hereafter briefly called the said income . . . . . . during the remainder of his life and down to his death. In cl. 4B the balance is referred to as of the said income accruing within the first thirteen months after the settlor's death (which would have been paid to the settlor if alive) and the trustees are to pay within thirteen months of the settlor's death to Goolbai from time to time in such sums as the state of the income in the hands of the trustees shall permit the total sum of Rs. 80,000 and divide the remainder of the balance of the said income arising or accruing during the thirteen months which shall be left after payment of the Rs. 80,000 to certain named beneficiaries. The rents, dividends and income are thereafter available as they arise. The income arising during thirteen months is to be paid as income from time to time in the hands of the trustees within the thirteen months. It cannot be paid before it arises and comes in the hands of the trustees, and such rents and dividends only as are received within thirteen months can be paid within that period. The beneficiaries under cl. 4B have no right to claim anything received by or payable to the trustees after that period, and we infer that for calculating income due to the settlor's estate the same process must be applied. Nothing is to be paid after his death. On the words of the deeds therefore all right to apportionment is by implication excluded. The

case of *Lysaght* v. *Lysaght* (2) relied upon for the Appellant was an instance of a stipulation intended to exclude from the operation of the English Apportionment Act certain dividends which otherwise might have been apportionable. We do not think that either the cessation of the settlor's interest on his death or the expiration of the thirteen months' period after his death can be treated as effecting transfers within the meaning of sec. 36 of the Transfer of Property Act. If they can properly be so treated the provisions of the deed exclude the operation of the section. They exclude similarly recourse to the equitable rules of Chancery practice in England."

From this decree the Appellant appealed to His Majesty in Council and the Respondents Nos. 5-9 supported his appeal on the points above stated.

Messrs. Upjohn, K. C., Tomlin, K. C. and *E. B. Raikes* for the Appellant.

Mr. E. B. Raikes for the Respondents Nos. 5-8 and 9 who supported the Appellant.

Messrs. Clauson, K. C. and *R. J. T. Gibson* for the Respondents Nos. 10 and 11.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—This is an appeal from the High Court at Bombay, which had affirmed a decree of the same Court in its Original Jurisdiction. The questions decided had been raised by originating summons, taken out by certain of the present Respondents, who were trustees of an *inter vivos* settlement, dated 1st August 1913, and made by a wealthy Parsee inhabitant of Bombay one Bomanjee Dinshaw Petit, who died on the 17th December 1915.

(2) [1898] 1 Ch. 115.

By this settlement the settlor had conveyed a large amount of property to the trustees on trust, *inter alia*, and so far as is material for the purposes of the questions in this appeal, to receive the rents and profits, and, after making certain other payments, to make over the balance of income to the settlor himself during his life. After his death the trustees were to realise, by sale, conversion or otherwise, of the trust premises, certain sums, and, within thirteen months after the settlor's death, out of the balance of income from what remained, accruing within the first thirteen months, to pay to his widow, the first Respondent, from time to time and in such sums as she should reasonably require and the state of the income should permit, the total sum of rupees 80,000 for purposes mentioned. The trustees were then to divide the remainder of the balance of such income arising or accruing during the first thirteen months after the settlor's death, among the Respondent, Bai Goolbai, the widow, the Respondents, Jehangir and Dhunjibhoy, and the Appellant, Phirozshaw, the settlor's son, in equal shares; the capital and income, after the thirteen months, were, subject to the trusts stated, to go to other beneficiaries under the trust deed as therein provided.

The settled property consisted of land and immoveables specified in the first schedule to the trust deed; shares, bonds, and securities specified in the second schedule; and outstanding debts due to the settlor specified in the third schedule.

Questions arose as to the interpretation of the deed, and an originating summons was taken out by the trustees to which the beneficiaries under the trust deed and the executors of a subsequent Will made by the settlor were Defendants. This summons raised a number of questions,

of which two only are now raised on the appeal to His Majesty in Council. The first of these two questions arose between the settlor's executors and beneficiaries under the trust deed. It was whether an apportionment of the income of the settled properties, or any of them, should be made, as if the title to such income had accrued continuously, up to the 17th December 1915, the date of the testator's death. It was contended for the executors that the whole income should be treated as accruing *de die in diem*, continuously, so that although instalments, such as rents or interest, were not actually payable until after that date, the executors of the settlor who was to take during his life-time should be held entitled to so much of what was not actually payable until after his death as was to be attributed on this footing to his title down to the date of his death.

The second question was an analogous one. It was whether, as between those who took beneficially the income for thirteen months after the settlor's death, and those beneficially entitled to the income subsequently, a similar apportionment should be made as on the 17th January 1917, being the date of termination of the thirteen months' period.

The summons was heard by Kajiji, J., who decided against the application of any principle of apportionment, excepting as to interest on the debts due to the settlor specified in the third schedule and such of the securities specified in the second schedule as bore interest. As to these, it was not disputed by the Respondents that his view was right. He gave no reasons for his judgment.

The case was heard on appeal by Scott, C. J., and Hayward, J., and these learned Judges affirmed the decision of Kajiji, J. The only question which now arises is whether there is applicable, under Indian law, any principle of apportionment which applies to rents and periodical payments, such as rents and profits from land, and the dividends and income arising from shares carrying income periodically payable, such as are specified in the second schedule.

The point is raised on this appeal by one of the beneficiaries whose interest it might have been to contend that the principle of apportionment did not apply to the property in the first two schedules. He has, however, severed from his co-beneficiaries, and contends that the principle does apply, having regard to the terms in which the settlement is expressed, and this is the question which their Lordships have to decide.

The English Apportionment Act of 1870 provides that after its passing, all rents, annuities, and other periodical payments in the nature of income are, unless it is expressly stipulated that no apportionment is to take place, to be considered as, like interest on money lent, accruing from day to day, and shall be apportionable in respect of time accordingly. But this Act does not apply in India, nor do any of the earlier English Apportionment Acts. It is common ground that the principle which applies in the present case is that of the original English law as it stood apart from statute. The older English law on the subject was stated by Lord Eldon in *Ex Parte Smyth* (1) and is amplified in the learned note appended to the report of that case by Mr. Swanston. The latter traces it to the two propositions, that an entire contract cannot be apportioned, and that under such an instrument as, for instance, a lease with a reservation of periodically payable rent, the contract for each portion is distinct

(1) 1 Swanston 337 (1818).

PHIROZSHAW BOMANJEE PETIT *v.* BAI GOOLBAI.

and entire. The rule, however, while applicable to periodical payments becoming due at fixed intervals, did not apply to sums accruing *de die in diem*. It did not, for example, apply to annuities or to debts. The distinctions drawn were often fine. But it is not necessary for their Lordships to discuss them, because it is plain that, however clear the principle which governed the character of proprietary and contractual rights, it was always open to a testator or settlor, with full power of disposition, to exclude its practical consequences. He had only to say that it was his intention that the person entitled to the fixed sum, payable only after the determination of the intermediate title, should account to those in whom that intermediate title was vested or their representatives. Such an expression of intention had, at least, the effect of creating a trust in equity, and might, in certain cases, be operative at law by giving a special character to the title to the periodical payments. It had the effect of making the question, in most instances, one merely of construction of the instrument.

It is common ground that the old law in England, as referred to in 1818 by Lord Eldon in *Ex Parte Smyth* (1), was the law applicable in India to the present case, and that under it the income from the property specified in the first two schedules was *primâ facie* only apportionable if an intention to make it so was clearly discoverable in the trust deed and while the income arising from the debts specified in the third schedule was apportionable. The only question which now arises is as to the former, and as to this there is no question of difficulty as to the general principle of law. The real controversy is as to whether there is not in the trust deed language which, b[illegible] case will appear from [illegible] Court (28 C. [illegible] that apportionment was di[illegible] the judg[illegible] settlor to take place.

In order to answer this question their Lordships, therefore, turn to the provisions of the instrument.

Under the first trust in the settlement the trustees are to get in the income of the whole of the property settled, from whatever the sources specified in the schedules "arising," and to pay the balance to the settlor for and during the remainder of his life, "and down to his death." The subsequent direction is contained in the trust in the deed numbered 4B. This is to pay to the widow within thirteen months of the settlor's death out of the balance of the "income accruing within the first thirteen months" the rupees 80,000 already referred to. The trustees are further directed to divide the remaining balance of the income "arising or accruing" during the first thirteen months after the settlor's death among four beneficiaries named in equal shares. The direction in the deed operates under the form of a trust for sale. The balance of the proceeds of sale and the income to be derived from it, are to be held as subsequently directed, "except the income arising or accruing due for and within the first thirteen months after the settlor's death," as to which there is reference back to the direction already quoted.

It was argued for the Appellant that the juxtaposition of the expressions "arising" and "accruing," and the employment of them in the language of the deed as if interchangeable, indicated that the income was intended to be treated as one, the title to which was contemplated as accruing continuously. Moreover, it was said, if the trustees were to alter the character of the investments, they might from time to time vary the rights of

(1) 1 Swanston 337 (1818).

of which two only entitled at their pleasure, appeal to His the settlor could not have first contemplated. But their Lordships do not think that reliance can properly be placed on these arguments. The character of payments such as those directed is *primâ facie* discontinuous at common law. No doubt, the settlor could have given directions which would have modified this character, or at least, have deprived it of the consequences arising from its discontinuity. But such directions would have had to be clear and unambiguous in order to have had the result of varying the rights defined by the general law. Their Lordships can find no such distinctness in direction in the deed before them as would have been required to have this effect.

They will accordingly humbly advise His Majesty that the appeal should be dismissed. The trust estate is very large and the trustees found it necessary to have the questions which have arisen decided by the Courts below. There the costs were allowed out of the estate. As regards the present appeal, their Lordships think that justice will be done if the Appellant has no costs and the 10th and 11th Respondents who contested the appeal have their costs, as between party and party, out of the estate. The trustees do not appear separately on the appeal. They will be entitled to have reimbursed to them any expenses to which they have been put by it.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Sandersons* and *Orr, Dignams* for the Respondents Nos. 5-8 and 9.

Solicitors: *Messrs. Lattey* and *Hart* for the Respondents Nos. 10 and 11.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 195 OF 1923.

SANDERSON, C. J.
WALMSLEY, J.
1924,
29, April.

S. & C. NORDLINGER
v.
CHANDMULL MULCHAND.

Award—Reasons given by arbitrators in the award, if erroneous on a point of law—Arbitration clause, stipulation for survey of goods before award is made—Award, if valid when made before such survey—Buyer's duty to prove that goods are of contract quality, when arises.

In a contract for the sale and purchase of goods, it was agreed that "in the event of any dispute arising as to inferiority of quality, defects or differences in the goods, the same shall be referred . . . to the Bengal Chamber of Commerce." A dispute having arisen as regards the quality of the goods, the parties referred the same to arbitration. The buyers' statement before the Chamber concluded as follows: "The combined defectiveness in the out-turn has thus made the goods too much unqualified and ought to be cancelled, but we leave the matter to the hands of the learned arbitrators either to award cancelment or any other relief as they would deem fit." The arbitrators made their award against the buyers in these terms: "We have considered the papers and as buyers . . . . . are unwilling to produce the bales required for inspection, their claim cannot be upheld and we award that they pay for and take delivery in terms of the contract." A suit by the buyers to set aside the award was decreed. The sellers appealed:

Held (reversing the decision of the lower Court)—*That there was no error on the face of the award inasmuch as* (1) *the buyers having themselves complained of the inferior quality of the goods and*

S. & C. NORDLINGER *v.* CHANDMULL MULCHAND.

having failed to produce them for inspection when called upon to do so by the arbitrators, could not legitimately complain of the arbitrators coming to the conclusion that the buyers did not prove their case; and, (2) having regard to the statement in the award, " we have considered the papers," it was not a legitimate inference from the terms of the award that the arbitrators had decided against the buyers relying upon the mere fact that the latter were unwilling to produce the goods.

CHAMPSEY BHARA & CO. *v.* JIVRAJ BALLOO SPINNING AND WEAVING CO., LTD. (2) *referred to.*

Where the arbitration clause provided that " the Chamber shall arrange for survey in accordance with its rules," and the arbitrators made their award without having made such survey:

Held—*That one method of deciding as to the quality of the goods was contemplated by the parties to be a survey, but it was not contemplated that that should be the only means of arriving at a decision and therefore the arbitrators, although they had not made a survey of the goods, had not acted without jurisdiction.*

Held also—*That the arbitrators, having come to the conclusion that the buyers had failed to satisfy them that the goods were not in accordance with the contract quality, acted within their jurisdiction in awarding that the buyers should pay for and take delivery of the goods.*

This was an appeal from the judgment* of Mr. Justice Buckland, dated the 19th November 1923.

(2) [1923] A. C. 480: I. L. R. 47 Bom 578; 28 C. W. N. 397 (1923).

*Reported in 28 C. W. N. 261 (1923).

The facts of the case will appear from the judgment of the lower Court (28 C. W. N. p. 261) as well as from the judgment of the Chief Justice.

Messrs. S. R. Das, A. N. Chaudhuri, B. C. Bonnerjee and *J. N. Sinha, Counsel* appeared for the Appellants.

Messrs. N. N. Sirkar and *A. K. Roy, Counsel* appeared for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Defendants S. & C. Nordlinger against the judgment of my learned brother Mr. Justice Buckland.

The suit was brought by the Plaintiffs Chandmull Mulchand against the Defendants for a declaration that a certain award, dated the 3rd of September 1921, made by the Bengal Chamber of Commerce, was invalid and inoperative; and the two grounds upon which the claim was based at the trial in this Court are first, that the award was bad on the face of it and secondly, that the arbitrators had no jurisdiction to make the award.

The learned Judge held in favour of the Plaintiffs on both the points and declared that the award was invalid and inoperative. Against that decision the Defendants have appealed.

The award was in the following terms :—

" Contract No. Nil. Dated 7th December 1920.

Goods covered by contract. Finished Dhooties.

Basis of Sale No. 2226.

Packages available for inspection B/S 116/20, 141/5.

Packages examined.

Complaint—inferior quality and other defects as per buyers' statement, dated

S. & C. NORDLINGER v. CHANDMULL MULCHAND.

1st March 1921. Award :—We have considered the papers and as buyers Messrs. Chandmull Mulchand are unwilling to produce the bales reqvired for inspection their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of contract.

Buyers to pay cost of this reference, amounting to Rs. 101."

The learned Judge on the first point, namely, whether there was an error of law on the face of the award, said this: "The contract related to 60 bales. There was a dispute as to quality. The mere fact that the buyers are unwilling to produce the bales required for inspection is not by itself a sufficient reason for making an award against them. I do not desire to go further than I should having regard to the strict limitation laid down by the authorities as to what may be considered in a case such as this; but ordinarily, where there is a dispute between a buyer and a seller with reference to quality, it would be the duty of the seller to prove that the goods were of the quality contracted for."

It is not necessary for me to refer to the authorities because they were fully considered by this Court in the case of *U. M. Chowdhury & Co.* v. *Jiban Krishna Ghose & Bros.* (1) and because the learned Judge has himself drawn attention to the decision of the Judicial Committee in the Privy Council in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ltd.* (2) and the narrow limits within which a matter like this has to be considered. The first question which I have to ask myself is whether I am satisfied that the award does show upon the face of it an error in law, and, for the purpose of coming to that conclusion, one is entitled to consider the award itself and any documents incorporated in the award.

It is, therefore, legitimate to consider, in the first place, the buyers' statement dated the 1st of March 1921. That is referred to in the award as the "complaint." That statement sets out the reasons why the buyers alleged that the goods were inferior in quality to the contract quality. I need not refer to them in detail and the statement concludes in this manner:

"The combined defectiveness in the out-turn has thus made the goods too much unqualified and ought to be cancelled but we leave the matter to the hands of the learned arbitrators either to award cancelment or any other relief as they would deem fit."

Therefore, it is clear, in my judgment, that the buyers were contending that the goods were not in accordance with the contract by reason of their inferior quality and that they left the decision of the question as to quality to the arbitrators and they further left it to them to say whether the contract should be cancelled or whether any allowance should be made to the buyers in respect of the inferiority in the quality.

It appears to me that it was for the buyers to prove the case which they were alleging before the arbitrators.

The arbitrators said in their award: "We have considered the papers and as buyers Messrs. Chandmull Mulchand are unwilling to produce the bales required for inspection, their claim cannot be upheld." The learned Counsel for the Respondents, as I understood his argument, did not find fault with that part of the award because it must be obvious that when the buyers were the complainants

(1) I. L. R. 46 Cal. 646 (1922).

(2) [1923] A. C. 480: I. L. R. 47 Bom. 578; 28 C. W. N. 897 (1923).

S. & C. NORDLINGER *v.* CHANDMULL MULCHAND.

and were alleging the inferior quality of the goods and they were asked by the arbitrators to produce the goods so that they might be inspected by the arbitrators, and when they failed to produce any of the goods in question, the buyers cannot now complain of the arbitrators coming to the conclusion that the buyers did not prove their case.

The learned Judge seems to have thought that the arbitrators had decided against the buyers relying upon the mere fact that the buyers were unwilling to produce the bales. In my judgment, with great respect to the learned Judge, that is not a legitimate inference to be drawn from the terms of the award. The arbitrators said that they had certain papers. I am not in a position to say what those papers were or to speculate what their contents were. They certainly had some materials before them which were contained in the papers referred to in the award.

But the learned Counsel for the Respondents presented a further argument and contended that the second part of the award should not be upheld even though the first part, to which I have already referred, was held to be correct. The second part of the award, to which the learned Counsel referred, was that the buyers should pay for and take delivery of the goods in terms of the contract.

The argument was that the only question that the arbitrators had to decide was whether the goods were of the contract quality or not; and, if they did not decide that, then they ought not to have made the award. I cannot accept that contention. In the first place, the buyers' statement, to which I have referred, makes it clear that the question as to what was to be done with regard to the *dhooties* was left to the arbitration of the Bengal Chamber of Commerce. The arbitrators were to say whether the goods were in accordance with the contract. If they found that they were not, then they were to say whether the contract was to be cancelled or whether any allowance should be made. It seems to me that when the arbitrators, as they obviously did, came to the conclusion that the complainants did not satisfy them that the goods were not in accordance with the contract quality it follows, as a matter of course, that they should award that the buyers should pay for and take delivery of the goods. In my judgment it was within their jurisdiction so to do. In short, on this part of the case, on the materials which we are entitled to consider upon the question as to whether there was an error of law on the face of the contract, I am by no means satisfied that the arbitrators have been guilty of an error of law.

The second point depends upon the question of survey. The learned Counsel for the Respondents argued that it was a part of the submission that there should be a survey by the arbitrators and that if no survey took place, there should be no award.

The learned Advocate-General, who appeared for the Appellants, on the other hand, argued that no doubt it was contemplated by both parties that there should be a survey and that if there was a survey it should be carried out in a particular manner which was specified by the sellers but that it was not agreed upon by the parties and was not contemplated by the parties that a survey should be the only method of obtaining evidence as regards the quality of the goods. I think that the learned Advocate-General's argument in this respect is correct. The arbitrators were not merely surveyors. We do

S. & C. NORDLINGER *v.* CHANDMULL MULCHAND.

not know the names of the gentlemen who acted in this case. I believe that it is the practice of the Bengal Chamber of Commerce not to disclose the names of gentlemen who acted as arbitrators. But it is clear on a reference to the arbitration and the statement of the buyers that it was intended that the gentlemen, who would act in accordance with the Rules of the Bengal Chamber of Commerce, should act as arbitrators and should finally decide the question in dispute between the parties.

One method of deciding as to the quality of the goods was contemplated to be a survey, but in my judgment, it was not contemplated that that should be the only means of arriving at a decision.

I am by no means satisfied that the parties agreed that there should be a survey, and that if a survey were not held, there should be no award. It seems to me that the argument of the learned Advocate-General on behalf of the Appellants must be adopted. The result is that in this respect also, with great respect to the learned Judge, I am constrained to come to the conclusion that the arbitrators acted within their jurisdiction.

For these reasons, in my judgment, the appeal must be allowed, the learned Judge's judgment and decree will be set aside and the suit dismissed with costs in both the Courts, except such costs as have been directed to be paid by the Defendants with regard to the amendment of the written statement.

WALMSLEY, J.—I agree.

Messrs. Leslie & Hinds, Solicitors for the Appellants.

Messrs. Dutt & Sen, Solicitors for the Respondents.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1994 OF 1921.

NEWBOULD, J.
B. B. GHOSE, J.
1923,
15, November.

THE CHAIRMAN OF THE COMMISSIONERS OF THE HOWRAH MUNICIPALITY and ors., Defendants, Appellants,
v.
HARIPADA ROY CHOWDHURY, Plaintiff, Respondent.

Municipal Act (III of 1884, B. C.)—Candidate for election, right of, to be present at the recording of votes—Specific Relief Act (I of 1877), sec. 42, if a bar.

The right to be present at the recording of votes, not being given by the statute (Act III of 1884, B. C.), a candidate for election as Commissioner of a Municipality has no such right under natural law.

CLEMENTSON *v.* MASON (1) *explained.*

The rule forbidding his presence in that part of the polling station where votes are actually recorded is not inconsistent with the provisions of the Act:

Held—*That sec. 42 of the Specific Relief Act was no bar to the suit, as there was a prayer for an injunction as further relief.*

This was an appeal preferred on the 21st of September 1921 against the decree of the 1st Subordinate Judge of Zillah Howrah (Babu Banwari Lal Banerjee), dated the 30th of June 1921, affirming the decree of the 2nd Munsif of Howrah (Babu Nato Behari Ghose), dated the 15th of March 1920.

The facts of the case will appear from the judgment.

Babus Ram Chandra Mazumdar,

(1) L. R. 10 C. P. 209 (1875).

Panchanan Ghose (for *Babu Manmatha Nath Roy*) for the Appellants.

Dr. Dwarka Nath Mitter and *Babu Kanaidhan Dutt* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from the decision of the 1st Subordinate Judge of Howrah affirming the decision of the Munsif, 2nd Court, Howrah. The Plaintiff in this case was a candidate for election as Commissioner of the Howrah Municipality. The Defendants are the Chairman of the Municipal Commissioners of Howrah, the Vice-Chairman and the Presiding Officer appointed to hold the Municipal General Election which was to take place shortly after the suit was instituted. The Plaintiff asked for a declaration of his right to be present at the place and time when and where the votes of the voters would be recorded and also that the Defendants or any of them have no right to prevent the Plaintiff from being present at that place. He further asked that the Defendants be restrained from prohibiting the Plaintiff to be present at that place.

The Municipal Act applicable in Howrah is Act III of 1881, B. C. Sec. 15 of that Act gives the Local Government power to lay down rules not inconsistent with the provisions of the Act, amongst other matters in respect of the mode of election. Such rules are published in Notification No. 4345-M, dated the 21st November 1896. Also instructions to the Presiding Officer have been drawn up, and this case really turns on the legality of r. 14 of those instructions which is to the following effect : "After getting his ticket the voter will enter the second enclosure where candidates or their agents shall not be permitted to enter this enclosure except to get their own votes recorded." In order to understand the point it is necessary to state the provisions made for the recording of votes. The polling station is divided into three separate enclosures. There is the first general enclosure in which the voters are to be assembled. There is then the further enclosure which is entered through gates and there are Municipal employees sitting at separate tables where tickets with serial numbers of the voters are given to the voters as they apply for them. Under the rules it is the duty of any one objecting on the ground of false personation to do so when the voters applies for his ticket in the enclosure. After the voter has obtained his ticket he enters into the third enclosure and there his vote is recorded by one of the members of the Committee who sit at separate tables.

The whole question is whether the candidate is entitled to be present in that part of the polling station where votes are actually recorded. Both the lower Courts have decided this point in the Plaintiff's favour. The first Court based its decision on the ruling in the English case of *Clementson* v. *Mason* (1). As the learned Subordinate Judge has rightly pointed out the decision of this English case has no application to the facts of the present case. That decision was based on the construction of certain sections of the Ballot Act which is not in force in this country. The learned Subordinate Judge, however, supported the decree on the ground that every person interested like the candidate has a natural right to be present where votes are recorded under the ordinary law. With this we are unable to agree. We cannot agree that the rights of candidates or electors which are rights expressly given by statute carry with them any rights under natural law

(1) L. R. 10 C. P. 209 (1875).

not given by statutory law. In order to succeed in this case it is necessary for the Plaintiff to show that he has the statutory right to be present at the place where votes are recorded or that the rule forbidding his presence in that particular place is inconsistent with the provisions of the Bengal Municipal Act, III of 1884, B. C. The learned vakil for the Respondent has been unable to satisfy us on either of these points. The candidate as such has a right to be present to take objection where there has been wrongful personation. Also as an elector he has the right to enter the enclosure where votes are recorded in order that his vote may be recorded. But we can find nothing in the Act which suggests that the candidate has the right of himself supervising the recording of the votes. The recording of the votes is supervised by the Presiding Officer and the committee and there is no reason why the candidates themselves or their agents should necessarily be present to see that the votes are properly recorded. As regards the right of the candidate to object in case of wrongful personation that is fully provided by the rules which have been drawn up as regards the issue of tickets in the second of the enclosures to which the candidate and his agent are not only allowed but specially invited to be present.

We therefore hold that the Plaintiff has failed in establishing his case and the suit must fail on that ground.

It was also contended that sec. 42 of the Specific Relief Act is a bar to this suit. But we hold that as the Plaintiff asked for further relief in the form of an injunction that section is no bar.

The result is that the appeal is decreed with costs in all Courts.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 32 OF 1923.

SUHRAWARDY, J. GRAHAM, J. 1924, Heard, 2, April. Judgment, 17, April.	KHETTRA MOHAN DAS, Defendant No. 1, and ors., Appellants, v. BISWA NATH BERA, Plaintiff, Respondent.

Transfer of Property Act (IV of 1882), sec. 6 (e)—Assignment of right to sue for account, if valid—Document, construction of.

An assignment of a mere right to sue an agent for accounts and to recover moneys found to be due from him upon such accounts being taken is not enforceable an law, sec. 6 (e), Transfer of Property Act, being a bar to such a transfer.

Cl. (e) to sec. 6 is not confined to the assignment of damages arising from torts alone.

P. VARAHASWAMI v. M. RAMA CHANDRA RAJU (2), K. SEETAMMA v. P. VENKATARAMANAYYA (4), ABU MAHOMED v. S. C. CHUNDER (1), SHAM CHAND KUNDU v. THE LAND MORTGAGE BANK OF INDIA, LTD. (3) *and* COUNTY HOTEL AND WINE COMPANY, LTD. v. LONDON AND NORTH-WESTERN RAILWAY COMPANY (6) *considered, referred to and followed.*

MADHO DAS v. RAMJI PATAK (5) *differentiated.*

This was an appeal preferred on the 16th December 1923 against an order of the Additional District Judge of Zillah Midnapur (Mr. A. Henderson), dated the 23rd November 1922, reversing an order

(1) I. L. R. 36 Cal. 345: s. c. 13 C. W. N. 384 (F. B.) (1909).
(2) I. L. R. 38 Mad. 138 (1913).
(3) I. L. R. 9 Cal. 695 (1883).
(4) I. L. R. 35 Mad. 308 (1913).
(5) I. L. R. 16 All. 286 (1894).
(6) [1918] 2 K. B. 251, 260.

KHETTRA MOHAN DAS v. BISWA NATH BERA.

of the Munsif, 4th Court at that place (Babu Upendra Nath Chatterji), dated the 29th September 1921.

The *pro formâ* Defendant (Respondent No. 2) sold two mouzas to the Plaintiff (Respondent No. 1) with all his rights to get from the (Appellant) Defendant No. 1 his Gomasta the accounts and papers relating to the properties and to recover from him the sums which would be found due upon taking accounts by a conveyance, dated the 5th Falgun 1327 A. S. The Defendant No. 1 (Appellant) executed a security *kabuliyat* in favour of the *pro formâ* Defendant (Respondent No. 2) mortgaging his properties on 7th Kartik 1306 A. S. for due performance of his work. Plaintiff as transferee brought an action for accounts and papers and for recovery of the sum which may be found due to him upon taking accounts making his transferror a *pro formâ* Defendant. The primary Court upon a construction of the above conveyance, held that the Plaintiff (Appellant) having purchased merely the Defendant No. 2's right to sue the Defendant No. 1 for accounts his suit was not maintainable under sec. 6 (*e*), Transfer of Property Act. The lower Appellate Court determined that the transfer was of all rights including the transferror's lien on the properties under the security *kabuliyat* and his right to recover money which would be found due upon taking account and the present suit for account was thus maintainable. The question in the appeal was as to the maintainability of the suit.

Babu Samarendra Kumar Dutt for the Appellants.—I submit the lower Appellate Court is wrong in holding that the present suit is one for recovery of moneys realised on behalf of the Respondent No. 2 and embezzled: it is a suit for account and the transfer is of a mere right to call for account and such transfer is prohibited by sec. 6 (*e*), Transfer of Property Act (IV of 1882). The primary Court is right in saying that upon a proper construction of the conveyance, dated the 5th Falgun 1327 A. S., the Plaintiff purchased merely the Defendant No. 2's right to sue for accounts from the Defendant No. 1 and this is surely unassignable within the meaning of sec. 6 (*e*).

This is in the nature of a transfer of claim to an unascertained damage, past mesne profit—and thus of a mere right to sue. *Abu Mahomed* v. *S. C. Chunder* (1). An actionable claim is transferable but not a mere right to sue.

Right to sue for mesne profits cannot be transferred—*Sham Chand Kundu* v. *The Land Mortgage Bank of India, Ltd.* (3).

Claim for damages against an agent for his negligence to collect rent is not transferable. See *P. Varahaswami* v. *M. Rama Chandra Raju* (2).

And the case of misappropriation by the Gomasta Appellant after realisation has not been made in the plaint. On the other hand the allegation was that the amount ought to have been realised but not actually realised.

Right to sue for damages on account of breach of contract is not assignable, though the case is otherwise where a liquidated sum is mentioned in the contract as the measure of damage in the event of its breach. The case of *County Hotel and Wine Co., Ld.* v. *London and North-Western Railway Company* (6) supports my contention.

(1) I. L. R. 36 Cal. 345, 351: s. c. 13 C. W. N. 384 (F. B.) (1909).
(2) I. L. R. 38 Mad. 138 (1913).
(3) I. L. R. 9 Cal. 695 (1883).
(6) [1918] 2 K. B. 251, 260.

Babu Joges Chunder Ray (with *Babu Santosh Kumar Pal*) for the Respondent. I submit though the right to sue for account is not transferable, the right to recover money found due on taking accounts is transferable. Sec. 6 (e) of the Transfer of Property Act applies to damages arising from torts, they are incapable of transfer. Rights and obligations arising out of some contracts are transferable and sec. 6 (e) has no application to those cases. In this case the transfer is of money which will be found to be actually due from the Defendant after taking accounts. The Appellate Court is right in holding that the transfer in this case is one of the right to recover moneys which will be ascertained as actually embezzled upon accounts being taken, and this is no transfer of a mere right to sue and the transaction is not prohibited by sec. 6 (e).

This is the transfer of a debt, an actionable claim, as defined in sec. 3, Transfer of Property Act and this is assignable. (Sec. 130, Transfer of Property Act). *Ibu Mahomed* v. *S. C. Chunder* (1).

The right to sue for damages for breach of contract is assignable. This is the case of a failure to pay the rent collected and is assignable.

County Hotel and Wine Co., Ld. v. *London and North-Western Railway Company* (6) and *Dawson* v. *Great Northern and City Railway* (7) rather help my case. The appeal should be dismissed

The JUDGMENT OF THE COURT was as follows :—

SUHRAWARDY, J.—This appeal arises out of a suit for accounts and is directed against an order of remand made by the learned Additional District Judge of Midnapur.

The facts of the case have been shortly stated as follows in the judgment of the Court of first instance :-

"This is a suit for accounts. The Plaintiff's case is that the Defendant No. 1 was Gomostha under the *pro formâ* Defendant No. 2 in Mouzas Barkola and Mirzapore and that he executed a security *kabuliyat* for his work in favour of the *pro formâ* Defendant on the 7th Kartik 1306 A. S., mortgaging the plaint schedule properties and on the strength of that *kabuliyat* he did the Gomostha work from Kartik 1306 to Magh 1327 A. S., that on 5th Falgun 1327 A. S., the *pro formâ* Defendant No. 2 sold off to Plaintiff all his rights in the two mouzas together with his rights to get accounts and papers from Defendant No. 1 and to recover from him the sums due thereon, by a registered *kobala* taking due and proper consideration thereof, that on the basis of the security *kabuliyat* this Defendant No. 1 was to submit all collection papers and explain those and pay off all sums found due thereon and he was to be liable for all rents and decretal dues barred by limitation owing to his default and to get 1 rupee 4 annas monthly pay for his work, that the Defendant No. 1 submitted and explained his accounts and papers till 1309 A. S. to *pro formâ* Defendant No. 2 and from 1310 A. S., he submitted no accounts and papers to him except a Thoka only of 1327 A. S. and as per *hisab* given in Schedule "*ka*" of the plaint the Plaintiff, on the basis of the *kobala* in his favour, asks for such accounts and papers provisionally valuing his claim at Rs. 937 15 annas 18¾ gandas. It is also stated in the plaint that

(1) I. L. R. 36 Cal. 345 : s. c. 13 C. W. N. 384 (F. B.) (1909).
(6) [1918] 2 K. B. 251, 260.
(7) [1905] 1 K. B. 260, 275.

KHETTRA MOHAN DAS *v.* BISWA NATH BERA.

after the Plaintiff's *kobala* such accounts and papers were demanded from Defendant No. 1 on 11th Falgun 1327 A. S. but no such accounts were submitted."

The learned Munsif, on a construction of the deed of sale, held (*i*) that the Plaintiff did not purchase the rights of Defendant No. 2 under the mortgage *kabuliyat* executed by Defendant No. 1 in favour of Defendant No. 2; and (*ii*) that the Plaintiff, if he purchased anything at all, purchased the right to sue for accounts, which is unassignable under sec. 6 (*e*) of the Transfer of Property Act. In the result he dismissed the suit. On appeal the learned Additional District Judge reversed both these findings and remanded the case for determination on the merits which, in the circumstances of this case, must mean for taking accounts from the Defendant No. 1.

When the Courts below have differed on the construction of the deed of sale executed by the Defendant No. 2 in favour of the Plaintiff, it becomes necessary to closely examine the terms thereof. In the heading of the document it is stated that the sale is in respect of the mouzas belonging to Defendant No. 2 together with back rents from tenants for a sum of Rs. 720 which is the full consideration for the transfer. In para. 2 after a description of the mouzahs sold and their appurtenances the following passage appears :—

"And Tahbil (cash) due to me and my dues from the Gomostha together with the right of taking accounts from the Gomostha and the right of taking the papers from him."

Para. 6 runs thus :—"If the Thoka or the Karcha of the year 1327 filed by the Gomostha be not correct, you will make enquiries yourself and will ascertain the correct amount; you will be entitled to

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 802 OF 1923.

SUHRAWARDY, J.
PAGE, J.
1924,
Heard, 10 and
th 11, January.
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DHIRENDRA NATH ROY and ors., Petitioners,
v.
KAMINI KUMAR PAL and ors., Opposite Party.

the generdure Code (Act V of 1908), Or. 21,
clear that win to set aside sale, if maintain-
was the right decree-holder—"Interests" in
Defendant No. to proprietary or possessory title
interest.
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deed does not specaffected by the sale"
for the transfer of Or. 21, r. 90 of the
amount recoverable fromnd as such is en-
No. 1, if any, is uncertaiplication under
upon the taking of account
the learned Munsif has obse" in r. 90 is
is for accounts tentatively valupossessory
tain sum for purposes of jurisd such as
court-fee. The observations of th
ed Additional District Judge on the MON-
seem to be somewhat inconsistent anESSA
accurate. He says :—"The present SA-
is one to recover sums of money realised on behalf of Defendant No. 2 but embezzled by Defendant No. 1. In view of the allegation that the Respondent has submitted no accounts, it is not possible for the Plaintiff to say what precise sum is due, until an account is taken. Although the Plaintiff has been compelled to sue for accounts his claim is really one for a sum of money received on behalf of Defendant No. 2 and misappropriated by Defendant No. 1." He further observes that the transfer was not of a mere right to sue but of a right to a specific sum of money which has been embezzled. It seems to me, however, that the transfer was not of a right to a specific sum but of a right to call for accounts, and to recover

KHETTRA MOHAN DAS v. BISWA NATH BERA

Babu Joges Chunder Ray (with *Babu Santosh Kumar Pal*) for the Respondent.—I submit though the right to sue for account is not transferable, the right to recover money found due on taking accounts is transferable. Sec. 6 (e) of the Transfer of Property Act sue plies to damages arising from tortsw but are incapable of transfer. to a sum of obligations arising out of taking of ac- are transferable and sec. I am unable to plication to those cases. a of law thus transfer is of money v hold would be to to be actually due n of the law which after takin acco of a right to sue for Court is right in ful test for determin- fer in this case ility or otherwise of an cover moneys whether it can be attach- as actually ation of a decree. That the being takerand accounts or to an indefi- a mere richich may or may not be found not prohe taking of accounts cannot be

This will not, I think, be disputed. tionaas been further argued that sec. 6, Tr(e) declares rights to damages arising am torts to be incapable of transfer, but oes not prohibit the transfer of rights or obligations *ex contractu*. This is not an altogether correct view of the law. Rights arising out of torts are undoubtedly unassignable but there may also be rights arising out of contract which offend against the rules as formulated in the section. *Abu Mahomed* v. *S. C. Chunder* (1). This is indicated by the alteration in sec. 6 (e) in 1900 by eliminating the words "for compensation for a harm illegally caused" which formed part of the clause before the amendment.

On a proper construction of the document and regard being had to the frame of the suit it seems to me that the Plain- ʟ is not entitled to maintain the suit since he has purchased, if anything, a mere right to sue for accounts. A number of cases, English and Indian, have been cited by the learned vakils on both sides but I do not consider it necessary to refer to them, as none of them is exactly in point and every case must be decided with reference to its own particular facts. Some of the reported cases may, however, be briefly referred to. In *Varahaswami* v. *Rama Chandra Raju* (2), it was held that a mere right to recover damages for the negligence of an agent in failing to collect rent is not assignable. There does not seem to be much difference in principle between failure to collect rent and failure to pay rent collected. A claim for mesne profits is not transferable. *Sham Chand Kundu* v. *The Land Mortgage Bank of India, Ltd.* (3) and *Seetamma* v. *Venkataramanayya* (4). The principle followed in these cases is applicable in the present case. The learned Additional District Judge has relied on the case of *Madho Das* v. *Ramji Patak* (5). There a sum of money was in the hands of the agent on his principal's account to be spent for certain purpose. It was held that that sum or so much of it as had not been actually spent could be attached in execution of a decree. That case, having regard to its particular facts, is no authority for the view which found favour with the learned Judge. The learned vakil for the Respondent has laid great stress on the case of *County Hotel and Wine Co., Ld.* v. *London and North-Western Ry. Co.* (6). If anything, that case supports the view that we have adopted. There the subject of transfer

(1) I. L. R. 36 Cal. 345; s. c. 13 C. W. N. 384 (F. B.) (1909).

(2) I. L. R. 38 Mad. 188 (1913).

(3) I. L. R. 9 Cal. 695 (1883).

(4) I. L. R. 38 Mad. 308 (1918).

(5) I. L. R. 16 All. 286 (1894).

(6) [1918] 2 K. B. 251, 260

KHETTRA MOHAN DAS *v.* BISWA NATH BERA.

was an option under a lease and McCardie, J., held that a mere right of litigation cannot be transferred.

In view of the conclusion at which I have arrived above the question whether the Plaintiff purchased the rights of the Defendant No. 2 under the security *kabuliyat* ceases to be of any importance. I may state, however, that I am unable to agree with the view of the learned Additional District Judge on this point also. The *kobala* does not mention the transfer of Defendant No. 2's right as mortgagee, nor does it contain any description of the properties covered by the *kabuliyat*. The only mention thereof is to be found in a schedule at the end of the document. The learned Judge held on two grounds that the Defendant No. 2 transferred his lien on the property mortgaged to him by the Defendant No. 1, (1) that that was the intention of the parties and (2) that the mortgage *kabuliyat* was delivered by Defendant No. 2 to the Plaintiff at the time of the execution of the *kobala*. I am unable to accept the learned Judge's reasoning. Where the document is not itself ambiguous, the intention of the parties should not be taken into consideration and the mere delivery of a document of title does not constitute a transfer of the right to the property. There are certain well recognised rules relating to the mode of transfer of interest in immoveable properties and transfer of such interest can be effected in no other way.

In the above view of the matter the appeal succeeds. The judgment and decree of the lower Appellate Court are set aside and those of the first Court restored with costs 3 gold mohurs.

GRAHAM, J.—I agree.

H. D. C.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 802 OF 1923.

SUHRAWARDY, J. PAGE, J. 1924, Heard, 10 and 11, January. Judgment, 11, January.	DHIRENDRA NATH ROY and ors., Petitioners, *v.* KAMINI KUMAR PAL and ors., Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 21, r. 90—Application to set aside sale, if maintainable by attaching decree-holder—"Interests" in r. 90, if restricted to proprietary or possessory title or includes pecuniary interest.

An attaching decree-holder is a person "whose interests are affected by the sale" within the meaning of Or. 21, r. 90 of the Civil Procedure Code, and as such is entitled to maintain an application under that Rule to set aside a sale.

The expression "interests" in r. 90 is not restricted to proprietary or possessory title but includes other interests such as pecuniary interest.

JOGENDRA NATH CHATTERJEE *v.* MONMATHA NATH GHOSE (2), ASMUTUNNESSA BEGUM *v.* ASHRUFF ALI (1) *and* SANKARALINGA REDDA *v.* KUNDASAMI TEVAN (3) *referred to.*

This was a Rule granted on the 16th July 1923 against the order of Babu N. R. Guha, Subordinate Judge of Faridpur, dated the 16th April 1923, affirming that of the Munsif, 3rd Court, Bhanga.

The facts of the case will appear from the judgment.

Rai Surendra Chandra Sen Bahadur and *Babus Hemendra Chandra Sen* and *Surendra Nath Basu* (*Sr.*) for the Petitioners.

Babu Surendra Nath Das Gupta II for the Opposite Party.

(1) I. L. R. 15 Cal. 488 (F. B.) (1888).
(2) 17 C. W. N. 80 (1912).
(3) I. L. R. 30 Mad. 418 (1907).

DHIRENDRA NATH ROY *v.* KAMINI KUMAR PAL.

The JUDGMENT OF THE COURT was as follows :—

SUHRAWARDY, J.—This Rule raises an important question, *viz.*, whether an attaching creditor, as such, is entitled to maintain an application under Or. 21, r. 90, of the Code of Civil Procedure. The facts of this case are that the Opposite Party and the Petitioners are two rival decree-holders having obtained decrees against the same judgment-debtor. The Petitioner at first attached the judgment-debtor's property in execution of his own decree. Thereafter the Opposite Party executed his decree, attached the property and brought it to sale. Thereupon the Petitioner applied to the Munsif in whose Court the decree was being executed to have the property re-sold on the ground that it was sold for a very inadequate price. He further applied to have the assets distributed rateably under sec. 73 and also for such distribution of the assets after the re-sale. The Court having rejected his application, he withdrew it. The effect of this withdrawal was that he gave up his right to the rateable distribution. He subsequently proceeded to execute his decree and brought this property to sale and purchased it himself. He now applied to have the sale by the Opposite Party set aside under Or. 21, r. 90, on the ground of material irregularity. The Courts have proceeded upon an examination of one question, whether he is a person who is still entitled to a share in the rateable distribution of the assets, having withdrawn his application in which he prayed for rateable distribution, and the Courts held that he is not a person entitled to make an application under Or. 21, r. 90. It has been argued before us that the view taken by the lower Court is wrong; and further that though the Petitioner has lost his right to share in the rateable distribution of the assets, he is a person whose interests are affected by the sale and, therefore, he is entitled to maintain this application. In my opinion, this contention has great force. The corresponding words in sec. 311 of the Code of 1882 were "any person whose immoveable property has been sold." The change of wording in the new Act indicates that the Legislature thought it proper in view of the decision in *Asmutunnessa Begum* v. *Ashruff Ali* (1) to widen the scope of the section. It may be profitable to note that the words that occur in r. 90, namely, "a person whose interests are affected by the sale" are even wider than the words that are to be found in r. 89, namely, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale." This clearly shows that the person who has got a vestige of title in the property sold may apply under r. 89 to have the sale set aside, may be a person whose interests are such (not necessarily in the property) as may be affected by the sale. It cannot be said that an attaching creditor has no interest in the sale of the property, or, if I may go further, in the property itself. There is no authority directly in point, but from the observations made in several cases, some support may be found to the view I have adopted. Reference may be made to the case of *Jogendra Nath Chatterjee* v. *Monmatha Nath Ghose* (2). There the question was whether the Plaintiff who had attached immoveable property before judgment had such interest as would entitle him to apply under Or. 21, r. 90, to set aside the sale of the property in execution of another person's decree. The learned Judges held that he

(1) I. L. R. 15 Cal. 488 (F. B.) (1888).
(2) 17 C. W. N. 80 (1912).

DHIRENDRA NATH ROY *v.* KAMINI KUMAR PAL.

had not. But in coming to that conclusion, they drew a distinction between a person who had obtained attachment before judgment and a decree-holder who had attached the property sold in execution of his decree. Reference may also be usefully made to the case of *Sankaralinga Redda* v. *Kundasami Tevan* (3). There it has been held that an attaching creditor does not acquire any such charge on the attached property which will give him priority over another creditor, but he acquired a right to have the property kept in *custodia legis* for the satisfaction of his debt, and an intentional interference without justification with any such right is an actionable wrong for which an action would lie. In that case a moveable property was attached in execution of a decree. It was removed by a third party. It was held that the attaching decree-holder may maintain a suit for the recovery of that property from the third party. If he had no interest in the property, it is difficult to see how he can maintain a suit for recovery of the same. It is argued on behalf of the Opposite Party that if the attaching creditor is a person whose interests are affected by the sale, then the expression "any person entitled to share in a rateable distribution of the assets" in the sale is superfluous. On the face of it, this argument assumes some importance. But it is arguable that the first clause has reference to a particular class of persons, while the latter is of general application. Now, what are the interests which the Petitioner has which are affected by the sale of the property by the Opposite Party. His case is that the property is liable to be re-sold, because there was material irregularity and that the sale was brought about in collusion with the judgment-debtor. I cannot say that such contention is groundless. It appears that this property was previously sold in execution of the decree of the Petitioner for a higher price than that fetched at the present sale. The judgment-debtor applied under Or. 21, r. 90, and had that sale set aside. The present sale is for a much lesser amount, but the judgment-debtor has not taken any step to challenge it. It is further submitted to us on behalf of the Opposite Party that the effect of allowing the Petitioner to contest the present sale is that in the event of his success in setting aside the present sale, his own sale would stand and the Opposite Party would have no further remedy. I am not concerned with what may be the effect of having the sale set aside. The only question with which we have to deal at present is whether the Petitioner is a person who can maintain an application under Or. 21, r. 90. It has also been urged with great deal of emphasis that the word "interest" in r. 90, must be interest in property; that is, interest which must be some sort of proprietary or possessory title. I am not prepared to restrict the meaning of a plain word so as to exclude all other interests, such as "pecuniary interest." In my opinion, the present Petitioner is a person whose right to the property, however insignificant it may be, is affected by the sale. In this view of the law, I am of opinion that the Rule ought to succeed.

The result is that this Rule is made absolute and the case sent back to the Court of first instance for disposal on merits. Costs will abide the result. We assess the hearing fee at one gold mohur.

PAGE, J.—I am of the same opinion. The issue in this case is whether the applicant was entitled to apply to the Court to set [illegible]

(3) I. L. R. 30 Mad. 418 (1907)

[illegible] R. 14 Mad. 898 (1890).

DHIRENDRA NATH ROY *v.* KAMINI KUMAR PAL.

brought about by the Opposite Party. It is conceded having regard to the facts of this case, that the applicant was entitled to share in a rateable distribution of the assets realized by the sale under Or. 21, r. 90, but it is said that he has lost his right to share in a rateable distribution of the assets because he applied that the assets which resulted from the sale should be rateably distributed and then withdrew that application. If that were so, I should be disposed to think that his right to share in the rateable distribution of the assets has gone. But I am not satisfied that this was what really happened. What happened was that when the sale took place the applicant applied to the Court that the bid of the execution creditor No. 1 should not be accepted and that the sale should go on, in which case, he stated that, he would be willing to offer Rs. 700 for the property, the bid of the execution creditor No. 1 being only Rs. 145. He, further applied that if an order was made that the sale should proceed on the terms suggested the assets realized by the sale should be rateably distributed, and that in that distribution the applicant should be entitled to share. The first application was refused and the applicant then withdrew the second one and thereafter proceeded to purchase the property at the subsequent sale which was brought about at his instance. If that was what happened, in my opinion, the applicant never did make or withdrew an application for a share in the rateable distribution of the proceeds of a sale in which the execution creditor No. 1's bid was accepted. All that he withdrew was an application to share in the proceeds of the sale made on the assumption that he was entitled though [illegible] the property was put up for [illegible] eafter arises, it may be, if the proceedings to set aside the sale are dismissed, that it will still be open to the applicant to apply to share in a rateable distribution of the assets; as to that I express no opinion.

But there is another ground upon which the applicant contends that he is entitled to apply to set aside the sale under Or. 21, r. 90, namely, that the sale being an irregular or fraudulent one, his interests were thereby affected. The Opposite Party contends that an execution creditor who has obtained a writ of attachment is not a person whose interests are affected by the sale because in his contention the only persons connoted by the words "those whose interests are affected by the sale" are persons who possess proprietary or possessory title to the property which forms the subject-matter of the sale which title will be destroyed if the sale is allowed to remain effective. In support of that contention the learned Vakil for the Opposite Party cited certain cases which had been decided under corresponding provisions in the old Code (sec. 311). But it is to be observed that the words in sec. 311 were "any person whose immovable property has been sold," and that in r. 90 there have been substituted the following words, *viz.*, "any person whose interests are affected by the sale." The intention of the Legislature, in my opinion, when making this amendment of the language of the Rule, was to enlarge the class of persons who would be entitled to apply under r. 90. In my opinion "persons whose interests are affected by the sale" is an expression which is not limited to persons whose proprietary or possessory title is affected by the sale. Now, is an execution creditor who has attached immoveable property a person whose interests are affected by a fraudulent or irregular sale? In my opinion, he is. It may

DHIRENDRA NATH ROY v. KAMINI KUMAR PAL.

well be that a decree in itself does not create a charge or a lien in favour of the decree-holder in the property of the judgment-debtor and it also may be a sound contention that the attachment of property in execution of a decree does not itself create in the decree-holder any title to such property; but, in my opinion, it gives him an interest in the property; and a very real interest, because the effect of obtaining a decree is that the decree-holder becomes entitled to enforce the right which he has obtained under his decree against that property. Now, if the sale by another decree-holder is in fact collusive, it affects the right of the execution-creditor who has attached the property: at any rate, to this extent that if he is entitled to a share in the rateable distribution of the proceeds of the sale, he will receive a lesser amount than he would have obtained if the property had been sold for a fair and proper price, or again, if he is not entitled to a share in the rateable distribution of the sale, there will be a less sum available after payment of the decree-holder's judgment-debt for the purpose of liquidating the decretal amount to obtain which he has attached the property. In my opinion, the interests of the applicant were or might be seriously affected by the sale; and in my judgment, he is entitled to have his application under r. 90 heard upon the merits. For these reasons, I agree with the order proposed by my learned brother.

H. C. S. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

CR. REV. (MIS.) No. 17 OF 1924.

GREAVES, J. DUVAL, J. 1924, Heard, 7, April. Judgment, 15, April.

MOHINI MOHAN ROY, Complainant, Petitioner, *v.* PUNAM CHAND SETHIA, Accused, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 528—Chief Presidency Magistrate, whether can withdraw a case to his file which the Additional Chief Presidency Magistrate had transferred to another Magistrate—Sec. 21, Additional Chief Presidency Magistrate, how far subordinate to the Chief Presidency Magistrate

The Additional Chief Presidency Magistrate who by a notification of the Local Government, in exercise of the powers under sec. 21 (2) of the Criminal Procedure Code, was declared ***subordinate*** *to the Chief Presidency* ***Magistrate****, transferred a case for disposal to the 4th Presidency Magistrate. Subsequently on the application of the accused* ***the Chief Presidency*** *Magistrate transferred* ***the case*** *to his own file under sec. 528, Cr. P. C.:*

Held—*That the Additional Chief Presidency Magistrate was subordinate to the Chief Presidency Magistrate and the latter had power under sec. 528, Cr. P. C. to make the order which he did withdrawing the case to his file.*

RAGHUNATHA *v.* EMPEROR (1), SANTHAPPA SETHURAU *v.* GOVINDASWAMY (2) *and* THAMAN CHETTI *v.* ALAGIRI CHETTI (3) *referred to.*

This was a Rule granted on the 4th February 1924 against an order, dated the 30th January 1924, of the Chief Presidency Magistrate of Calcutta (Mr. T. Roxburgh) withdrawing the case from the file of the 4th Presidency Magistrate and transferring same to his own file.

(1) I. L. R. 26 Mad. 130 at p. 132 (1902)
(2) I. L. R. 40 Mad. 791 (1916).
(3) I. L. R. 14 Mad. 899 (1890).

MOHINI MOHAN ROY *v.* PUNAM CHAND SETHIA.

The facts are briefly as follows :—A complaint of criminal breach of trust was laid before the Additional Chief Presidency Magistrate who, after police enquiry, transferred the case for disposal to the Fourth Presidency Magistrate. This Magistrate after examining witnesses ordered the issue of summons against the accused who applied to the Chief Presidency Magistrate asking, on the ground of jurisdiction, that the case should be recalled to his file and tried by him. The Chief Presidency Magistrate thereupon withdrew the case from the file of the 4th Presidency Magistrate and transferred it to his own file under sec. 528, Cr. P. C. Hence the present Rule was obtained by the Complainant.

Mr. Langford James and *Babu Satindra Nath Mukerji* for the Petitioner.

Mr. B. C. Chatterjee, *Babus Tarakeshwar Pal Chowdhry* and *Phanindra Nath Mukerjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—On the 13th November last the Secretary of the Nawab of Murshidabad complained to the Additional Chief Presidency Magistrate of criminal breach of trust by one Punam Chand Sethia in respect of certain jewellery.

The Additional Chief Presidency Magistrate took cognizance of the offence and after examining the Complainant directed the Police to enquire and report.

On the matter coming back to the Additional Chief Presidency Magistrate a judicial enquiry was asked for by the Complainant and the Additional Chief Presidency Magistrate thereupon transferred the case for disposal to the Fourth Presidency Magistrate. This Magistrate after examining witnesses ordered the issue of summons against Punam Chand Sethia on the 19th January 1924. On the 28th January Punam Chand applied to the Chief Presidency Magistrate asking, on the ground of jurisdiction, that the case should be re-called to his file and that the trial should take place in his Court. The Chief Presidency Magistrate, having ascertained that the 4th Presidency Magistrate had no objection, on the 30th January withdrew the case from the file of the 4th Presidency Magistrate and transferred it to his own file under sec. 528 of the Code of Criminal Procedure. It is said that the Chief Presidency Magistrate had no power to make this order and hence this Rule.

Sec. 18 (4) of the Criminal Procedure Code empowers the Local Government to appoint an Additional Chief Presidency Magistrate and provides that he shall have, all or any of the powers of a Chief Presidency Magistrate under the Criminal Procedure Code as the Local Government may direct. Sec. 21 (2) of the same Code empowers the Local Government to declare and define his subordination to the Chief Presidency Magistrate and the extent thereof.

By a Notification No. 6786-J, dated the 23rd October 1923 the Local Government appointed Mr. Das Gupta as Additional Chief Presidency Magistrate and authorised him to exercise the powers of a Chief Presidency Magistrate therein mentioned including the powers under sec. 528 to withdraw cases. He was not given the powers of recalling cases.

By a notification No. 6787-J of the same date the Local Government in exercise of the powers conferred by sec. 21 (2) of the Criminal Procedure Code declared the Additional Chief Presidency Magistrate to be subordinate to the Chief Presidency Magistrate. On behalf of the Petitioner it is said that the Chief Presidency Magis-

MOHINI MOHAN ROY *v.* PUNAM CHAND SETHIA.

trate had no jurisdiction to make the order as the case had been transferred by the Additional Chief Presidency Magistrate and that inasmuch as he had not been given the power to recall a case to his own file, which he had once transferred, the order could only have been made by this Court. On behalf of the accused it is said that the Chief Presidency Magistrate has made an order withdrawing the case to his own file and that he has power to make such order. We were referred to sec. 17 of the Code of Criminal Procedure which makes Magistrates subordinate to the District Magistrate and to sec. 25 of the same Code which by sub-sec. (*d*) confers on the Chief Presidency Magistrate the same powers given to a District Magistrate by sec. 17.

It is said that a District Magistrate could have made the order in question and that therefore the Chief Presidency Magistrate can make the order, and we were referred to *Raghunatha* v. *Emperor* (1). It was there held by Mr. Justice Bashyam Ayyangar that a District Magistrate had no power to cancel an order made by a Sub-Divisional Magistrate directing the transfer under sec. 528, Criminal Procedure Code of a case from the file of one Sub-Divisional Magistrate to that of another Sub-Divisional Magistrate and to direct the re-transfer of the case to the file of the Sub-Divisional Magistrate from whom it was transferred, as in the matter of transfer under sec. 528, Criminal Procedure Code, the District Magistrate and the Sub-Divisional Magistrate had co-ordinate authority over Magistrates subordinate to the Sub-Divisional Magistrate and that his order cannot be appealed against to the District Magistrate. The learned Judge at p. 132, however, adds this remark : "It may be that under sec. 528 a case once transferred from one Magistrate to another may be withdrawn from the latter by the District Magistrate or even by the Sub-Divisional Magistrate and that he may enquire into or try such case himself or refer it for enquiry or trial to some other competent Magistrate on a substantive application that it is inexpedient that the Magistrate to whom it had been transferred should enquire into or try the case."

(1) I. L. R. 26 Mad. 130 at p. 132 (1902).

The case of *Raghunatha* v. *Emperor* (1) was dissented from by a Division Bench of the Madras High Court in *Santhappa Sethurau* v. *Govindaswamy* (2) who followed and approved *Thaman Chetti* v. *Alagiri Chetti* (3), where it was held that a Magistrate who is subordinate to a Sub-Divisional Magistrate is also subordinate to the District Magistrate within the meaning of sec. 528 and that sec. 17, Cr. P. Code, which declares such Magistrate to be subject only to the general control of the District Magistrate, cannot be so construed as to take away the special power conferred by sec. 528.

In that case a Joint Magistrate transferred a complaint from a second class Magistrate to a Taluk Magistrate and the District Magistrate transferred it back.

I think the principles of this case with which I respectfully agree apply to the case before us.

The Additional Chief Presidency Magistrate is subordinate to the Chief Presidency Magistrate and I think the Chief Presidency Magistrate has power under sec. 528, Cr. P. Code to make the order which he did withdrawing the case to his file.

We have not considered the order on its merits as the matter was not argued

(1) I. L. R. 26 Mad. 130 at p 132 (1902).
(2) I. L. R. 40 Mad. 79f (1916).
(3) I. L. R. 14 Mad. 399 (1890).

MOHINI MOHAN ROY *v.* PUNAM CHAND SETHIA.

before us on those lines and our decision relates only to the power of the Chief Presidency Magistrate to make the order which he has made. I would discharge the Rule.

DUVAL, J.—I concur.

J. N. R. *Rule discharged.*

PRIVY COUNCIL

[APPEAL FROM BOMBAY.]

THE LORD CHANCELLOR. VISCOUNT HALDANE. LORD PARMOOR. LORD PHILLIMORE. 1923, Heard, 8 and 10, May. Judgment, 12, June.	THE MAHARAJA OF KOLHAPUR, Appellant, *v.* SHRI BALA MAHARAJ and ors., Respondents.

Bombay Revenue Jurisdiction Act (X Bom. of 1876), secs. 4, 12—Claim against Government of tenure being held as saranjam or jagir—Power of Government to refer to High Court—Jurisdiction—Grant as inam dharmadaya, *if religious or political—Summary Settlement Act (II Bom. of 1863), sec 16.*

A dispute as to succession to a tenure held under the Maharajah of Kolhapur was fought up to the Privy Council between two persons each claiming to be the adopted son of the last holder in proceedings to which the Maharajah was no party. The Maharajah took exception to these proceedings and made representations to the Government of Bombay that the adoption of the party who succeeded before the Judicial Committee conferred no title as the same had not received the approval of the Maharajah, whereupon the Bombay Government referred the claim under sec. 12 of the Bombay Revenue Jurisdiction Act of 1876 to the High Court:

Held—*That the claim of the Maharajah being that the lands were held under treaty or as saranjam or other political tenure, the jurisdiction of the Civil Courts was excluded by sec. 4 of the Act of 1876. The claim was therefore referable to the High Court under sec. 12 of the Act.*

That the grant which was made to the original grantee as inam dharmadaya *and was to be hereditary was made on religious and not on political grounds.*

That the mere fact that in occasional correspondence the grant was referred to as "jahagir" or "saranjam," could not derogate from the effect of the language of the grant itself.

That the question whether the tenure was political was one which was for determination by the Government under the provisions of the Interpretation sec. (16) of the Summary Settlement Act, II of 1863, and that by treating the title as one to which the Act applied, the Government must be taken to have determined that the tenure was not political.

These were consolidated appeals from a decision of the High Court at Bombay, dated the 21st July 1920, in a matter referred to it by the Government of Bombay under sec. 12 of the Bombay Revenue Jurisdiction Act (X of 1876).

The question for the decision of the Court was "whether the application in or about the year 1863 of the Summary Settlement under Bombay Acts II and VII of 1863 to certain lands then held by Shri Tatya Maharaj, which subsequently devolved upon the late Baba Maharaj, was valid and legal."

The High Court decided this question in the affirmative. Against that decision the Appellants appealed to His Majesty in Council.

The facts are fully set out in the judgment of their Lordships.

The judgment of the High Court is reported at I. L. R. 45 Bom. 463.

Mr. DeGruyther, K. C., Sir George

THE MAHARAJA OF KOLHAPUR *v.* SHRI BALA MAHARAJ.

Lowndes, *K. C.* and *Mr. E. B. Raikes* for the first Appellant.

Mr. T. R. Ramsay for the second Appellant contended that the question should have been decided in the negative as the lands in suit were held under treaty and had been granted, and were held, as jagir, or on similar political tenure, and because the title of the holders had been formally adjudicated as so held and granted before the application of the settlement, and because the consent of the Appellant (who was a party to the treaties in question, and interested in their provisions being observed) was not obtained to the application of the Summary Settlement to the lands in question.

Messrs. Upjohn, K. C., Luxmoore, K. C. and *Parikh* for the first Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—These are consolidated appeals from a decision of the High Court at Bombay on a question referred to it by the Government of Bombay, under sec. 12 of the Bombay Revenue Jurisdiction Act (X of 1876). The question referred was whether the application in or about the year 1864 of the Summary Settlement under Bombay Acts II and VII of 1863 to certain lands then held by Shri Tatya Maharaj, which subsequently devolved on the late Baba Maharaj, was valid and legal. These Acts provided for the settlement of claims to exemption from payment of land revenue and for the guarantee of a title in perpetuity to the holder of the land, his heirs and assigns, without restriction by Government as to adoption, succession or transfer. The Acts applied to holders of land the freedom of which from payment of land revenue had not been the subject of formal adjudication, where the holders hd consented to submit the terms and coditions of holding to summary settlemen. But the Acts were not to apply where the land was held under treaty or was g nted or held as a jagir or saranjam, or similar political tenure, which was defi d to mean tenure created from or depen t on political considerations, the existe of which was to be determined by t Government.

Sec. 12 o e Bombay Revenue Jurisdiction Act o 876 gave the Government a general pow o refer questions arising in the investig n of claims which, but for the passing that Act, could have been tried by a Court to the High Court at Bombay ision.

The circumstances nder which the question which has was referred to the High Court were Baba Maharaj died in 1897. In dispute arose between the second App t in the present appeals, Shri Ba Maharaj, as claimant to the lands the to which is in controversy, and the Respondent, Shri Jagannath M as to which of them was the vali dopted son of the late Baba Mahar agannath, who was then a minor, t a suit in the Court of the First Subordinate Judge of Poona again ala, who claimed to be the properly son, to establish his own title special purpose of the suit was to have determined that Jagannath had been validly adopted by Baba's widow, and that it was consequently impossible for her to make, as she had endeavoured to do, a second adoption of Bala less than two months later. A point relied on by the latter in his written statement was that the approval of His Highness the Maharajah of Kolhapur was necessary to such an adoption, and that such approval not having been given, the earlier adoption

THE MAHARAJA OF KOLHAPUR *v.* SHRI BALA MAHARAJ.

was void. In July 1906, the Subordinate Judge decided in favour of Jagannath, holding that he had been validly adopted as the son of Baba. It was held, as the consequence, that no title or interest in the property of Baba had passed to Bala, and he was restrained by injunction from interfering with Baba's property. The High Court at Bombay reversed this, but the Privy Council, differing, restored the judgment of the Subordinate Judge.

To these proceedings the Maharajah, who was no party to them, finally took exception, and he and Bala made representations to the Government of Bombay to the effect that, the adoption of Jagannath had not received the approval of His Highness, no adoption could have conferred title to the property of Baba, and that it must go to Bala, whose adoption the Maharajah had approved.

The point raised by this claim the Bombay Government thereupon referred under sec. 12 of the Bombay Revenue Jurisdiction Act of 1876. This section provides, as already stated, that if in the trial or investigation of any suit, claim or objection which but for the passing of the Act might have been entertained by a Civil Court, there arises any question on which the Government desires the decision of the High Court, it may cause a statement to be prepared and refer the question for such decision. But by sec. 4 it is provided that no Civil Court is to exercise jurisdiction *inter alia* in the matter of any claim against the Government relating to lands held under treaty, or to lands granted or held as jagir or saranjam or on other political tenure, or to lands declared by Government, or by any officer duly authorised in that behalf, to be held for service. Unless, therefore, the claim in the case before their Lordships falls within these words, it is said that, as a Civil Court might have exercised jurisdiction, the Government had no power to refer the question which arose to the High Court.

Passing for the moment from the consideration of the point as to jurisdiction which arises under this section, it will be convenient to refer in the first place to the history of the dispute. This is explained with sufficient accuracy in the statement submitted to the High Court by the Government of Bombay when defining the question referred. The history of the events which led to the reference to the High Court appears from the following abridgment of that statement :—

Shri Tatya Maharaj was a grandson of Shri Sidheshwar Maharaj, a learned and saintly man who at some date previous to 1800 was appointed by Chhatrapati Shivaji Maharaj III, the then ruler of Kolhapur, to be his spiritual preceptor. For the maintenance and dignity of the family of Shri Sidheshwar Maharaj hereditary grants of land had been made and hereditary honours, including the hereditary title of "Maharaj," conferred upon him by the said Maharaja of Kolhapur.

Upon the death of Shri Sidheshwar Maharaj in 1800, his property originally acquired from the Maharaja of Kolhapur was divided amongst his three sons, Baba, Nana and Bhau.

Between 1813 and 1821 Bhau Maharaj (Sidheshwar's youngest son) took an active part in Kolhapur politics, being then the Prime Minister of Kolhapur, and rendered valuable services to both the British Government and the Maharaja.

Upon the downfall of the Peshwa, Sir Thomas Munro, in 1818, when settling the Southern Mahratha Country which had fallen into the hands of the British Government, returned to Baba Maharaj (Sidheshwar's eldest son) three villages in

THE MAHARAJA OF KOLHAPUR *v.* SHRI MAHARAJ.

Chikodi, which were previously held by him, and by sanad, dated the 2nd August 1818, granted to Bhau Maharaj, as "*inam dharmadaya*," hereditarily three villages and one hamlet. The sanad stated that he was "great, worthy and a well-wisher of the Company's Government." The villages and hamlet so granted were Kerur, Hebal, Kadapur and Kochari, in the Talukas of Chikodi and Manowlee. This grant was subsequently confirmed on the 24th October 1819, by a sanad in the same terms signed by the Honourable Mountstuart Elphinstone.

In a letter dated the 28th June 1818, addressed to the Honourable Mountstuart Elphinstone, Sir Thomas Munro referred to the above grant (which he was then proposing to make) as "the new jahagir," and in his subsequent report to the same officer on the state of the Southern Mahratha country, dated the 28th August 1818, Sir Thomas Munro stated that the villages were given to Bhau Maharaj as a "jahagir."

By a private letter dated the 2nd August 1818, Sir Thomas Munro informed His Highness the Maharaja of Kolhapur that Bhau Maharaj being a particular friend of the Honourable Company, it had been deemed necessary to make him the above grant.

On the 2nd August 1818, Sir Thomas Munro wrote an official letter to His Highness the Maharaja of Kolhapur referring to the above grant and the assistance given by Bhau Maharaj, and in a letter dated the 15th August 1818, and also addressed to His Highness the Maharaja, the Collector of Dharwar also referred to the services of Bhau Maharaj and characterised him as "a very worthy man indeed."

On the 25th October 1818, His Highness the Maharaja rewarded Bhau Maharaj lakh of included in the Summary Settle- Bombay Act

In 1818 Governed by Mr. Baber, and the and Manowlee Collector at Dharwar, Thomas Munro to the Schedules of Maharaja of Kolhapur subjedule to him. to the grants made as above sta after-

In 1821 His Highness the Maharaped Kolhapur granted to Bhau Maharaj ten villages, several of which were within the said Talukas of Chikodi and Manowlee.

On the 24th January 1826, a treaty was concluded between the British Government and His Highness the Maharaja of Kolhapur which, after reciting that a treaty had been concluded in 1812 and that certain misunderstandings had arisen, declared, with a view to the removal of such misunderstandings and to the confirmation of the alliance, that the British Government acknowledged that the Districts of Chikodi, and Manowlee, which had been transferred to His Highness by a sanad under the signature of Sir Thomas Munro, were ceded to His Highness in full sovereignty, His Highness the Maharaja engaging on his part to respect the rights and privileges of the jamindars, inamdars and watandars of those Districts. The treaty further declared by Art. 7 as follows:—

"The Raja of Kolhapur promises to continue to Bhau Maharaj and Baba Maharaj their respective lands and rights agreeably to the Schedule annexed. The guarantee of the British Government to the enjoyment of the above lands and rights shall only continue during the life-time of the above-mentioned persons, but the rights of their descendants as founded on sanad or custom shall not be prejudiced by the cessation of the said guarantee."

This treaty was ratified by the Governor-General in Council on the 10th March 1826. The Schedules, a copy of which was sent to Bhau Maharaj, includ-

was void. In July 1906, the villages Judge decided in favo'ghness the holding that he ha...n 1821. as the son of [the second son of conseo... had died without issue in th... ving a widow. By order dated 1st January 1826, the Sir Collector and Political Agent, Dharwar, dealt with the succession to the share of Sidheshwar's property which came to Nana upon partition after the death of the former. The order laid down that the widow was entitled to enjoy the property during her life but that she had no right to deal with it by way of gift, sale or mortgage: that she was not to make any adoption, and that after her death the property was to go to Baba Maharaj and Bhau Maharaj and their sons. This property was included in the Schedule to the treaty of 1826

A further treaty between the British Government and the Maharaja of Kolhapur was signed on the 23rd October 1827. The treaty recited the treaty of 1826 and stated that His Highness had uniformly evinced a total disregard of the friendship of the British Government and in violation of the conditions contained in Art. 4 of the treaty of 1826 had repeatedly infringed the rights of the inamdars and watandars of the Talukas of Chikodi and Manowlee, and that it therefore became necessary that His Highness should give back to the British Government the said Talukas "in the same state in which he received them," and that His Highness thereby agreed so to do. Art. 3 provided as follows:—

"In the 7th Article of the said Treaty the possessions of Bhau Maharaj and Baba Maharaj were guaranteed to them for the terms of their respective lives only (provisions being made that the rights of their descendants, as founded on sanad or custom, should not be prejudiced by the cessation of the said guarantee). As, however, His Highness has never ceased to annoy and distress these persons by seizing their villages and other property, it has been deemed necessary to extend the guarantee of the British Government to their descendants, and His Highness accordingly engages never to molest them."

The Talukas of Chikodi and Manowlee accordingly passed into the possession of the British Government, but the Political Agent raised the question whether Government should retain the whole benefit of Art. 2 of the treaty of 1827, which provided that the two Talukas should be given back to the British Government in the same state in which His Highness received them, or whether subsequent grants were to be considered valid, and he submitted a list of inams which according to the strict letter of the treaty might have been resumed, but which he had allowed to remain in the possession of the proprietors. That list included the villages granted to Bhau Maharaj and Baba Maharaj by the Maharaja between 1818 and 1827, while the Talukas were under his sovereignty, and it stated that they were given up "as being included in the Schedule of their possessions guaranteed by the Honourable Company," *i.e.*, the Schedule to the treaty of 1826. The Government of Bombay, by letter dated the 23rd May 1828, approved of the Political Agent's proposals and authorised him to carry them into effect.

Bhau Maharaj died in 1837, and on the 4th January 1838, Government inquired of the Agent for Sardars whether the deceased held any possessions resumable at his death. The Agent replied, on the 3rd March 1838, that all the possessions held by Bhau Maharaj were

guaranteed by the 3rd ... the treaty of 1827, and that from ... the sanads and other documents which he had examined it appeared that all such possessions were hereditary and not resumable at his death. The Agent further reported that Bhau Maharaj left two sons, Huree Hur Pandit (*alias* Tatya Maharaj) and Vishwumbhur Pandit (*alias* Dada Maharaj).

In 1828 Bhau Maharaj had petitioned Government to be allowed to exchange one of the villages granted to him by Sir Thomas Munro (*supra*) for others situated near Poona, where he usually lived. The exchange was effected (after Bhau Maharaj's death) by sanad dated the 7th February 1838, signed by the Principal Collector of Poona, whereby the villages of Vadgaum, Koarlee, Pimpulgaum and Kassgaum (together with other lands) in the Poona District, were granted to Bhau's sons in exchange for Keyroor, one of the villages granted by Sir Thomas Munro.

In 1844 the widow of Nana Maharaj, in spite of the order referred to (*supra*), purported to adopt one Appa, a grandson of Baba Maharaj, but the Government ruled in 1857 that "the consent of the Kolhapur Government not having been obtained to the adoption, and the difficulty of proof as to the consent of Tatya Maharaj to the arrangement are facts which are fatal to the claim of Appa Maharaj."

During the years 1851 to 1864, which covered the period of inquiry into the titles to Inam Estates in the Districts in question, Raoji Maharaj was the representative of the elder branch of the family of Shri Sidheshwar Maharaj and Tatya Maharaj, the representative of the younger branch. In 1851 Tatya Maharaj submitted his *kaifiat*, or written

Po... been included in the Summary Settlement under Bombay Act ... and the sa... scrutinised by Government ... by Mr. Baber, ... Political Agent, Sirdar ... Collector at Dharwar, who had also registered the Schedules of possessions and sent the Schedule to him. The Assistant Inam Commissioner afterwards inspected the sanads and returned them.

On the 11th June 1857, Tatya Maharaj wrote to the Assistant Inam Commissioner, Belgaum, who had called for the sanads, stating that they had been sent to him. The letter went on to point out that the grants had been enjoyed under the guarantee of the Company's Government and that inquiries had already been held about them many times.

In 1859 an enquiry was held as to the succession to the villages in the Poona District which had been exchanged for the villages of Keyroor, in 1838 (*supra*), and the Sub-Assistant Inam Commissioner reported that Tatya Maharaj's (Hurree Hur Pandit's) claim appeared to be firmly based on the recognised competency of the grantor and the guarantee of the British Government under the treaties above referred to. Acting upon such report, the Acting Inam Commissioner decreed that the property "be continued in Inam for so long as there may be in existence any male lineal descendant of Wasudeo Pandit *alias* Bhau Maharaj."

In 1861 Summary Settlement was being proposed and Tatya Maharaj objected to its application to his possessions on the ground that they were held "under treaty." The Revenue Commissioner, Southern Division, on the 1st February 1862, referred to the Government of Bombay for decision under the Summary Settlement Rules XX (cl. C), the question whether Tatya Maharaj held any of his

was void. To July 1906, the villag[...] reply by letter in favo[...] March 1862, that His Excel[...] Council

"does not consider [...] a *primá facie* case has been made out for excluding Tatya Maharaj's lands from the benefit of the Summary Settlement on the ground of their being held on political tenure. His Excellency in Council accordingly directs that the terms of the Summary Settlement be offered to Tatya Maharaj. If he refuses to accept the unassailable title thus offered it will remain for further consideration whether any and what inquiry should be instituted into the title on which he holds the lands."

On the 28th March 1862, the Collector of Poona wrote to Tatya Maharaj requesting him to state in writing whether he agreed to the Summary Settlement being applied to his Inam holdings in British territory. He replied on the 29th March 1862, that since the time of his father the villages and lands had been continued to him through the friendship and favour of Government and this had been communicated in detail to the Agent for Sardars and the Revenue Commissioner, and continued: "In spite of it Government are passing the order and it cannot be helped. I therefore agree to the Summary Settlement being applied to the Inam villages and lands, etc. . . ."

In June 1862, Raoji Maharaj and Tatya Maharaj were served jointly by the Collector of Belgaum with formal notice giving them the option of either having the titles to their properties in the Belgaum District inquired into and adjudicated upon or of paying quit rent and *nazarana* and getting an absolute property in the holdings.

By letters dated, respectively the 14th and 25th August 1862, Raoji Maharaj objected to paying quit rent and *nazarana* on the grounds that the titles had been already investigated by Government officers and that the holdings were guaranteed by treaty. He asked that the notice might be withdrawn.

The Summary Settlement Act (Bombay Act II of 1863) was passed on the 9th April 1863.

On the 10th April 1863, the Collector of Belgaum informed Raoji that the Government had ruled that the Inams were not of such a nature as to preclude the application to them of the Summary Settlement Act (*supra*) and that it would therefore be applied.

By his reply dated the 10th June 1863, Raoji referred to the objections already put forward and stated that he was about to make a submission to Government in the matter.

On the 19th June 1863, the Collector of Belgaum again wrote to Raoji referring to the decision of Government that the Summary Settlement was applicable to his Inam holdings and informing him that notice had been served and that if he was unwilling to accept the Summary Settlement and desired an investigation into title under Act XI of 1852 he would have to furnish due security.

Raoji then, on the 6th July 1863, wrote setting out in detail his grounds of objection and submitting a prayer to Government that as the villages were guaranteed the title should not be investigated.

On the 2nd November 1863, the Revenue Commissioner, Southern Division, requested Colonel Etheridge, the Settlement Officer, Southern Division, "to prepare for submission to Government a comprehensive report indicating all the villages held by the family affected by the Order contained in para. 3 of Government letter No. 860, dated 6th March

1862, and stating how the offer of Summary Settlement had been received by the holders:"

Colonel Etheridge accordingly wrote to Raoji Maharaj on the 30th November 1863, and to Tatya Maharaj on the 2nd December 1863. As the result of his letters both Raoji and Tatya agreed to accept a Summary Settlement.

The Summary Settlement was accordingly applied to all the possessions of Raoji Maharaj and Tatya Maharaj in British India.

The settlement was so applied without reference to or the consent or approval of His Highness the Maharaja of Kolhapur.

In 1866 Tatya Maharaj died, and there were various claimants to his estate, one of whom was Baba Maharaj, who claimed to be an adopted son. The then Maharajah of Kolhapur was a minor and the British Government had assumed the administration of the State. The various claimants submitted their claims to British Government and the matter was referred to the Political Agent to report. Upon receipt of his report the Government of Bombay in the Political Department passed a Resolution No. 2105, dated the 24th June 1867, of which the following are the material paragraphs:—

"(12) The main question being whether the adoption should be recognised by Government, it is necessary first to obtain a clear idea as to the meaning and effect of its recognition by Government."

"(13) The recognition of the adoption can have effect merely as regards the right of the adopted son to succeed to the Inam lands, and here it must be mentioned that these lands are situated partly in British territory and partly in Kolhapur territory.

"(14) Now the lands in British territory have been included in the Summary Settlement under Bombay Act II of 1863 and the recognition by Government of the heir of the deceased Sirdar can, as regards these lands, have no meaning beyond a determination to whom the Government should primarily look for the payment of the *nazarana* commutation and quit rent due to Government under that Summary Settlement. As for the rights of any persons to succeed to these lands, whether by adoption or otherwise, their recognition by Government can have no effect whatever."

"(15) But as regards the holdings within the Kolhapur State, the recognition of the adoption by Government would have a distinct legal effect, inasmuch as under the laws of that Principality the recognition by the Raja is essential to the validity of the adoption as entitling to continuance of the Inam holdings, and the Government is now in the place of the Raja."

The Resolution proceeded to order that the matter should be sent back to the Political Agent for a further report.

After receipt of the further report the Government of Bombay passed a final Resolution (No. 3619, dated the 21st November 1867), the material parts of which are as follows:—"The Governor in Council considers that the objections put forward by the various Petitioners to the adoption of Wassoodeo Pandit (Baba Maharaj) by the late Tatya Maharaj have been satisfactorily disposed of. The adoption should therefore now be recognised on the part of the Kolhapur State. . . ." "With reference to para. 26 of the Political Agent's report, care should be taken not to sanction any adoptions save from lineal male descendants of Shideshwar Maharaj." (Para. 26 of that report dealt with a claim by the widow of a nephew of Tatya Maharaj that the right to adopt an heir rested with her.) This Resolution received the approval of the Secretary of State for

THE MAHARAJA OF KOLHAPUR *v.* SHRI BALA MAHARAJ.

India in Council in a despatch dated the 14th May 1868.

The acknowledged representatives of the family of Shri Sidheshwar Maharaj still bear the honorific title of "Maharaj" and are held in high reverence and esteem by His Highness the Maharaja of Kolhapur.

Baba Maharaj died in 1897 possessed of villages and lands both in British India and in Kolhapur, being those mentioned in the Schedule aforesaid, the villages and lands in British India being part of those to which Summary Settlement was applied, as before stated. He left a Will whereby he appointed five trustees (one of whom declined to act) and directed his widow, Tai Maharaj, in certain events, which happened, to adopt a son. On the 28th June 1901, the widow purported to adopt Jagannath, whose adoption was supported by the four trustees who acted but did not receive the approval and sanction of His Highness the Maharajah of Kolhapur On the 19th August 1901, the widow purported to adopt Bala Maharaj. His Highness the Maharajah approved of the latter adoption and sanctioned and recognised it. Jagannath filed a suit for a declaration that his adoption was valid, and it was ultimately decided by the Judicial Committee of the Privy Council in 1914, as already stated, that Jagannath was the validly adopted son of Baba Maharaj.

It was stated to the High Court in the present reference that His Highness the Maharajah and Bala Maharaj contended that no adoption which had not received the sanction and approval of His Highness could confer a title to the property in question, and that succession to the same would have to be determined in accordance with the terms of the guarantee in the treaties and the orders of Government based thereon, *i.e.*, the property in question should have to go to Bala Maharaj, whose adoption was sanctioned by His Highness.

The High Court held that it had jurisdiction to entertain the reference, and the question referred was accordingly dealt with by Macleod, C. J., and Pratt and Fawcett, JJ. These learned Judges decided that the lands in question were not held either under treaty or on political tenure, and that the application of the Summary Settlement to the lands in question had been valid.

Reverting to the point as to jurisdiction under the Act of 1876, to which their Lordships have made reference earlier, they think that the High Court held rightly that it had jurisdiction to decide the question referred. This in substance turned on whether there was actually a claim against the Government relating to lands held under treaty, or as saranjam or on other political tenure. The Maharaja of Kolhapur had himself, in their Lordships' opinion, a claim coming within the language of the Act. He was seeking to have it declared that the lands in question were not subject to the Summary Settlement and should therefore go to Bala, whose adoption he had sanctioned. There was accordingly a claim against the Government, jurisdiction as to which under the Act of 1876 was excluded by sec. 4, this claim being that the lands were held under treaty or as saranjam or on other political tenure; and as the Maharaja's position and rights on the question of adoption were not affected by the result of the proceedings which were disposed of by the decision of the Privy Council, for to those proceedings he had not been a party, the real question is whether power to answer the question referred to by the Govern-

ment did not come to the High Court because the case was one of the cases excluded by sec. 4. Their Lordships agree with the High Court of Bombay in thinking that the claim in question was one of those excluded by sec. 4, and was therefore referable to that Court. They agree also with the conclusion at which the High Court arrived upon the merits.

They are of opinion that the nature of the title of Bhau Maharaj was really defined by the sanad of the 2nd August 1818, and the later confirmatory sanad of 24th October 1819, referred to in the statement of the question laid before the High Court. In the first of these sanads Sir Thomas Munro, when settling the Southern Mahratha country, which had fallen into the hands of the British Government, granted to Bhau three villages and a hamlet, forming the bulk of the lands in question. The grant was made to Bhau as *inam dharmadaya* and was to be hereditary. The signification of such a grant is that it was made on grounds of religion, and not on political grounds. Their Lordships agree with the learned Judges of the High Court that the mere fact that in occasional correspondence the grant is referred to as "jagir" or "saranjam," *i.e.*, political, cannot derogate from the effect of the language of the grant itself. They also think that the question whether the tenure was political was one which was for determination by the Government under the provisions of the Interpretation sec. (16) of the Summary Settlement Act II of 1863, and that, by treating the title as one to which the Act applied, the Government must be taken to have determined that the tenure was not political. It appears, moreover, from a formal letter, which was before the High Court, that on the 6th March 1862, just before the Summary Settlement Acts were passed, the Governor in Council had determined that no *primâ facie* case had been made out for the exclusion of the lands from the settlement on the ground of their being held on political tenure.

Nor do their Lordships think that the lands can be properly said to have been held "under treaty." It is true that the treaty of 1827 referred to in the statement extended the guarantee of Bhau's title by the British Government to his descendants. But the correspondence with the Government at the time, also referred to in the statement, shows that Bhau's original title was not disturbed when action was taken against the Maharajah by the Government. Bhau therefore remained entitled under the terms of the original grant. Their Lordships agree on this point with the view taken of the effect of the treaty of 1827 by the learned Judges of the High Court.

As the result of the lands being thus brought under the Act of 1863 they became under sec. 2 the "heritable and transferable property of the holders, their heirs and assigns, without restriction as to adoption, collateral succession or transfer" in perpetuity.

It was therefore not only competent to the Bombay Government to refer the question they did to the High Court, but the decision given on that question was well founded.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Downer & Johnson* for the 1st Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 16 OF 1924.

SANDERSON, C. J.
WALMSLEY, J.
1924,
14, March.

UDOY CHAND PANNALAL
v.
KHETSIDAS TILOKCHAND.

Calcutta High Court Original Side Rules, Ch X, r. 36, if ultra vires—*High Court's power to make rules to regulate its procedure on the Original Side considered—Civil Procedure Code (Act V of 1908) and Letters Patent, 1865, cl. 37—Order dismissing suit under r. 36, if a "judgment" within the meaning of cl. 15 of Letters Patent, 1865, and appealable—Civil Procedure Code (Act V of 1908), sec. 129, if refers to Letters Patent of 1865 or 1862.*

A suit instituted on the Original Side of the High Court of Calcutta was placed on the "special list" under r. 36 of Chap. X, High Court Original Side Rules, and was dismissed for want of prosecution. It was contended that the Rule was ultra vires, *and that the Court was not competent to dismiss the suit:*

Held—*That r. 36, Chap. X of the High Court Original Side Rules is not* ultra vires, *the Court having jurisdiction to make it under cl. 37 of the Letters Patent of 1865 as well as sec. 129 of the Civil Procedure Code, 1908.*

An order dismissing a suit for want of prosecution under the above Rule is a "judgment" within the meaning of cl. 15 of the Letters Patent of 1865 and is appealable.

Sec. 129 of the Civil Procedure Code, 1908, may legitimately be read as referring to the Letters Patent of 1865 which were in force at the time of the passing of the Code.

This was an appeal preferred against the judgment delivered by Mr. Justice Buckland, on the 21st December 1923, in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Mr. S. M. Bose for the Appellant.

Messrs. A. B. Guha and *S. C. Maity* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Buckland which was delivered on the 21st of December 1923.

The judgment was delivered in respect of a notice, which was issued by the Assistant Registrar of this Court on the 13th of December 1923 and addressed to the attorney for the Plaintiff in the following terms: "Under r. 36, Chap. X of the Rules of the High Court, Original Side, 1914, notice is hereby given that the above suit will be set down in a list to be taken in chambers on Wednesday, the 19th day of December instant before the Hon'ble Mr. Justice Buckland and will be dismissed for default unless, on that day, good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper." That was a notice which was in terms of r. 36, Chap. X of the Original Side, High Court Rules, which in its present form runs as follows: "Suits and proceedings which have not appeared in the Prospective List within six months from the date of institution, may be placed before a Judge in chambers, on notice to the parties or their attorneys, to be dismissed for default unless good cause is shown to the contrary or be otherwise dealt with as the Judge may think proper." The learned Judge dismissed the suit for want of prosecution and made no order as to costs of the suit.

The first point, with which it is necessary for me to deal, was taken by the

learned Counsel for the Defendant-Respondent, namely, that there was no right of appeal to this Court from the decision of my learned brother. His main argument was based upon sec. 104 of the Civil Procedure Code which provides: "An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders." The learned Counsel pointed out that neither sec. 104 nor Or. 43, r. 1 provided for an appeal from the order of a learned Judge dismissing a suit for want of prosecution.

The learned Counsel for the Plaintiff-Appellant relied upon the following words in sec. 104: "Save as otherwise expressly provided in the body of this Code or by any law for the time being in force," and, he argued that the Letters Patent of 1865 of this Court are "a law for the time being in force"; and, that under cl. 15 of the Letters Patent an appeal would lie because the decision of the learned Judge was a "judgment" within the meaning of that clause.

I am of opinion that the argument of the learned Counsel for the Plaintiff so far as it extended to the meaning of the words "or by any law for the time being in force" is correct; and, that is made clear by the decision of the Judicial Committee of the Privy Council in the case of *Sabitri Thakurain* v. *Savi* (1). Lord Sumner in giving the judgment, dealt with this point at page 488 and said: "In order to appreciate the full effect of sec. 104 it should be compared with the corresponding section of the Act of 1882, sec. 588. The earlier section enacted that appeals should lie in certain cases which it enumerated, 'and from no

(1) I. L. R. 48 Cal. 481 at p. 488: s. c. 25 C. W. N. 587 (P. C.) (1921).

The delay to which I have already re-
pr..ed is inexcusable, so far as the Plain-
Patent his attorney are concerned.
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Sec. 15 of the Letters Patent is such a law, and what it expressly provides, namely, an appeal to the High Court's Appellate Jurisdiction from a decree of the High Court in its Original Ordinary Jurisdiction, is thereby saved.

The question, therefore, arises whether the decision of the learned Judge is a "judgment" within the meaning of cl. 15 of the Letters Patent.

In my opinion, there is no doubt that the learned Judge's decision was a "judgment." The effect of it was that the suit should not proceed and the Plaintiff's right to have his claim adjudicated upon by the Court, so far as this suit was concerned, was at an end; and, in my opinion, it would be impossible under those circumstances to hold that the learned Judge's decision, which was a judicial decision after hearing the arguments and considering the facts, which were before him, that the Plaintiff's suit should be dismissed was not a "judgment." In my opinion, therefore there is a right of appeal.

The next point, with which I must deal, was raised by the learned Counsel for the Appellant, namely, that the learned Judge had no jurisdiction to make the order because r. 36, Chap. X of the Original Side Rules was beyond the powers of this Court and was *ultra vires*.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 16 OF 1924.

SANDERSON, C. J.
WALMSLEY, J.
1924,
14, March.

UDOY CHAND ... ap- ...r that ... L'

Calcutta High ... *r. 36, if* ultra ... *rules to* ... *cons* ...

...gued that sec. ...dure Code, 1908, ...etters Patent of 1862, ...ere the Letters Patent ...ablished this High Court. ...is to be noticed that at the time ...n the present Code of Civil Procedure was passed, namely, in 1908, the first Letters Patent of this Court, namely, those of 1862, had been revoked and the Letters Patent which were in force at that date were the Letters Patent of 1865; and I agree with the learned Judge that sec. 129 may legitimately be read as referring to the Letters Patent of 1865 which were in force at the time of the passing of the Code.

The learned Judge referred to the various meanings of the word "establish" in his judgment. It is not necessary for me to deal with this matter at any length. It is sufficient for me to say that I am of opinion that it is not unreasonable to assume that sec. 129 was intended to refer to the Letters Patent which were then in force, dealing with the establishment and continuance of the High Court.

But, apart from that, I am of opinion that the Court had jurisdiction to make the Rule in question under cl. 37 of the Letters Patent of 1865 which provides that—"It shall be lawful for the said High Court of Judicature at Fort William in Bengal from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court. . . . . Provided always that the said High Court shall be guided

Th... making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure." In my opinion, the rule is one of procedure and for the purpose of regulating proceedings in civil cases which are brought before the High Court. To my mind it is unreasonable to suppose that the Court would have power to make rules regulating proceedings in civil cases and at the same time would have no power to attach any sanction in respect of the breach of such rules.

The result is that I agree with the learned Judge's decision that the Rule is not *ultra vires* and that he had jurisdiction to dismiss the suit for default after considering the facts and the arguments which were put before him, if in his discretion he thought it right to dismiss the suit.

I will now deal with the merits of the matter as presented by the learned Counsel.

In this respect it is to be noticed that this case was marked as a commercial suit and was brought to recover damages, which were alleged to be about Rs. 3,796 for an alleged breach of contract by the Defendants to take delivery of certain goods. As far as I understand the nature of the case from the materials before me, it was the kind of case, which is tried frequently on the Original Side, and was of a simple nature. Nothing has been put before the Court to show that this case could not have been got ready for trial within a few months from the date of its institution. Cases are entered in the commercial list not only because of the nature of the cases but also in order that they may have a more speedy trial than other cases; and, yet I find in this case a delay which I am bound to say is very serious indeed.

This is an instance of the delays which do take place, I regret to say, even now on the Original Side, in respect of which the Court is in no way responsible. It cannot be denied that in this case the Plaintiff or his attorney were solely responsible for the delay which took place.

I will now mention the material dates. The suit was instituted on the 2nd of June 1922 as a commercial suit; the summons were issued on the 16th of June and it was served on the Defendants on the 24th of June. The Defendant entered an appearance on the 28th of June and it is to be noticed that the Defendants were bound under the Rules of the Court to file their written statement within fourteen days from the date on which the summons was served upon them. Therefore, the Defendants ought to have filed their written statement on or before the 8th of July 1922. When they did not file their written statement on or before the 8th July 1922, the Plaintiff could have made an application in chambers to have the case put in the undefended list and if he had taken the ordinary and proper steps, one of two things would have happened: either the case would have been placed in the undefended list or there would have been a peremptory order upon the Defendants to file their written statement within a reasonable time and in all probability the Defendants would have been made to pay the costs of such application. But no such step was taken by the Plaintiff or the Plaintiff's attorney. They did nothing until the 20th of November 1922. Then apparently, the Plaintiff's attorney called upon the Defendants for a copy of their written statement but the written statement was not filed until the 12th of December 1922.

The delay to which I have already referred is inexcusable, so far as the Plaintiff and his attorney are concerned.

After that another serious delay took place, because after the written statement was filed, the Plaintiff and his attorney did nothing until the 24th of July 1923. Then the Plaintiff called upon the Defendants for their affidavit of documents, and, on the 28th of August 1923, a peremptory order was made upon the Defendants that they should file their affidavit of documents within fourteen days. That affidavit of documents was filed within fourteen days, *viz.*, on the 11th of September. It is said that the Plaintiff and his attorney received no notice that the affidavit had been filed. But it is to be noticed that it was not until the 12th of December 1923 that the Plaintiff's attorney obtained a copy of the Defendants' affidavit of documents. On the 13th of December the notice to which I have already referred was given and the case was placed on the learned Judge's special list on the 19th of December, and, he gave his judgment on the 21st of December 1923.

It has been stated by the learned Counsel for the Plaintiff that the Plaintiff is a man who cannot speak English. The learned Counsel for the Defendants has agreed that that is the case. If so, it is probable that the Plaintiff himself was not conversant with the rules and procedure of the Court.

We asked the learned Counsel for the Plaintiff in the course of the argument to give an explanation for this delay. The learned Counsel frankly admitted that at all events for a part of this delay the attorney was responsible. I desire to say nothing more than is necessary about this. I am however convinced that it must have been to a large extent

UDOY CHAND PANNALAL *v.* KHETSIDAS TILOKCHAND.

the fault of the attorney that this inordinate delay took place. I do not say it is certain, but it may be that the Plaintiff himself was not in any way responsible for the delay and, if it be the case that the attorney is solely responsible for the delay and the Plaintiff himself is not responsible, that is a matte which may be taken into consideration in considering whether the Plaintiff should be deprived of the opportunity of having his case tried. Having regard to the above-mentioned matters and in view of the fact that when this application was heard the Plaintiff was ready and anxious to have his case tried, my learned brother and I are of opinion that the learned Judge's order may be varied to the following extent :—

The Plaintiff must pay to the Defendants' attorney the costs of the application before the learned Judge and the costs of this appeal, which we for the present assess at the sum of rupees one thousand, on or before Monday, the 21th instant, as a condition precedent to having his suit entered in the Prospective List for the purpose of being tried. Upon payment of the amount of Rs. 1,000 within the time fixed, his suit will be entered in the Prospective List and come on for trial in due course. If the above-mentioned sum is not paid as directed, this appeal will stand dismissed with costs.

The above-mentioned costs will be subject to taxation and, if the amount on taxation turns out to be more than the sum of Rs. 1,000 then the Plaintiff will pay the balance, and if it be less, then the Defendants' attorney will refund the amount overpaid. The above-mentioned costs are to be payable by the Plaintiff in any event.

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WALMSLEY, J.—I agree.

Mr. P. N. Banerjee, Solicit
Appellant.

Mr. H. C. Banerjee, Solicitor
Respondent.

P. K. C.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 509 OF 1922.

PEARSON, J. GRAHAM, J. 1924, Heard, 8 and 9, May. Judgment, 17, June.	RUKMINI KAN CHAKRAVARTI, P tiff, Appellan *v.* BALDEO DAS BI Defendant Responden

English mortgage, essentials of—Englis gagee's right of immediate possession, if by absence of an express covenant for posse the mortgage deed—Merger of mortgage i minary decree—Continuance of mortgage t the mortgage debt is satisfied.

RUKMINI KANTA CHAKRAVARTI *v.* BALDEO DAS BINANI.

S. borrowed money from P. on hand-note in 1909 and in 1911 borrowed money from B. on a mortgage in English form, whereby she transferred the property absolutely to B. with a covenant for re-transfer if the debt was paid on a certain date. P. sued S. for his money, got a decree and in 1915 purchased the mortgaged property in execution of his money decree and got possession through Court in April 1918. B. in the meantime sued S. on the mortgage and in execution of his mortgage decree purchased the mortgaged property and got possession through Court in August 1918 ousting P. After the preliminary decree but before the final mortgage decree, S. had died and the final decree was passed against her without any substitution of heirs. P. after dispossession by B. sued B. for recovery of possession on the ground that the final decree being against a dead person the sale thereunder was void, that the whole suit had abated and the preliminary decree too went with it. Further, that the mortgage security had merged in the preliminary decree and had been extinguished with it and that therefore P. was entitled to recover possession free from the mortgage lien:

Held—*That all the essentials of an English mortgage were present in the mortgage to B. Though the deed in question did not contain in so many words a covenant for possession, it was plain that it gave a right of entry, and that that right could be exercised at any time. The fact that the mortgagee obtained possession by proceedings which subsequently proved to be a nullity, could not stand in his way.*

The mortgage lien did not merge in the preliminary decree for the mere fact that a judgment had been obtained on

Next, what is the effect of the preliminary decree? The rights under the mortgage merge in the preliminary de-
cree. There was the usual mortgage de-
*ha*cee for accounts and for sale; assuming
*fail*t it was an English mortgage and
gage he was entitled to possession, as he
right not ask for that relief and as the
*fact th*did not grant that relief, he could
the exem to be in possession under the
other way decree. The possession he got
That the under the decree but outside the
*choose to liti*outside it he had no right.
in the mortgag· 2, C. P. Code. If he had
from falling ·session, he ought to have
ferred upon him ht in the suit, and not
and from retain, he is to be deemed to
mortgage debt was at right.
*gagor or his success*hammad Hafiz v.
entitled to a decree fo (7) and Kishan
redeeming the propert(8)..

LACHMIPUT SINGH *v.* f action and do not
u cannot after-
GAGE BANK OF INDIA (1) *a* ad the right to
lowed. he cannot now

This was an appeal again have posses-
of M. Smither, Esq., Distri were, were
Zillah 24-Perganas, dated the ree.
cember 1921, affirming the of heirs
Babu Banamali Sen, Subordinat he whole
2nd Court of that District, dated e years
of April 1920. was

The facts were briefly these:— pay-
Sushila Sundari Chowdhurani, a Hi the
lady, being in financial straits, borrow in-
various sums of money from Babu Mohini
Mohan Chatterjee. One of these promissory notes for Rs. 4,000 was endorsed by Mohini Babu in favour of one Rukmini Kanta Chakravarti, who brought a suit on it, obtained a decree, and purchased Sushila's house in execution of that decree in 1915, and in due course he obtained delivery of possession through Court in April 1918. In the meanwhile

(1) I. L. R. 14 Cal. 464 (1887).

the fault of the attorney that this inordinate delay took place. I do not say it is certain, but it may be that the Plaintiff himself was not in any ... ie, responsible for the delay and, i' and the case that the attorney is solely ... ainst sible for the delay and the Plainti. llowed self is not responsible, that is a metween which may be taken into consideratiminary considering whether the Plaintiffdari had be deprived of the opportunity ofunaware of his case tried. Having resut his decree above-mentioned matters anded the pro- the fact that when this apcution sale and heard the Plaintiff was readby the Court in to have his case tried, my Rukmini Kanta, and I are of opinion thated the present Judge's order may be sion of the property lowing extent :— ;e. The first Court

The Plaintiff must itiff could not recover ants' attorney the cg the mortgage. On tion before the ltrict Judge of Alipur costs of this appeadecision, and against this present assess atpresent second appeal was thousand, on or he High Court.

instant, as a Bose, Mr. T. Chatterjee and having his sui Chandra Khan for the Ap- List for the

Upon pay R. Das, Advocate-General, Mr. Rs. 1,000 Bannerjee and Babus Jitendra will be Roy and Profulla Chandra Chakra- and con for the Respondent.

the ab. H. D. Bose for the Appellant.— direct final decree and the sale were mis nullities because the mortgagor died before the final decree and there was no sub- je stitution of heirs. Therefore no interest t passed to the mortgagee by the sale. There is no question that the whole suit abated as there was no substitution within six months of Sushila's death.

The whole difficulty in the lower Courts arose from a misapprehension of the term "English mortgage." The law in India with regard to mortgage is that whether we call it a simple mortgage or a mortgage by conditional sale or an English mortgage, they are all securities for re-payment of the money and we are to be guided by Or. 34 of the Civil Procedure Code. The decisions prior to the passing of the Transfer of Property Act not only do not assist but rather embarrass. Sec. 58 (e) of the Transfer of Property Act defines what the framers of the Code understood by "English mortgage" and not "mortgage in English form." An English mortgage transfers the mortgaged property absolutely. That does not necessarily mean that the mortgagee is entitled to possession—that is confused with the English mortgage as defined here. Reads sec. 68. The mere fact that possession is referred to does not show that the Legislature was referring only to English mortgage—may refer to usufructuary mortgage, English mortgage or mortgage by conditional sale. Sec. 69 is the only section which deals with English mortgage. The expression in cl. (a) is "English mortgage" and not "mortgage in English form." There is a material difference between a mortgage in English form in England and an English mortgage under sec. 58 (e).

Having regard to sec. 69, the power of sale could not be exercised because the parties were Hindus and the property was not in Calcutta. There is no section which allows the mortgagee right to claim possession, because the only other section is sec. 58, and in the deed itself there is no clause giving right of entry. Refers to Prideaux, Vol. I, 7th Edition, p. 471. Precedents are guided by statutory forms since 1882. The form gives a clause for entry after default. Reads Williams on Real Property, p. 563. The mortgagee in consequence of that covenant acquires at law the fee simple. He

RUKMINI KANTA CHAKRAVARTI *v.* BALDEO DAS BINANI.

gets the right of possession not in consequence of its being an English mortgage, but in consequence of that covenant. Reads sec. 58 (*a*). It is only a security for the debt—no distinction between legal estate and equitable estate. Refers to *Gokul Doss* v. *Eastern Mortgage and Agency Co., Ltd.* (2). On breach of the covenant there is a right of suit to the mortgagee, and there being no distinction between an equitable estate and a legal estate, he is entitled to a sale. Sec. 68 (*a*) allows the mortgagee to exercise his power of sale if the property be in Calcutta. In this case he cannot exercise the right because the property is outside Calcutta and the parties are Hindus.

Refers to *Surnomoyee* v. *Srinath* (3) and *Srinath Das* v. *Khetter Mohun Singh* (4).

A mortgage in the English form was understood as a mortgage by conditional sale outside Calcutta, etc. There was a conflict for 40 years between the Calcutta and the Madras Courts, Calcutta giving rights as mortgage by conditional sale and Madras giving rights strictly as an English mortgage.

Refers to *Khelut Chundra* v. *Tara Charan* (5).

The covenant for possession is not implied, but there must be a distinct covenant.

The above case went in appeal to Privy Council, *vide Brojo Nath* v. *Khelut Chundra* (6).

The English mortgage does not predicate that there is immediate right of entry unless postponed by a clause to that effect.

Next, what is the effect of the preliminary decree? The rights under the mortgage merge in the preliminary decree. There was the usual mortgage decree for accounts and for sale; assuming that it was an English mortgage and that he was entitled to possession, as he did not ask for that relief and as the Court did not grant that relief, he could not claim to be in possession under the mortgage decree. The possession he got was not under the decree but outside the decree and outside it he had no right. Reads Or. 2, r. 2, C. P. Code. If he had right of possession, he ought to have claimed that right in the suit, and not having done so, he is to be deemed to have abandoned that right.

Refers to *Muhammad Hafiz* v. *Muhammad Zakariya* (7) and *Kishan Narain* v. *Pala Mal* (8).

If you have a cause of action and do not claim all the rights, you cannot afterwards claim it. If he had the right to enter and did not claim it, he cannot now fall back upon that right to have possession. Whatever his rights were, were merged in the preliminary decree.

As there was no substitution of heirs of the mortgagor Defendant, the whole suit had abated. More than three years have elapsed since the date which was fixed by the preliminary decree for payment. Having regard to Art. 181 of the Limitation Act, the decree is extinguished.

Refers to *Munna Lal Parruck* v. *Sarat Chandra Mukherjee* (9).

A mortgage in England is transfer of a legal estate. The deed in form comes

(2) I. L. R. 33 Cal. 410 at p. 421 (1905).
(3) I. L. R. 12 Cal. 614 (1885).
(4) I. L. R. 16 Cal. 693 (1889).
(5) 6 W. R. 269 at p. 274 (1866).
(6) 14 M. I. A. 144 at p 147 (1871).
(7) L. R. 49 I. A. 9: s. c. 26 C. W. N. 297 (1921).
(8) 27 C. W. N. 802 (P. C.) (1922).
(9) I. L. R. 38 Cal. 913 (1911): on P. C. I. L. R. 42 Cal. 776; 19 C. W. N. 561 (P. C.) (1914).

RUKMINI KANTA CHAKRAVARTI *v.* BALDEO DAS BINANI.

under sec. 58 (*e*) of the Transfer of Property Act. But sec. 58 (*e*) does not transfer *plus* possession, whereas an usufructuary mortgage delivers possession. The legislature could not have overlooked this. Sec. 58, cl. (*d*) speaks of delivery of possession but in cl. (*e*) there is no mention of possession. In England possession goes because the mortgagee is the holder or the transferee of the legal estate. Assuming that it was a mortgage with the covenant for entry, yet having regard to the preliminary decree and Or. 2, r. 2 and sec. 11 of the Civil Procedure Code, he will be deemed to have abandoned the right to sue or take possession. If his suit is barred, can he have an independent right to take possession? He having elected to litigate under the mortgage, can he have an independent right? If he had, that independent right is also gone. He sued for sale and foreclosure. He was bound to include this in his suit. After the preliminary decree, he could enter into possession only ostensibly by virtue of his right as purchaser. There is no evidence that he entered except by virtue of his power as a purchaser. Therefore his possession is now that of a trespasser.

Refers to *Lachmiput Singh* v. *The Land Mortgage Bank of India* (1).

The question is not whether the mortgage lien was not discharged. The question is whether the mortgagee is entitled to be in possession. If he sues and does not ask for possession, he is to be deemed to have abandoned this right. The right to possession was barred as soon as the suit was instituted.

As to applying the decision in *Lachmiput Singh* v. *The Land Mortgage Bank of India* (1) to this case, construction of one document cannot afford any basis for construction of another document. You cannot come to any decision as to the rights of a party by a reference to another document. The whole reasoning of the Judges is fallacious. The Judges overlooked sec. 43 of the Civil Procedure Code of 1882 and also the *res judicata* section.

Refers to *Het Ram* v. *Shadi Ram* (10).

The mortgagee did not take the plea that he entered into possession as mortgagee, but as a purchaser.

It was an unlawful ouster, so it does not make any difference whether a suit for possession under the Specific Relief Act or a suit like the present suit is brought, if I sue within 12 years. Does it take away my rights?

Their rights merged in the preliminary decree.

Refers to *Muhammad Hafiz* v. *Muhammad Zakariya* (7).

Finally, the equities are against the Defendant, who in his mortgage suit, obtained decree against a dead person, suppressing the real state of things.

Mr. S. N. Bannerjee for the Respondent submitted that the point to be decided lay within a very brief compass. He could not appreciate any difference between an English mortgage or a mortgage in English form. Reads sec. 58 (*e*). All the three essential conditions of an English mortgage as required by the section are present in the present deed and my friend finally admitted that in form it comes under sec. 58 (*e*). Now the only question is whether the mortgagee was entitled to be in possession as an English mortgagee. In an English mortgage, there is an out and out conveyance, there is an absolute transfer, which gives the

(1) I. L. R. 14 Cal. 464 (1887).

(7) L. R. 49 I. A. 9; s. c. 26 C. W. N. 297 (1921).

(10) 22 C. W. N. 1033 (P. C.) (1918).

RUKMINI KANTA CHAKRAVARTI v. BALDEO DAS BINANI.

mortgagee (transferee) right of immediate possession. The covenant for entry, upon default is intended to be in derogation or curtailment of this right of immediate entry, and unless there is any postponement of this right by such an express covenant, an English mortgagee has the right to enter whenever he pleases.

Reads Ghose's Mortgage, 5th Edition, Vol. I, pp. 326 and 328 and Gour's Law of Transfer, Vol. II, p. 860.

Therefore even if I admit that the whole suit abated, that any fresh claim for possession by suit is barred, the only effect is that I cannot bring a suit, *i.e.*, I cannot figure as a Plaintiff, but I need not. I am already in possession by virtue of my right as English mortgagee, and it makes no difference that I stepped in in some other right which afterwards failed.

I take my stand on *Lachmiput Singh* v. *The Land Mortgage Bank of India* (1) and unless your Lordships hold that that case was wrongly decided, I am entitled to continue in possession unless and until the mortgage debt is satisfied. But in respect of that too, the Plaintiff has declined to redeem.

As regards merger, the mortgage security cannot merge in the decree until it is made productive in satisfaction of the debt. And even if there was merger, the security revived as soon as the decree became ineffectual.

Reads Ghose's Mortgage, Vol. I, pp. 472, 473, 474, 475 and 476.

Refers to *Shaikh Abdulla* v. *Haji Abdulla* (11) and *Jatha* v. *Venkata Naik* (12).

(1) I. L. R. 14 Cal. 464 (1887).
(11) I. L. R. 5 Bom. 8 (1880).
(12) I. L. R. 5 Bom. 14 (1880).

As regards the equities, the Appellant for Rs. 500 purchased the property which was mortgaged to me for Rs. 18,000; besides his purchase was subject to my mortgage and it was distinctly stated in the sale-proclamation and that enabled him to get the property so cheap. Therefore, in equity, when his purchase was subject to my mortgage, he cannot be allowed to claim possession without redeeming my mortgage as decided in *Lachmiput Singh* v. *The Land Mortgage Bank of India* (1).

The JUDGMENT OF THE COURT was as follows :—

The litigation, which has culminated in this appeal, relates to a property known as 20, Gorachand Road, Alipore, situate within the jurisdiction of the District Court of the 24-Perganas. The facts, out of which it has arisen, may be briefly stated.

The property in question belonged to a Hindu lady named Sushila Sundari Chowdhurani, who appears to have been in financial straits in the year 1902 and to have borrowed various sums of money from an attorney named Mohini Mohan Chatterjee. One of these promissory notes for Rs. 4,000 was endorsed by Mohini Mohan in favour of the Plaintiff, the present Appellant Rukmini Kanta Chakravarti, who brought a suit on it in the Original Side of the High Court and obtained a decree. The decree was transferred to Alipore and the Plaintiff executed it, attached the disputed property, and purchased it at auction sale on the 12th August 1915. The sale was in due course confirmed on the 30th March 1916, and the Plaintiff obtained delivery of possession on the 9th April 1918.

In the meanwhile, however, nearly

(1) I. L. R. 14 Cal. 464 (1887).

RUKMINI KANTA CHAKRAVARTI *v.* BALDEO DAS BINANI.

seven years previous to this, *viz.*, on the 4th August 1911, Sushila Sundari had mortgaged the property in suit to the Defendant, now Respondent Baldeo Das Binani, for a sum of Rs. 18,000 and as she failed to pay within the time stipulated, Baldeo Das brought a suit against her in the year 1913 and obtained a preliminary decree on the 10th January 1916 followed by a final decree which was passed on the 2nd July 1917. It appears, however, that in the interval between the passing of the preliminary and final decrees Sushila Sundari had died on the 22nd April 1916, *i.e.*, some fifteen months before the making of the final decree, the mortgagee being apparently unaware of her death. Notwithstanding this the mortgagee put his decree into execution, purchased the property on the 12th June 1918, and on the 26th August 1918 was put into possession by the Court ousting the Plaintiff, who thereupon instituted the present suit to recover possession of the property from the mortgagee.

Before the trial Court some of the facts were disputed and issues were framed *inter alia* as to the genuineness and validity of the Plaintiff's decree and purchase, and of the Defendants' mortgage. The Subordinate Judge found that both transactions were valid and genuine. He held, however, that the omission to bring the legal representatives of Sushila Sundari on the record rendered the mortgage sale void and inoperative as against them, and that as the Plaintiff had purchased the interest of Sushila in the disputed property on the 12th August 1915, the mortgage sale held on the 12th June 1918 did not affect the interest of the Plaintiff. He then went on to consider whether the Plaintiff's interest in the property was subject to the Defendant's mortgage lien, and relying mainly on the case of *Lachmiput Singh* v. *The Land Mortgage Bank of India* (1) held that the Plaintiff could not get possession without redeeming the mortgage debt, and that, as he had declined to exercise his right of redemption the suit failed.

On appeal by the Plaintiff the learned District Judge relying upon the same authority affirmed the decision of the Subordinate Judge holding that the mortgage decree and the sale thereunder were nullities, but that, as the mortgage lien of the Defendant was still subsisting, the Plaintiff was not entitled to get possession of the disputed property without paying off the mortgage debt. The appeal was accordingly dismissed with costs. The Plaintiff then filed this second appeal.

The facts are not now in dispute, and the sole question for consideration is what the legal rights of the parties are. Learned Counsel for the Appellant has challenged the conclusion arrived at in the Courts below upon various grounds. In the first place he raised the question, whether the deed in question (Ex. B) is an English mortgage at all. We do not think having regard to the terms of that document that there is really any room for contention. The three essentials of an English mortgage are—

(1) That the mortgagor binds himself to repay the mortgage money on a certain day:

(2) That the property mortgaged is transferred absolutely to the mortgagee: and

(3) That such absolute transfer is made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the day on which the mortgagor bound himself to repay the same.

All these essentials are to be found in the Defendant's mortgage deed so that

(1) I. L. R. 14 Cal. 464 (1887).

RUKMINI KANTA CHAKRAVARTI v. BALDEO DAS BINANI.

there can be little doubt that it has been rightly held to be an English mortgage.

It was next argued, however, that, even assuming it to be an English mortgage, or mortgage in English form, the Plaintiff's claim to possession on the basis thereof is untenable inasmuch as there is a material difference between a mortgage in English form, as it obtains in England, and an English mortgage as defined in sec. 58 (e) of the Transfer of Property Act, the mortgagee in England being entitled to immediate possession of the mortgaged property, unless there is a special covenant excluding or suspending such right, whereas in India there is no mention in sec. 58 of the Transfer of Property Act of possession of the mortgagee immediately upon execution of the deed, and an English mortgagee in this country is, it is argued, entitled to possession only under a special covenant for such possession. In the present case there was no such covenant. Therefore it is urged the possession of the Defendant is wrongful, and the Plaintiff is entitled to have him ousted and to get possession of the property.

We do not think there is any substance in this argument. Though the deed in question does not contain in so many words a covenant for possession, it is plain that it gave a right of entry, and that that right could be exercised at any time. The fact that the mortgagee obtained possession by proceedings, which subsequently proved to be a nullity, cannot we think stand in his way.

It is then contended that, even assuming the mortgage to be an English mortgage with a covenant for entry, still having regard to the provisions of Or. 2, r. 2 and sec. 11 of the Code of Civil Procedure, the Defendant not having elected to put his right to litigation in the mortgage suit, the mortgage merged in the preliminary decree, which subsequently abated, with the result that the mortgagee lost the right, if he ever had it, and that there is now nothing left to redeem. Admittedly he entered into possession by virtue of his purchase at the mortgage sale, and as that sale fails, he must, it is argued, be regarded as a mere trespasser. The mortgage deed in fact becomes a mere scrap of paper which cannot be enforced and is valueless for all practical purposes.

We do not think this contention is well-founded. The mere fact that a judgment had been obtained on the mortgage could not operate to extinguish the debt, and the mortgage debt must, we think, be held to continue as a lien until it has been satisfied. The suit no doubt failed, but that cannot debar the mortgagee from falling back on his subsisting right under the mortgage deed, and, the fact that he came into possession not in the exercise of that right but in some other way, cannot alter the position. He had undoubtedly a right of entry under the deed, and is now in *de facto* possession. The Plaintiff in order to succeed must succeed by virtue of his own right.

In our opinion the Courts below have rightly decided the question of law involved, and we are not prepared to hold that the case of *Roy Lachmiput Singh* v. *The Land Mortgage Bank of India* (1), upon which they have relied, was wrongly decided. The following passage which occurs in the judgment in that case is to the point and may be quoted.

"Upon these considerations we hold that the mortgagees are now entitled notwithstanding the decree and sale to insist upon the covenant of entry into possession stipulated in the mortgage deed. They

(1) I. L. R. 14 Cal. 464 (1887).

might have enforced such a covenant by suit in Court. But it does not follow that, because such a suit was not brought and the mortgagees entered into possession under a sale which has now fallen through, the mortgagor is entitled to obtain an unconditional decree for possession without redeeming the property."

So in the same way here it does not follow because the mortgagee did not choose to litigate upon his right of entry in the mortgage suit, he is thereby debarred from falling back upon the rights conferred upon him under the mortgage deed, and from retaining possession of the property until such time as his mortgage debt has been satisfied.

It is true that in the case referred to above there was an express covenant of entry in the mortgage deed, but that does not materially alter the position, since by implication the mortgage deed in suit included such a covenant.

Finally it is urged on behalf of the Appellant that the Courts below have been influenced by a false sense of sympathy with the mortgagee, that this ought not to be allowed to weigh at all in the decision of the case, inasmuch as the point involved is purely one of law, and that the equities, so far from being on the side of the mortgagee, are against him having regard to the careless manner in which the mortgage suit was conducted.

We are not favourably impressed by this argument. Looked at apart from the legal aspect of the matter, we think that there can be no doubt that the equities are entirely on the side of the Defendant, and the persistent manner in which the Plaintiff has pressed his claim seems to us to be questionable to say the least. The property in suit appears to have been valued in the trial Court (*vide* judgment of the Subordinate Judge) at Rs. 4,000, and in the year 1911 it was considered sufficiently valuable to justify the advance of a sum of Rs. 18,000 on the security thereof. The Plaintiff seeks to obtain possession of this property for the wholly inadequate price of Rs. 500, and that notwithstanding the fact that the sale certificate clearly stated that the sale was subject to the mortgage lien. The Plaintiff declined to exercise his right of redemption, and it is plain that he has throughout been trading upon the accidental circumstance that the representatives of Sushila Sundari were not brought on the record in the mortgage suit with the legal consequences (fatal, as he no doubt hoped, to the mortgagee) which that omission involved. There are certainly no merits in the Plaintiff's case, and he is deserving of no sympathy.

In the result the appeal fails and must be dismissed with costs, and the decree of the District Judge affirmed.

J. N. R. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1097 OF 1923.

MUKERJI, J.
1924,
Heard,
14, March.
Judgment,
17, March.

PROBHAS KUMAR GANGULI and anr., Plaintiffs, Petitioners,
v.
NITHAR LAL GANGULI and ors., Defendants, Opposite Party.

Court Fees Act (VII of 1870), sec 15, conditions requisite for refund of court-fees under—Civil Procedure Code (Act V of 1908); Or. 47, r. 1 and sec. 151, application for review under both but granted under sec. 151—Right to refund of court-fees—Inherent powers of the Court, it can be invoked where provision in the Code clear.

An application for review was headed as one under Or. 47, r. 1 and sec. 151 of the Civil Procedure Code. The Court, however, allowed it under sec. 151, and on the re-hearing of the suit the previous decree

PROBHAS KUMAR GANGULI *v.* NITHAR LAL GANGULI.

was modified. Petitioner then applied for refund of court-fees under sec. 15 of the Court Fees Act, but the application was refused on the ground that the Court having acted under sec. 151 the Petitioner was not entitled to the refund:

Held—*That the case came clearly under Or. 47, r. 1, C. P. C. and the conditions requisite for bringing it within the purview of sec. 15 of the Court Fees Act were fulfilled, and that the Petitioner was entitled to the refund.*

No application on the part of the Petitioner, far less any with court-fees as on an application for review, need have been filed under sec. 151 of the Civil Procedure Code.

PEARY CHOWDHURY *v.* SONOO DAS (1) *referred to.*

Where the power is granted by the Code itself it is not necessary to invoke the inherent powers of the Court under sec. 151, C. P. C.

This was a Rule issued upon the Opposite Party and the Collector of Nadia to shew cause why the order of Babu B. L. Biswas, Munsif of Chuadanga, dated the 13th July 1923, refusing an application for refund of court-fees under sec. 15 of the Court Fees Act should not be set aside.

The facts of the case will appear from the judgment.

Babu Mrityunjay Chatterjee for the Petitioners.

Babu Surendra Nath Guha for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

The Petitioners applied for review of an order passed by the Munsif of Chuadanga dismissing their suit on the ground that the said order had been passed on overlooking the fact that the Defendants had admitted a portion of their claim. The application was headed as one under Or. 47, r. 1 and sec. 151 of the Code of Civil Procedure. The learned Munsif passed an order, the material portion of which ran as follows :—" I am satisfied that the application comes more properly under sec. 151 than under Or. 47, r. 1. I must note here that the application in question has been filed under both provisions of law. I therefore allow it and restore the case for re-hearing under sec. 151, C. P. C." The suit was proceeded with and the previous decree modified. The Petitioners then applied for refund of court-fees under sec. 15 of the Court Fees Act. The learned Munsif refused the application, being of opinion that he had acted under sec. 151, C. P. C. and therefore the Petitioners were not entitled to the refund.

On the application of the Petitioners for revision of the said order the present Rule was issued upon the Collector of the District of Nadia to show cause why the said order should not be set aside. The Collector has sent a letter in answer to the Rule, supporting the order in question and the learned junior Government Pleader has appeared and also supported the same.

Now, " in order to attract the operation of sec. 15 of the Court Fees Act, the conditions requisite are that there should be an application for review of judgment, that it should have been admitted, that on the re-hearing the Court should have reversed or modified its former decision on the ground of mistake in law or fact and that such reversal or modification was not due to fresh evidence which might have been produced at the original hearing." All

(1) 19 C. W. N. 419 (1914).

PROBHAS KUMAR GANGULI v. NITHAR LAL GANGULI.

these conditions seem to have been satisfied in the present case. The only objection put forward is that the Court purported to act under sec. 151, C. P. C. and not under Or. 47, r. 1. It is difficult to see why the provisions of Or. 47, r. 1, C. P. C. would not apply to the case, for the review was sought for on the ground of a mistake or error apparent on the face of the record. Where the power is granted by the Code itself it is not necessary to invoke the inherent powers of the Court under sec. 151, C. P. C. The powers exercisable under these respective provisions are not mutually exclusive. It is unnecessary, however, to discuss whether the Court was right in holding that it should proceed under sec. 151, C. P. C. rather than under Or. 47, r. 1 for the simple reason that it is difficult to see how the Petitioners can be said to have been in a worse position if the Court chose to proceed under sec. 151, C. P. C. : it being remembered, that no application on the part of the Petitioners, far less any with court-fees as on an application for review, need have been filed [*Peary Chowdhury* v. *Sonoo Das* (1)]. As the case came clearly under Or. 47, r. 1, C. P. C. and as the conditions requisite for bringing the case within the purview of sec. 15 of the Court Fees Act are clearly present the Rule is made absolute and the order complained of is set aside. The Munsif is directed to grant the certificate for refund which the Petitioners applied for. No order is made as to costs.

H. C. S. *Rule made absolute.*

(1) 19 C. W. N. 419 (1914).

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SUMNER.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.
LORD SALVESEN.
1923,
Heard, 9 and 10, May.
Judgment, 21, June.

SETH KEVALDAS TRIBHOVANDAS, Appellant,
v.
SAKERLAL BULAKHIDAS and anr., Respondents.

Civil Procedure Code (Act V of 1908), Or. 23, r. 3—Suit for accounts by shareholder of Company against managing director—Resolution passed at shareholders' meeting subsequent to preliminary decree settling terms with Defendant without examination of accounts or ascertainment of facts, if bona fide *adjustment—Application to record adjustment and pass decree thereon, necessity of.*

The Plaintiff, a shareholder of a Company, sued the Defendant who was the Chairman of the Board of Directors and the manager of the Company for an account of the funds of the Company used by the Defendant for his own purposes and for a declaration that a weaving factory erected and worked by him was the property of the Company. A preliminary decree was passed in the suit, and pending Defendant's appeal to the District Judge, Defendant convened a meeting of the shareholders at which a resolution was passed to the effect that the Defendant should transfer the weaving shed to the Company upon payment by the latter of three lacs odd rupees and ' the Defendant and his heirs and representatives were to get Rs. 8,000 a year for his trouble "after debiting the same to the account of expenses." The appeal against the preliminary decree to the District Judge and a further appeal to the High Court were dismissed without the attention of either Court being drawn to the resolution, but

it was put forward in the subsequent proceedings as an adjustment of the suit within Or. 23, r. 3 of the Civil Procedure Code:

Held—*That the adjustment not being a real adjustment after an examination of accounts or ascertainment of facts was not a* bonâ fide *adjustment within the meaning of the Rule, and further the Defendant never having asked the Court to record satisfaction and pass a decree in accordance with the alleged adjustment, no action could be taken upon it.*

This was an appeal from a decree of the High Court of Bombay, dated the 22nd August 1916, reversing a decree of the Subordinate Judge of Ahmedabad, dated the 24th April 1914.

The suit in which the said decrees were passed was brought by the 1st Respondent against the Appellant, (1) for a declaration that the Bharatkhand Cotton Mills Co. was the owner of a factory started by the Appellant for weaving yarn and that the Appellant was in possession of the same on behalf of the Company and (2) for an order that the Appellant should pay to the Company all such profits as might be found to have been made by the factory.

The Appellant was the Chairman of the Board of Directors and manager of the Company. As such manager he from time to time drew, against the surplus funds of the Company, monies which he employed in the business of his factory.

There was no authority under the memorandum or articles of the Company to justify such drawings, and by a special resolution of the 4th November 1900, it had been resolved that monies of the Company should not be advanced on personal security.

The suit was instituted by a shareholder on the 5th January 1909, and on the 26th January 1910 the Subordinate Judge passed a preliminary decree directing accounts against the Appellant.

The latter appealed and pending the appeal a meeting of the shareholders was convened which passed a resolution on the 15th May 1910 to the effect that the Company should take possession of the weaving factory and credit the Appellant's account with the sum of Rs. 3,51,000.

The appeal was dismissed by the District Judge on the 8th February 1911 and a further appeal to the High Court was dismissed on the 18th September 1912.

Thereafter the accounts were taken by the Commissioner and a final decree was passed by the Subordinate Judge on the 24th April 1914, by which he dismissed the suit and held that the Company was not entitled to recover anything from the Respondent.

From this decree the Plaintiff and the Company appealed to the High Court who reversed the judgment of the Subordinate Judge and passed a decree in favour of the Company for over Rs. 1,46,000.

An application for review of the judgment was rejected, and the present appeal was brought before His Majesty in Council.

Messrs. L. DeGruyther, K. C. and *E. B. Raikes* for the Appellant.—There was no fraud on the part of the Appellant, who openly made use of the Company's surplus funds with the consent of the Company. The resolution of the 15th May 1910 was an effectual compromise of the dispute which the Company was empowered to make.

In their judgment on the 10th December 1919, the High Court held that the

special resolution confirmed on the 15th May 1910 was binding on the Company. That is a final judgment which has never been questioned and operates as *res judicata*.

[LORD SUMNER.—It is a judgment three years after the judgment appealed from and could not have been considered by the Judges deciding the judgment appealed from.]

It could not have formed a portion of the original record but may be taken into consideration by the Board.

Civil Procedure Code, Or. 41, r. 33.

Tarini Charan Sarkar v. *Bishun Chand* (1).

Reference was also made to *Burland* v. *Earle* (2).

Messrs. Upjohn, K. C. and *Parikh* for the Respondents.—The resolution of 15th May 1910 was not a real adjustment within the provisions of Or. 3, r. 23 of the Civil Procedure Code and no application was made to the Court to have satisfaction recorded.

The Appellant's contention based on that resolution was in substance dealt with and decided against him by the High Court on 18th September 1912 and cannot be raised now. He is bound by the preliminary decree affirmed by two Appellate Courts and is not entitled to raise any point which would disturb that decree.

Mr. DeGruyther, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The Plaintiff (Respondent) is a shareholder in the Bharatkhand Cotton Mills Company, Limited, carrying on business in the City of Ahmedabad, Bombay Presidency. He brought this suit, the nature of which will be explained presently, so long ago as the 5th January 1909. The first five Defendants are managing agents and directors of the Company; the sixth is a retired director; the seventh Defendant is the Company itself, having been added as a party to the suit later in the course of the proceedings. The first Defendant (the present Appellant before the Board), Kevaldas Tribhovandas acted as Chairman of the Board of Directors and is the manager of the Company. The Plaintiff seeks in the suit an account of the funds belonging to the Company used by the Appellant for his own purposes, and for a declaration that a weaving factory erected and worked by him is the property of the Company. The Company appears to have been established sometime in the year 1896. The evidence shows that in 1905 the Defendant Kevaldas Tribhovandas started the weaving factory which he claimed as his own property. The Plaintiff charges that that factory was built and erected by the Defendant with money belonging to the Company, and that he has worked the same for his own benefit. He seeks an account of the profits made by the Defendant therefrom and a declaration that such profits also belong to the Company.

The date for filing the defence was originally the 12th February 1909, but the Appellant applied for time which was extended to the 14th April 1909, when the written statement was filed. It is unnecessary to refer in detail to the contentions raised by him against the Plaintiff's claim. It is enough to say that on the 23rd December of the same year the Subordinate Judge delivered a judgment in which he overruled the Defendant's technical objections to the suit; and that on the 26th January 1910,

(1) 22 C. W. N. 505 (P. C.) (1917).
(2) [1902] A. C. 83.

he made a preliminary decree directing accounts against the Defendant and appointing a Commissioner to take the same. The Defendant preferred an appeal from this preliminary judgment to the District Judge. Whilst this appeal was pending he convened a meeting of the shareholders which was held on the 29th April 1910. At this meeting a resolution was adopted which the Plaintiff charges was at the instance of the Defendant. This resolution was subsequently on the 15th May affirmed, it is charged, under similar circumstances. It runs as follows :—

"On reading the application received from some shareholders and the 'scheme' which has been submitted thereupon by Pari. Kevaldas Tribhowandas (it appears that) Pari. Kevaldas Tribhowandas has asked for Rs. 4,00,000, (in words four lacs) as the price of the weaving factory erected by himself (*sic*). But on a consideration of the said (matter, it appears that) as he has worked the same up to this day depreciation had been caused and profit had been made (or) loss had been sustained. After deducting a lump of Rs 49,000, (in words forty-nine thousand) for both the items Rs. 3,51,000, (in words three lacs and fifty-one thousand) in the lump be brought to account with reference to him and possession of the said weaving-factory be taken by us and as owing to this the work of 'Vahiwat' (management) (to be done) by Pari. Kevaldas Tribhowandas would increase Rs. 8,000, (in words eight thousand) be continued to be paid every year to him and his heirs and representatives for his trouble after debiting the same to the account of expenses"

It is necessary to mention here that on the 4th November 1900, at a meeting of the shareholders a resolution had been adopted, which is extremely material in the consideration of this case. It is as follows :—

"The moneys of the Company shall not be lent to any one on personal security. And the Vahivatdar (the Manager) shall not keep the account of the Company in his own shop; so also the Vahivatdar shall not withdraw by debiting in his own name, any amount whatever, except his own dues."

After the institution of the present suit, several meetings were held on the Defendant's motion or at his instance, for the purpose of rescinding the resolution of the 4th November 1900, which certainly clogged his free handling of the Company's funds. There is an allusion to this alleged rescission in the resolution affirmed on the 15th May 1910, in these terms :—

"As to the special resolution which we passed on the 4th November, 1900, clause 6 thereof was cancelled on the 10th April, 1909, and the whole of the special resolution besides that be cancelled. Moreover, we do not consider the suit which has been filed by Sakarlal Bulakhidas in the Court of the First Class Subordinate Judge (at) Ahmedabad as a *bona fide* one and that on account of the said suit having been filed the company's credit has suffered to a very great extent. This meeting is therefore of opinion that the Agents should seek remedy by taking proper steps for the said loss of credit to the company. This meeting therefore resolves that if the Agents think proper, proper steps be taken against Sakarlal Bulakhidas accordingly. Shah Nagindas Girdhardas seconded the said (proposal)."

Although the resolution, which the Defendant now contends was an adjustment between the Company and himself, was affirmed on the 15th May 1910, no reference to it was made in the appeal to the District Judge, which was dismissed on the 8th February 1911. The Defendant appealed from the decree of the District Judge to the High Court, which appeal was dismissed on the 18th September 1912. No reference was made to this so-called adjustment in the appeal to the High Court. No appeal was pre-

ferred from the dismissal by the High Court of the appeal from the preliminary decree of the Subordinate Judge holding him accountable for his dealings with the Company's funds and directing accounts. It is suggested before this Board by counsel for the Defendant that on the appeal from the final decree by the High Court, he is entitled at this stage to question the preliminary decree. The certificate granted by the High Court to enable the Defendant to come to His Majesty in Council does not cover any appeal from the preliminary decree. But even if it was open to the Defendant to question in the present appeal the findings arrived at by the three Courts in India on the accountability of the Defendant relative to his dealings with the Company's funds, their Lordships do not find any material on which his contention may be said to be legitimately based.

To proceed with the history of the case, on the dismissal of the appeal by the High Court on the 18th September 1912, the Commissioner proceeded with the taking of the accounts. It was only on the 21st October 1912, after the dismissal of his appeal, from the preliminary decree, by the High Court, that the Defendant first applied to the Subordinate Judge stating that :—

"during the pendency of our appeals, the Company settled this suit with us, and the Company has taken from us the possession of the weaving shed, which we had built with our own money, agreeing to pay us Rs. 3,51,000 as price of the said weaving shed, after taking into consideration the wear and tear (*i.e*, depreciation) on account of the conducting of the work of the said weaving shed till this day and the profit and loss which had occurred; and a registered sale-deed has also been taken from us in the matter."

and he then proceeded to urge :—

"The Company having agreed with us—the Defendant—in this way, with regard to this suit, this suit cannot now proceed further. Therefore a note should be taken of this settlement, and after holding that this suit has been settled, this suit should be dismissed."

On the 1st November 1912, the Plaintiff filed an affidavit in contradiction of the Defendant's statement as set forth in his petition of the 21st October 1912, charging the Defendant with having manipulated the shareholders' meetings ever since he was called upon to answer the charges made in the suit. He also alleged that the meetings of the 29th April 1910, or the 15th May 1910, were equally worked by Kevaldas for the purpose of getting the resolution affirmed. The Plaintiff further stated in his affidavit that on the 23rd December 1911, whilst the appeal from the preliminary decree was still pending in the High Court certain arbitrators had been appointed with the object of settling the matter in dispute after examining the Company's account books and the Defendant's private books of account, but the Defendant having failed to produce the necessary books, the reference to arbitration proved ineffectual and the arbitration failed. There appears to have been no mention in the application to refer the matter in dispute to arbitrators of the alleged settlement arrived at on the 15th May 1910. The Company were added as Defendants, apparently soon after the settlement of the issues, and new agents had been appointed for carrying on the work of the Company. These agents, on the 21st November 1912, filed an affidavit in answer to the Defendant's allegations, in which they stated as follows :—

"Defendant Kevaldas' allegation in his application that the (Defendant) Company had effected settlement with him in connec-

tion with the suit is entirely untrue. It appears from the records of the Company that no settlement has at all been effected in connection with the present suit. Subsequent to a 'preliminary decree' for taking accounts being passed by the Court of first instance in this suit the Defendant Kevaldas filed an appeal, being Appeal No. 85 of 1910 in the District Court. It appears that prior to the hearing of the appeal Mr. Kevaldas, as Chairman of the Board of Directors, called an extraordinary meeting of the Company on an application of some shareholders and got some resolutions passed improperly at the said meeting. One of the resolutions got passed is to the effect that the weaving shed Karkhana (factory) should be purchased from Mr. Kevaldas for Rs. 3,51,000, in words three lacs and fifty-one thousand, and that as he would be required to take more trouble for its Vahivat (management) he should be paid every year Rs. 8,000, in words, eight thousand, for that trouble. Before this resolution was got passed valuation of the machinery and premises of the weaving shed was not got made by any experienced man. . . . As a resolution to the above effect has been got passed simply on the strength of Mr. Kevaldas holding a large number of shares, a great fraud has been committed on the Defendant Company, and the Company has thereby sustained a very great loss."

It is clear that after this affidavit, which challenged the validity and *bonâ fides* of the resolutions adopted after the institution of the suit, the Defendant abandoned, so far as the records show, proceeding with his contention that there had been a settlement on the 15th May 1910.

No order, however, appears to have been recorded in the order-sheet in respect of the Defendant's petition of the 21st October 1912. The Commissioner submitted his report on the 11th July 1913, and on the 24th April 1914, the Subordinate Judge made his final decree in which he held that the Company was not entitled to recover anything from the Defendant. The judgment also contains no reference to the question of settlement. The final order of the Subordinate Judge is in these terms :—

"Defendant 1 is thus entitled to Rs. 1,08,703-10-8. At this rate Plaintiff or the Company is entitled to recover nothing as profit. The Plaintiff has brought suit No. 408 of 1910 against the Defendant and the Company for getting the resolution under which the Company agreed to purchase the factory from Plaintiff set aside on the ground that the said resolution is illegally passed. That suit has been all along kept with this suit after settling issues. Under the resolution the sale has taken place and the Defendant Company is actually in possession and enjoyment of the factory since May, 1910. The profit and loss of the sale transaction has been considered in this suit as shown above. So practically speaking that suit has been disposed of by itself.

"For the above reasons, I dismiss this suit. Plaintiff has succeeded in the preliminary decree but the final result is in Defendant's favour. Under these circumstances, I order that each party should bear his or their own costs of this suit."

The Plaintiff and the Company appealed from this decree of the Subordinate Judge to the High Court of Bombay, and the learned Judges disposed of the appeal on the 22nd August 1916. They criticised, not without reason, the view of the Subordinate Judge absolving the Defendant from all liability in connection with his dealings with the Company's funds and with the profits made by him from the weaving factory with the funds of the Company. They held, in fact, that the Defendant Kevaldas Tribhovandas had misappropriated the money of the Appellant Company to his own use and then, being called upon to account and restore what he had appropriated, claimed a very large salary for "the time and skill" he had spent on the employ-

ment of that money; and they justly ridiculed the idea of the Subordinate Judge giving him remuneration for his work. In the result they made a decree against the Defendant for a considerable sum of money. There was an application for review of judgment on the question of the alleged settlement of the 15th May 1910, which was rejected. The present appeal to His Majesty in Council is from this decree of the High Court and the order on review.

The main contention on which the appeal is based relates to the orders of the High Court with regard to the alleged adjustment. In their main judgment the learned Judges had said as follows :—

"When the dispute arose, negotiations appear to have been entered into, and on the 29th of April, 1910, upon a representation by the Defendant that he had spent some three *lacs* and 66 thousand rupees upon building and stocking the factory, the Appellant-company agreed by a majority resolution, which was confirmed on the 15th of May, to take over this factory at a price of Rs. 3,51,000 in part payment of the Defendant's total indebtedness to them."

After stating that :—

"There was a clear misrepresentation by one who was under a very special obligation to make full and true disclosure, and that being so, it follows without the need of pursuing the argument through the somewhat nice and difficult case-law of England that the Appellant-company was entitled to a refund of so much of this money as has been overpaid."

and dealing with the specific plea of adjustment, they state their views in the following terms :—

"On the 29th of April 1910, after the preliminary decree had been passed, a resolution was passed, which was confirmed on the 15th of May at a General Extraordinary Meeting, and it was contended on behalf of the Respondent that that was a lawful adjustment of the suit which put an end to all further proceeding. This matter appears to have been brought before the Lower Court and issues were raised upon it on the 21st November 1912, but the Respondent or whoever was taking sides with him at the time pressed the matter no further. We cannot discover that any evidence whatever was offered to the Court in substantiation of this contention. The onus clearly lay upon the Defendant-Respondent and inasmuch as he failed to discharge it or even to attempt to discharge it, we are not now in a position to express any opinion upon this last contention and to afford relief on that ground."

On the review application they deal with the contention more fully.

Their Lordships entirely concur with the views of the High Court on this point. They consider in the first place that there is absolutely no reality in the plea of adjustment; that it was not a real adjustment after an examination of the accounts or ascertainment of the facts; that it was never brought to the notice of the District Judge or of the High Court when the preliminary decree was under appeal; that it was never mentioned before the arbitrators and that soon after the Defendant Company filed its affidavit the allegation was dropped. Besides, on a reference to r. 3 of Or. 23 of the Civil Procedure Code, it is abundantly clear that whatever might have taken place at the shareholders' meeting it was not an adjustment within the provisions of the Code. R. 3 provides as follows :—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

In this case there is not the smallest

proof of a *bonâ fide* adjustment, nor did the Defendant ever ask the Court to record satisfaction and pass a decree made in accordance with the alleged adjustment.

On the whole their Lordships are of opinion that the judgment of the High Court is correct and that this appeal should be dismissed with costs. They will, therefore, humbly advise His Majesty accordingly.

Solicitor: *Mr. Edward Delgado* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

LORD SHAW.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
1923,
Heard, 20, 22 and 23, November.
1924,
Judgment, 28, January.

MUHAMMAD RAZA, Appellant,
v.
SYED YADGAR HUSSAIN and ors., Respondents.

*Mahomedan law—*Wakf, *grant of—*"Wakf," *term if must occur in grant—Grant with direction to maintain temple out of profits, if* wakf.

According to Mahomedan law, it is not necessary in order to constitute a wakf *that the term* "wakf" *should be used if from the general nature of the grant itself that tenure can be inferred.*

Where a grant in which the word "wakf" *did not occur, was claimed to be a* wakf:

Held—*That in such a case, the actings or statements of the grantee or his successor may be relevantly taken into account as to their interpretation of the original grant, while the method in which the property has been treated on the administrative records may also throw light on the same problem, though these are not conclusive.*

Held, *upon the interpretation of the grant in question in this case, that it was not a* wakf *but was a grant* sub conditione, *the conditions being that the expenses of the Imambara should be defrayed from the revenue and a report submitted to Government for sanction.*

This was an appeal from a decree, dated the 10th January 1920 of the Court of the Judicial Commissioner, Central Provinces, reversing a decree of the Court of the Additional District Judge of Nagpur, dated the 18th December 1918.

In 1840 the then ruler of the Bhonsla raj granted three villages in the Nagpur District "to Hakim Yadgar Hussein," the Court physician, "for the Imambara of Pir Hussein."

The terms of the grant are set out in the judgment of the Privy Council. Yadgar Hussain remained in possession until 1850 when he died.

In 1852 a grant was continued in the name of his son Hakim Bunyad Hussain. On the death of Bunyad Hussain in 1913 his eldest son, the Appellant, professed to succeed him as *mutwalli* of the villages, the subject-matter of the original grant.

In the settlement operations, 1913-16, the name of the 1st Respondent (amongst others) who was a cousin of the Appellant was entered on the register as a co-sharer in the villages in suit. The Appellant thereupon brought the suit now under appeal for the cancellation of entries on the register of the names of his co-sharers. He contended

that a "*wakf*" had been established by the grants of 1840 and 1852 of which he had become the sole *mutwalli*.

The District Judge held that the original grant was in the form of a religious charitable trust, as was also the re-grant in 1852, and that the Plaintiff was *mutwalli*, and he accordingly passed the decree prayed for.

On appeal Drake, Brockman and Kotval, J. J. C. decided that the grant had never been treated as a "*wakf*" but only as a personal grant with a condition attached and that the villages had been treated as the subject of temporal ownership. In the result they reversed the decree of the District Court and dismissed the suit.

Messrs. DeGruyther, K. C. and *A. Majid* for the Appellant (*ex parte*).—The lower Appellate Court held that there was no *wakf* and so did not decide the question as to whether a "*wakf*" could be created by a non-Mahomedan.

It is submitted that even a man who does not hold the Mussalman faith may create a *wakf*.

[Ameer Ali's Mohammedan Law, 4th Ed., pp. 192 and 217, Wilson, Anglo-Mohammedan Law, 3rd Ed., pp. 338, 339, 344.]

Shastri's Hindu Law, 4th Ed., p. 480.

That a *wakf* was intended is clearly indicated by the manner in which the proceeds of the property have been applied where a grant is made to an individual for an institution, the individual represents the institution.

Jewun Doss Sahoo v. *Kubeer-ood-deen* (1) and *Muhammad Hamid* v. *Mian Mahmud* (2).

The permanent appropriation of property for pious purposes is sufficient to constitute a "*wakf*." It is unnecessary for the word "*wakf*" to be used specifically.

A grant with a condition is invalid in Mahommedan law except as a "*wakf*." This cannot be a gift with a condition attached, because in that case there would be no *mutwalli*, for the property would be divisible on the death of the grantee and there would be no successor entitled to be trustee.

The fact that Bunyad appointed a *mutwalli* was a clear indication that he considered the grant as a *wakf*.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree of the Court of the Judicial Commissioner of the Central Provinces, dated 10th January 1920, reversing a decree of the Court of the Additional District Judge of Nagpur, dated 18th December 1918. The case was argued before the Board *ex parte*.

The point of the appeal as presented was whether in the year 1840 Raja Raghoji Bhonsla, a Hindu ruler, created a *wakf* of three villages, namely, Gorewara, Sonkham and Nankapar, to Hakim Yadgar Hussain, the royal physician. The document so said to create a *wakf* is as follows :—

"From

"Raghoji Bhonsle, Sena Saheb Subha.

"The village of Mouza Gorewada in this *pergana* is given as *mokasa in the Arabic year* 1241/1840 (*Fasli year* 1250) to Hakim Yadgar Hussein for the Imambara of Pir Hussein, with all income of Land Revenue, Pandhari extra income, *Kalali* and mango groves, for ever from the commencement of the current year. It is assessed to a rental of Rs. 401-12-0. You may therefore continue the *mokasa* from year to year and generation to

(1) 2 M. I. A. 390 (1840).

(2) L. R. 50 I. A. 92, 102: s. c. 27 C. W. N 701 (1923).

MUHAMMAD RAZA *v.* SYED YADGAR HUSSAIN.

generation. Don't expect a fresh Sanad every year. Keep a copy of this Sanad and return the original to the grantee *dated 16th Jamadilawal.*"

16th July, 1840.

The argument is that this grant constituted a *wakf* for the Imambara of Pir Hussain. It was maintained that the use of the words "for ever"—manifestly applicable to the income of land revenue, etc.—together with the further use of the words "you may therefore continue the *mokasa* from year to year and generation to generation," signifies the creation of a *wakf*, although a *wakf* was not stated by name, nor is there any nomination of the grantee as *mutwalli*. The case was supported in argument by various decisions, the leading one of which is *Jewun Doss Sahoo* v. *Kubeer-ood-deen* (1). It can hardly be denied that according to the Mahommedan law it is not necessary in order constitute a *wakf* that the term "*wakf*" be used, "if from the general nature of the grant itself that tenure can be inferred."

This state of the law makes the present case one of difficulty on the facts and history elicited in these proceedings. In all such cases the actings or statements of the grantee or his successor may be relevantly taken into account as to their interpretation of the original grant: while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things are not conclusive, but are circumstances worthy of consideration. The following narrative is accordingly given :—

The grantee Yadgar Hussain continued in possession of the temple until 1850, when he died. The *mokasa* village was then resumed. On 15th May 1852, a grant was ..ted by substi...reer Chur Raninna-Hakim Bunya.. full 16 annas ... Judge conti-

In the view of averment is ... the Appel-pened in 1867 a.. the wishes of his ... to those years, as after-mentio.. office of *mutwalli* and It appears from the pro.. and has since been 25th February a revenue *wakf* property ex-and three orders, one appl... ..d exclusive right ...ssession of the village, were signed by Mr. . Settlement Officer. They were ..e accom-ed :— is posi-

Claim to proprietary right in Mo.. can-Sonkham, late Purganah Katol, Thuse..ub lee Nagpur,

and it was narrated :—

"This village has been held in Mokasa tenure since 1840 A.D., and the Mokasdar has all along held it in his own management as appears from the entries in the old record as follows :—

1234 Fs.	to 1236	Amrun Gond.
1237	,, 1241	Amrun Gond.
1242	,,	Prubalad Porec.
1243	,, 1260	Hukeem Yadgar Hussain.
1261	,, 1263	Mokasa ,,
1264	,,	,, ,,
1265	,, 1267	Mokasa Meer Hussain Emambara through Hukeemjee.
1268	,, 1270	Peer Husain thor' Boonyad Husain.
1271	,, 1271	Meer Boonyad Husain.

"Yadgar Husain was the grantee and was succeeded by his son Boonyad Husain. The female members of the family have laid claim to share, but they have no title. Boonyad Husain has a younger brother named Thoofeyl Husain.

"Proprietary right in Mouza Sonkham is hereby conferred on Boonyad Husain and Thoofeyl Husain."

On the 4th May of the same year (1867), however, an order was passed by the Settlement Officer of Nagpur, Mr. Ross, in these terms :—

"Claim by Bunyad Hussain to hold in Mokasa the village of Sonkham. This village together with the villages of Gorewara, and Nonkapar were granted by Takeed

(1) 2 M. I. A. 390 (1840).

MUHAMMAD RAZA *v.* SYED YADGAR HUSSAIN

that a "*wakf*" had been esta
the grants of 1840 and 1852 ar Hussain
had become the sole *mutt* al Family) for
The District Judge, of Peer Hussain
ginal grant was in t Nagpur. The grant
charitable trust, a ity and inclusive of
in 1852, and th Sayer and demands of
walli, and he The revised *jama* of
cree prayed f been fixed respectively,
On ap and 120. Yadgar Hussain
Kotval Fasli (1851 A.D.) and the grant
had r ued by a Takeed dated 24th Rajab
car to his son Bunyad Hussain.
e expenses of the Imambara are de-
ed by the holder during the Mohurram
ad Ramzan festivals. I recommend that the grant be continued while its object is maintained."

While on the 19th May the Chief Commissioner passed an order, the terms of which are of great importance. They are as follows:—

"The Mouza of Gorewara may remain revenue free as long as the Imambara is in existence, on this condtion that the income arising from the *muafi* s properly spent and a report submitted o Government for sanction."

The three orders, one applicable to each village, are in the same terms.

It appears to their Lordships difficult to predicate that these transactions of 1867 establish that a *wakf* with Yadgar Hussain as its *mutwalli* is established as having been instituted or continued as such.

If a statement made by Hakim Bunyad Hussain in the Court of the Settlement Officer on the 27th October 1865, be referred to, their difficulty grows greater. He is asked the question, "Have you got a co-sharer?," to which the answer is: "There is no co-sharer. My real younger brother Syed Tufail Hussain has got an equal share. We both live together." And in a further stage in his evidence he declares "I myself and my brother are in possession."

From a consideration of these documents and the evidence it appears to the Board to be fairly plain that Bunyad Hussain's own position was not that of an exclusive claim to the *mutwalliship* of this property and endowment as a *wakf*, but an allegation of joint ownership and possession with his brother, subject, it may be, to respecting the conditions of the grant.

Hakim Bunyad Hussain died on 3rd April 1913, and the recent settlement known as Mr. Dyer's settlement was made. From the papers it appears that a careful examination of the history of the property and its ownership and possession was then made. The decision of the Settlement Officer was to enter the Defendant No. 1's name with other Defendants Nos. 2 and 4 as co-sharers along with the Plaintiff of the remaining 8 annas share. This administrative action was also of course quite inconsistent with the idea of a *wakf* having been constituted or there being any right in the deceased to have nominated his successor as *mutwalli*.

Their Lordships have carefully considered all the relevant documents and evidence in this case and they are of opinion that the judgment reached by the Judicial Commissioner is correct.

There are one or two matters, however, which the Board wishes to make clear. In the first place, in their Lordships' judgment the nature of the grant in this case, whether that term be applied to the document issuing from the Raja in 1840 or to the orders and records issuing from the Settlement Offices in 1867, was not a *wakf* but was a grant *sub conditione*. That condition was two-fold. In the first place the expenses of the temple should be defrayed from the revenue. The grant was for that purpose expressly, namely, "that the income

MUHAMMAD RAZA *v.* SYED YADGAR HUSSAIN.

arising from the *muafi* is properly spent," and secondly that a report was to be submitted to the Government for sanction, or to use the language of the Chief Commissioner's order of 10th July 1867, with regard to Sonkham :—

"The village of Mouza Sonkham may remain revenue free for ever on this condition that the object for which was given *muafi* should be properly maintained and the Imambara be kept in good repairs and a report submitted to Government for sanction."

In the next place the Board desires to make it clear that the interests of the Imambara are paramount and that no administration by the persons claiming either under the title of grantee, or of *mutwalli* or of manager could be legally sanctioned which was in violation or betrayal of the interests of the Imambara as safeguarded by the imposition of the condition which attached, throughout to the grant.

The rights which would emerge or the course of procedure which would have to be followed in the event of such mal-administration are not before the Board. The sole question arising is that defined by the plaint itself and is to the following effect :—

"That a decree be passed under sec. 83 of the Central Provinces Land Revenue Act for setting aside the decisions of the Settlement Officer and cancelling the entries showing Defendant No. 1's name as an 8 annas co-sharer and those of Defendants Nos. 2 to 4 as co-sharers along with Plaintiff of the remaining 8 annas share in the record-of-rights and other papers relating to the new settlement of the mouzas :—

1. Gorewara } More fully described in the schedule herewith attached and by substituting the name of Plaintiff alone, as the full 16 annas mokasdar and mutwalli of the said villages."
2. Sonkham }

The true point of the proceeding is that the Plaintiff in the present case, Muhammad Raza, desires these entries to be deleted by substi... alone "as the full 16 annas ... *mutwalli*." His averment is ... "in pursuance of the wishes of his ... succeeded him in the office of *mutwalli* and the aforesaid Imambara, and has since been managing the aforesaid *wakf* property exclusively in his own sole and exclusive right as such *mutwalli* and is in possession of the same in that capacity."

His object of course cannot be accomplished unless he can establish his position as *mutwalli*, and that position cannot be established unless the grant *sub conditione* as before described can be considered to be a *wakf*. An additional negative distinction must be made. The Board makes no pronouncement whatsoever on a question mooted, namely, whether a grant by a Hindu to a Mahomedan community was incompetent as the foundation of a *wakf*. The grant in the present instance has been dealt with on its own terms and conditions, and the issue has been settled against it being the constitution of a *wakf*. Further questions mooted only confuse that issue.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The petition for further documents will also be dismissed.

The Appellant will pay to the first Respondent such costs as he has incurred.

Solicitors: *Messrs. Francis & Harker* for the Appellant.

G. D. M.

MUHAMMAD RAZA v. S

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[APPELLATE JURISDICTION.]

APPELLATE DECREES ...5 AND 2546 OF 1921.

The ... ...SON, C. J. ...HARDSON, J. 1923, Heard, 19 and 20, July. Judgment, 20, July.	GOPI SUNDARI DASI and ors, Principal Defendants, Appellants, v. KHEROD GOBINDA CHOWDHURY and ors., Plaintiffs, Respondents.

Judgment, not inter partes—Admissibility in evidence—How far conclusive—Weight to be attached.

A judgment in a previous suit in which one of the parties in a subsequent suit was not a party, though not conclusive against him, is admissible in evidence, like any other fact to be weighed in the balance, to prove the nature of the claim made in the previous suit and the legal effect of the decision.

DINOMANI CHAUDHURANI v. BROJO MOHINI CHAUDHURANI (2) *relied on.*

TEPU KHAN v. RAJANI MOHAN DAS (1) *referred to.*

KASHI NATH PAL v. RAJA JAGAT KISHORE ACHARYYA CHAUDHURI (3) *distinguished and explained.*

This was an appeal preferred on the 11th November 1921 against the decree of the Additional District Judge of Pabna in Zillah Pabna and Bogra (P. M. Chatterjee, Esq.), dated the 31st May 1921, affirming the decree of the Additional Subordinate Judge of Pabna (Babu Rajendra Lal Sadhu), dated the 14th of March 1919.

The facts of the case will appear from the judgment.

Dr. Dwarka Nath Mitter and *Babu Tarakeswar Pal Chaudhuri* for the Appellants.

Babus Ram Chandra Majumdar and *Jotindra Nath Choudhuri* for the Respondent in No. 2195.

Babus Surendra Chandra Sen and *Surendra Nath Bose* for the Respondent in No. 2546.

The JUDGMENT OF THE COURT was as follows :—

RICHARDSON, J.—This is an appeal from the Appellate judgment of the Additional District Judge of Pabna, dated the 31st May 1921. The questions which the learned Additional Judge had to consider are thus stated by him :

"(1) Was Mouza Chur Raninagar included within the *putni* held by the Plaintiffs and other *pro formâ* Defendants under the *malik* Defendants? Was Mehal No. 2159 created out of the lands of that *putni?*

(2) Are the Plaintiffs entitled to a refund of the amount claimed?"

Some short explanation is necessary to the nature of the dispute in connection with which these questions arose.

The Plaintiffs and those Defendants in the suit who are described as *pro formâ* Defendants are the proprietors of a *putni* tenure within the estate of the principal Defendants Nos. 1 to 7. The tenure is bounded on one side by the river Ganges and in the year 1912-1913, a survey was made by the Government with the result that certain lands were formed into a separate estate No. 2159 known as Mouza Chur Raninagar, on the footing that the lands were an accretion to the parent estate, Raninagar, the estate that is of the principal Defendants. On that footing a settlement was made under which the *putnidars* were to pay rent for these lands at the rate of Rs. 189 a year in addition to the rent payable for the original

(1) I. L. R. 25 Cal. 522; s. c. 2 C. W. N. 501 (F. B.) (1898).

(2) L. R. 29 I. A. 24: s. c. I. L. R. 29 Cal. 187; 6 C. W. N. 386 (1901).

(3) 20 C. W. N. 643: s. c. 23 C. L. J. 583 (1916).

putni. It is stated in the judgments of the Courts below that in the settlement the Government were recorded as *tahasildars* of the proprietors of the estate. No suggestion appears to have been made that the *putnidars* were party to or bound by the proceedings. In the result, however, they were compelled to pay this additional rent for four years and they then brought the present suit to retrieve the amount so paid. Their case is that the original *putni*, the *putni* as originally created, for which rent was payable under their engagement with the proprietors, included the lands of the new estate No. 2159 and they contend accordingly that in respect of this area rent has been recovered from them twice over. They succeeded in the Courts below and three of the principal Defendants (Nos. 1 to 3) have preferred this appeal.

Now it is conceded by Dr. Mitter, the learned Vakil who has argued the case on behalf of the Appellants, that the questions above set out were essentially questions of fact. The main burden of Dr. Mitter's argument has been that in deciding those questions of fact, the Courts below have committed an error of law in respect of the use which they have made of a certain judgment of the year 1874. The principal Defendants, the proprietors, were not parties to the litigation or bound by the result. The judgment, it seems, decided a suit or suits between the *putnidars* as Plaintiffs and the Secretary of State as Defendant, in which the *putnidars* successfully asserted their title to Chur Raninagar as part of this *putni*. The learned Additional Judge says: "It appears, that the Plaintiffs in those cases obtained decree for lands of Raninagar and Mouza Chur Raninagar as appertaining to their *putni tatuk*, and the entire lands were made into one new mouza named Decreer Chur Raninagar." Then the learned Judge continues: "It is contended for the Appellants that they were not parties to those suits, and therefore, the judgment and decree in those cases are not admissible against them. The argument is against established case-law, and I have no doubt that they are admissible in evidence. The decree and judgment prove that the predecessors of the Plaintiffs claimed in 1874 lands of Mouza Chur Raninagar as appertaining to the *putni taluk*; their claim was upheld, and they remained in possession as before."

Dr. Mitter has not, I think, disputed that the proceedings of 1874 and their result were relevant under sec. 13 of the Evidence Act. Nor could he have successfully taken this position. In the judgment of a Full Bench of this Court in *Tepu Khan* v. *Rajani Mohan Das* (1) the following passage occurs:—"It is clear from the decisions in the Privy Council that under certain circumstances and in certain cases, the judgment in a previous suit to which one of the parties in the subsequent suit was not a party may be admissible in evidence for certain purposes and with certain objects in the subsequent suit." In a later case which came before the Privy Council [*Dinomoni Chaudhurani* v. *Brojo Mohini Chaudhurani* (2)] Lord Lindley delivering their Lordships' judgment observed that the words of sec. 13 of the Evidence Act were very wide. I have no doubt that the litigation of 1874 was within the meaning of sec. 13, a transaction or instance in which the right of the Plaintiffs to hold the disputed lands as part of their

(1) I. L. R. 25 Cal. 522: s. c. 2 C. W. N. 501 (F. B.) (1898).

(2) L. R. 29 I. A. 24: s. c. I. L. R. 29 Cal. 187; 6 C. W. N. 866 (1901).

Gopi Sundari Dasi v. Kherod Gobinda Chowdhury.

putni was successfully asserted and this transaction or instance was relevant or admissible in evidence in the present suit. So far, I think, Dr. Mitter would not disagree. His objection, as I understand it, is that the learned Additional Judge in some way gave judicial force to the judgment as against the Petitioners who are not bound by it. Of course if the learned Judge had expressed himself to the effect that the judgment was in law conclusive against the proprietors, he would have been guilty of serious error. As I read his words, however, I do not think that the learned Judge has attributed to the judgment any judicial force as against the proprietors. He treats the judgment or the transaction which it discloses, as an item of fact in the history of the disputed lands. This clearly appears from what he says later in his own judgment which must be read as a whole. Two or three paragraphs further down after referring to other matters, he says " all these go to prove," meaning each of the different events or items in the history of the land to which he had referred together went to show, the title of the *putnidars*.

In the circumstances it seems to me merely hypercritical to find fault with the learned Additional Judge's statement that the judgment proves " that the predecessor of the Plaintiff claimed in 1874 lands of Mouza Chur Raninagar as appertaining to the *putni taluk*, their claim was upheld, and they remained in possession as before." The relevancy of the previous suit and its result necessarily gave access to the judgment in that suit, and in my opinion the learned Judge was right in saying that the judgment proved the nature of the claim made and the legal effect or result that the claim was upheld. He was at liberty to use the judgment for that purpose and to that extent. The legal effect of the judgment as between the parties to the previous suit had to be determined from the judgment itself and, when determined, it became not conclusive as between the parties to the present suit but a fact to be weighed in the balance like any other fact. Its probative force or weight in the circumstances was matter for a Court of fact to decide.

The point that this judgment of 1874 does not prove the previous or subsequent state of the possession is really a very small one. In the first place the learned Judge may have expressed himself badly. The subsequent state of the possession must clearly have depended on other evidence and there may have been other evidence also as to the previous state of the possession. But in any case, the judgment of 1874 declares the right of the *putnidars* to possession and as to subsequent possession there appears to be no dispute at all.

As to the case of *Kashi Nath Pal* v. *Raja Jagat Kishore Acharyya Chaudhuri* (3) to which Dr. Mitter referred, in my opinion, the learned Additional Judge has not committed the error which was there condemned. Apart from the negligible point as to the previous state of the possession, the learned Judge had not treated recitals in the judgment of 1874 as substantive proof in the present case of the truth of the facts recited. His treatment of the judgment of 1874 is within the principle that where a judgment is admissible, it is "conclusive evidence for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered."

The result is that in my opinion, the learned Vakil's main contention is not substantiated.

(3) 20 C. W. N. 643: s. c. 23 C. L. J. 583 (1916).

GOPI SUNDARI DASI *v.* KHEROD GOBINDA CHOWDHURY.

The learned Vakil raised another point in connection with a document described as a document of the year 1287 which is exhibit A on the record. This point, however, was not seriously pressed and no more need be said about it.

The last contention of the learned Vakil is that the Secretary of State should have been a party to this suit. As to this point, it appears, that a complaint made in the trial Court that the Secretary of State was not a party was overruled by the learned Munsif. The complaint, however, does not appear to have been repeated in the lower Appellate Court, and there is no decision of the learned Additional Judge upon it. It would seem that if this objection was ever seriously put forward it was afterwards abandoned. Moreover, the position of the Government in respect of the disputed lands is not very clear. I have referred to the statement in the judgments of the Courts below that the Government is recorded in the settlement proceedings as the *tahasildar* of the proprietors. Before we could say that the Secretary of State should or should not be a party, some further enquiry would be necessary as to the facts. That being so, I think this point fails in second appeal.

For the reasons I have stated I would dismiss this appeal with costs.

It is conceded that this judgment will govern appeal No. 2546 of 1921, which should accordingly be also dismissed with costs.

SANDERSON, C. J.—I agree.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2358 OF 1921.

SUHRAWARDY, J.
CHOTZNER, J.
1924,
25, February.

INDRA BHUSAN SAHA and ors., Defendants Nos. 1 to 9, Appellants,
v.
JANARDAN SAHA and anr., Plaintiffs, Respondents.

Civil Procedure Code (Act V of 1908), Or. 41, r. 27, admission of fresh evidence by Appellate Court, under what circumstances justified.

Where some tenants sued for recovery of possession of some lands and it was necessary to ascertain the status of the tenants for the determination of the question as to whether the suit was barred under Art. 3 of Sch. III of the Bengal Tenancy Act:

Held—*That the record-of-rights, which was published after the decision by the trial Court but before judgment was pronounced by the lower Appellate Court and which the Defendants with all due diligence were not in a position to produce in the latter Court, should be admitted in evidence under Or. 41, r. 27 of the Civil Procedure Code and considered in determining the status of the Defendants.*

RAJA INDRAJIT PRATAP BAHADUR SAHI *v.* AMAR SINGH (1) *and* BHAIRAB CHANDRA DUTT *v.* KALI KUMAR DUTT (2) *followed.*

This was an appeal against the decree of Rajendra Nath Roy, Esq., Additional District Judge of Zillah Jessore, dated the 15th of August 1921, affirming the decree of Babu Ravindra Nath Dhar, Munsif, 1st Court at Magura, dated the 21st of June 1920.

The facts will fully appear from the judgment.

(1) L. R. 50 I. A. 183: s. c. 28 C. W. N. 277 (1923).
(2) 37 C. L. J. 491 (1922).

INDRA BHUSAN SAHA *v.* JANARDAN SAHA.

Babus Surendra Chandra Sen and *Bhuban Mohan Saha* for the Appellants.

Babu Kshettra Mohan Ghose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

In this appeal the question raised is whether the Plaintiffs' suit is barred by limitation under Art. 3 of Sch. III of the Bengal Tenancy Act. Both the Courts below decreed the Plaintiffs' suit for recovery of possession of the property in dispute and the Defendants have preferred the present appeal. The decree passed by the lower Appellate Court is supported by the finding arrived at by that Court to the effect that the tenancy was neither an occupancy nor an under-raiyati one. The learned Judge therefore finds that Art. 3, Sch. III, Bengal Tenancy Act does not apply in this case. This finding virtually makes the status of the Defendants that of a tenure-holder. The controversy between the parties centred round the question whether the Defendants' interest in the land was that of an occupancy raiyat or of a tenure-holder. The Plaintiffs are the tenants of the Defendants' tenant. Their case is that the Defendants are the landlords of their landlord. The questions, therefore, that arise are, first, whether as the Defendants are the landlords of the Plaintiff's landlord, Art. 3 of Sch. III applies to this case; secondly, whether the Defendants are raiyats within the meaning of that article. The first question was not determined by the lower Appellate Court and the Defendants' appeal to that Court was dismissed on the finding that they were neither occupancy nor under-raiyats. With reference to this question the learned Vakil for the Appellants contends that the finding of the lower Appellate Court is not based on legal evidence. It appears that under the Talukdars, Gumani and Nakari held a non-transferable occupancy and under them Tilak Saha—the predecessor-in-title of the Defendants—held a *bekayemi jama*. Gumani and Nakari surrendered their holding and the learned Judge says that Tilak then became a tenant under the Talukdars of the village. He does not say how Tilak on the surrender of the tenancy by the superior landlord became a tenant directly under the Talukdars—whether there was a fresh settlement with Tilak or whether by virtue of the surrender by the superior landlord he became a tenant directly under the Talukdars. The learned Judge further does not state the circumstances under which Tilak who had a *bekayemi jama* under the raiyat of a non-transferable occupancy holding obtained a *kayemi maurashi jama* under the landlords. These are no doubt omissions in the judgment of the lower Appellate Court. But on a consideration of the evidence before him the learned Judge has come to the conclusion that the tenancy is neither an occupancy nor an under-raiyati one. We are not justified in second appeal in disturbing that finding of fact.

The Appellants have, however, raised another point.

They say that the record-of-rights which has been prepared with reference to the land in dispute could not be produced in time before the lower Appellate Court and that the case should, therefore, be re-tried in the light of the record-of-rights which raises a presumption in favour of the Appellants. It appears that the record-of-rights was published after the decision of the suit by the first Court but before the lower Appellate Court pronounced its judgment. The Appellants have filed an affidavit to show that with all diligence

INDRA BHUSAN SAHA *v.* JANARDAN SAHA.

they were not in a position to produce the record-of-rights in the lower Appellate Court before the hearing of the appeal and we are satisfied that they were unable to produce it through no laches on their part. That is an important piece of evidence which should be taken into account in determining the present question. As this evidence could not be produced before the lower Appellate Court, we are of opinion that it should be considered in determining the status of the Defendants by the Courts which are entitled to deal with facts. We therefore propose to admit the record-of-rights in evidence under Or. 41, r. 27 on the application of the Appellants. The course which we propose to adopt is justified by the observations made by their Lordships of the Privy Council in the case of *Raja Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1). A similar course was followed in the case of *Bhairab Chandra Dutt* v. *Kali Kumar Dutt* (2). The order that we make in this case is that this case should be remitted to the Court of first instance in order that that Court may try the question of the status of the Defendants after admitting the record-of-rights as evidence in the case. The Defendants will be entitled to adduce such evidence, if any, as is necessary to prove the record-of-rights. The Plaintiffs will be entitled to adduce such evidence as they consider necessary to rebut the presumption arising from the record-of-rights. It is not intended that there should be a *de novo* trial or that fresh evidence in respect of other points involved in this litigation should be adduced. The Court of first instance will then dispose of the case according to law.

The result is that this appeal is allowed, the decrees of the lower Courts are set aside and the case sent back to the Court of first instance to be re-tried according to the observations made above. The costs of this appeal will abide the result.

J. N. R. *Appeal allowed.*

(1) L. R. 50 I. A. 183; s. c. 28 C. W. N. 277 (1923).

(2) 37 C. L. J. 491 (1922).

CRIMINAL REVISIONAL JURISDICTION.

JURY REF. No. 12 OF 1924.

NEWBOULD, J.	THE KING-EMPEROR
B. B. GHOSE, J.	*v.*
1924,	SAGARMAL AGARWALLA, Accused.
29, May.	

Criminal Procedure Code (Act V of 1898), sec. 307—Powers of High Court in a reference against jury's verdict—Misdirection—Verdict, reasonableness of, the test.

In a reference under sec. 307 of the Criminal Procedure Code against the verdict of the jury, the High Court is to give due weight to the opinion of the Sessions Judge and of the jury after considering the entire evidence and then to acquit or convict the accused. It does not require the High Court to attempt to reconstruct the verdict of the jury when there is misdirection in the charge to the jury. In giving due weight to the opinion of the jury the High Court always hesitates to reverse a unanimous verdict unless it holds it to be unreasonable.

This was a Reference by Mr. R. E. Jack, Sessions Judge of the Assam Valley Districts, under sec. 307 of the Criminal Procedure Code, against a unanimous verdict of the jury.

The facts of the case will appear from the judgment.

Messrs. B. C. Chatterjee, N. K. Nag, Babus Satindra Nath Mukherjee and *Prafulla Chandra Ghose* for the Accused.

Babus Kshitish Chandra Chakrabutty and *Monmotha Nath Roy* (II) for the Complainant.

Mr. P. C. Mitter for the Crown.

THE KING-EMPEROR *v.* SAGARMAL AGARWALLA.

The JUDGMENT OF THE COURT was as follows :—

The accused Sagarmal was tried before the Sessions Judge of the Assam Valley Districts on two charges, firstly, with having forged an Ekrarnama, Ex. 2, a valuable security purporting to have been executed by Kanai Lal on 21st January 1905, and secondly, with having fraudulently and dishonestly used as genuine by filing in the Court of the Extra-Assistant Commissioner Mr. S. Goswami in a sec. 145, Cr. P. C. proceeding in 1922 the Ekrarnama Ex. 2 purporting to have been executed by Kanai Lal on 21st January 1905 which he knew or had reason to believe at the time of filing to be a forged document. The jury returned a unanimous verdict of not guilty. The learned Sessions Judge disagreeing with the jury's verdict on the second charge has thought it necessary to refer this case to this Court under the provisions of sec. 307 of the Code of Criminal Procedure.

The main facts of the case are as follows :—On the 21st November 1904 Kanai Lal purchased a piece of land from Ram Chandra Brahmin for Rs. 1,000. On the 9th March 1905 Kanai Lal died leaving a widow Musstt. Gigi. Kanai Lal left several debts and Gigi executed a deed of sale in respect of this land to one Joy Narain. It appears that though the document executed was a valid deed of sale there was some contemporaneous verbal arrangement between the widow and Joy Narain that Joy Narain should hold the property as trustee for Kanai Lal's creditors and after paying off Kanai Lal's debts out of the profits from the property should restore it to the widow. Effect was given to this arrangement and on the 24th April 1917 Joy Narain re-transferred the land to her. The land was in three plots occupied by different tenants. On one of those plots the tenant Ghanesyam had erected a mill. On the 18th August 1920 the accused Sagarmal purchased the mill and Ghanesyam's interest in this plot. On the 1st March 1921 Sagarmal sold to Nagarmal, the complainant, the property purchased from Ghanesyam. Nagarmal was given possession of the mill and it was arranged that possession of some other buildings in the property should not be delivered for three months. Sagarmal failed to keep his promise and on the 10th June 1921 Nagarmal instituted a suit against Sagarmal for possession. On the 30th July 1921 Sagarmal dispossessed Nagarmal from the mill by locking it up. Nagarmal then instituted proceedings under sec. 145, Cr. P. C. and got possession of the mill and the other houses in this plot of land through the Court. Then on the 6th July 1922 Sagarmal instituted fresh proceedings under sec. 145, Cr. P. C. in respect of the land on which the mill stood and in the course of these proceedings on the 18th October 1922 he filed a document Ex. 2 which is the document alleged to be forged on which the present prosecution is based.

This document is an Ekrarnama which purports to be executed by Kanai Lal on the 21st January 1905. In it Kanai Lal acknowledges that Sagarmal has bought the land *benami* in his name and that it will be returned to Sagarmal after 20 years and during that period Kanai Lal would enjoy the land but would have no right to transfer the same by sale or otherwise. It also provides for re-entry by Sagarmal in the case of transfer. In the meantime Nagarmal had brought two civil suits against Sagarmal, one on the 10th June 1921 which was decreed in Nagarmal's favour on the 10th May 1922 after reference to arbitration. Then on

the 15th November 1922 he brought a second suit on the basis of a lease which he had obtained from the widow Gigi and that suit was decreed *ex parte* on the 4th January 1923. When the document Ex. 2 was filed in the sec. 145 case, a few days later on the 24th October 1922 a petition was filed on behalf of Nagarmal stating that there were good grounds for believing the Ekrarnama to be a forgery and asking the Court to put its signature on both its sheets and to note the letters appearing in the water-mark of the cartridge paper of the second sheet.

The case for the prosecution rests on evidence which can be classified under three heads. The first is the direct evidence that the signatures on the document purporting to be those of Kanai Lal are not Kanai Lal's signatures. The second class of evidence relates to circumstances which make it improbable that the document was executed by Kanai Lal. The third class of evidence is evidence that from the water-mark on the second sheet of Ex. 2 it appears that that piece of paper could not have been in existence in 1905.

As regards the first class of evidence we think that the learned Sessions Judge did not direct the jury properly. Three witnesses have definitely deposed that they were acquainted with the signature of Kanai Lal and that the two signatures on Ex. 2 which purported to be his are not in his handwriting. The first of these is Nagarmal, the complainant, who deposed that Kanai Lal was his uncle and that he often received letters from him and knows his signature and that the two signatures marked "2 (1) and 2 (2)" are neither of them his signatures. The second of these witnesses is Bholaram who deposed that Kanai Lal was his sister's husband and that he was his *gomastha* for 1. also deposed that ...ther of th... tures 2 (1) and 2 (2) were Kanai ...and. signatures. The third of the witnesses is Ram Protap who had business dealings with Kanai Lal and has deposed that he knows the signature of Kanai Lal and that Exs. 2 (1) and 2 (2) are not his signatures. In dealing with this evidence the learned Sessions Judge has only referred to that of Bholaram's and has said to the jury: "In any case I do not suppose that you will regard this part of the evidence as conclusive." It has been argued before us that this means that both the learned Sessions Judge and the jury have rejected the evidence entirely. This is certainly not the correct interpretation of the learned Sessions Judge's remarks giving them their ordinary meaning. We think, it would have been better if he had told the jury that they should consider this evidence and attach such weight to it as they thought fit and not suggested to them that it was not of much importance. In our opinion it is of considerable importance, though we agree to this extent with the Sessions Judge that a conviction of forgery could seldom be based solely on non-resemblance of handwriting. But when this evidence is considered with the other evidence in the case it strongly supports the case for the prosecution. In connection with this evidence there is also the evidence to prove the only specimen of Kanai Lal's handwriting which has been produced on either side, Ex. 15 (1); that is an entry in the *Khata* produced by Ram Protap, and although on behalf of the defence it has been attacked as a spurious entry we see no sufficient ground for doubting its genuineness. Our attention has been drawn to certain facts, which are said to be suspicious, such as the fact that Kanai

THE KING-EMPEROR *v.* SAKRMAL AGARWALLA.

The JUDGMENT OF T Agarwalla to his follows, that the ... of the entry of ...ch the signature is part is different to that of the entry of the account in the *Khata*, that the stamp appears to have been regummed and that other persons had signed acknowledgments in the *Khata* by signing right across the page. In our opinion none of these are sufficient reasons for rejecting this evidence, when there appears no other sufficient reason for doubting the genuineness of the account book in which the entry is made. Explanations have been given as regards the form of the signature and the difference of the inks which to us appear satisfactory and the other objections seem to us trivial. We hold therefore that there is very strong evidence on the record that the signatures on this document are not those of Kanai Lal.

As regards the circumstances of the case the document in itself is one which it seems highly improbable that Kanai Lal should have executed. We have never in our experience known a case of *benami* sale in which he had no right for a period of 20 years. The property was of considerable value being situated in the town of Gauhati and no satisfactory reason has been given why Kanai Lal should have been allowed the benefit of this land for 20 years. It is suggested that the consideration was that he was to improve the land and induct tenants. But this, having regard to the nature of land, would not be a sufficient consideration for the benefit to be enjoyed. Further it was not proved that the accused at that time was in such pecuniary difficulty that it was necessary for him to resort to *benami* transactions. The facts show that Kanai Lal himself was in difficulties and this makes it extremely improbable that the accused should have chosen him as his *benamdar* at that time. It is further urged on behalf of the prosecution that had this document been genuine the accused could have asserted his right to possession at the time of the transfer to Joy Narain. We think there is some force in the contention on behalf of the accused that if this document were genuine it is possible that the accused might have been a consenting party to the arrangement with Joy Narain and therefore took no action in the matter. But this does not remove the initial improbability that such a document would have been executed. Another suspicious point is the conduct of the accused in allowing the second case instituted by Nagarmal to be decreed against him *ex parte* after he had taken adjournments for the purpose of filing a written statement. Had he really believed this document to be genuine he would surely have defended that suit.

We now come to the evidence as to the water-mark in the second page of the document. This sheet of paper is what is known as cartridge paper which is sold by Government to the public. There is evidence that the water-mark letters A, Z were not in existence at the time in 1905 when the document is alleged to have been executed. The case for the prosecution is that since 1907 secret marks have been introduced in the water-marks on this paper and they have been varied from time to time so that the officers of the Controller of Stationery can say from an examination of the document the period when the paper of the document was issued. It has been proved by Mr. Coster, Deputy Controller of Stationery, that mark Z was first used in 1920. In support of this statement also the letter of the Controller, dated 19th December 1919, to the paper manufacturers

THE KING-EMPEROR *v.* SAGARMAL AGARWALLA.

directing the use of this letter on water-marked papers manufactured during the year 1920 has been proved. The evidence of Mr. Coster has been attacked on two grounds, firstly on the ground that he has made contradictory statements, and secondly that a good deal of his evidence is irrelevant as he is not speaking from personal knowledge. We have been taken through the whole of Mr. Coster's evidence and we think that the attitude he adopted in the witness-box was unfortunate. He seems at first to have insisted on claiming privilege of not replying to questions and was not willing to give the assistance to the Court which he should have done. But his attitude was certainly not one which was unfavourable to the defence and we can see nothing that would justify us in thinking that he was not telling the truth in the definite statement which he did make.

As regards the second point it would appear that it is difficult to bring within the provisions of the Evidence Act certain portions of his evidence. But so far as the introduction of the letter Z from the commencement of 1920 is concerned the letter of the Controller to which we have referred is sufficient to establish the fact. Then Mr. Coster has definitely stated that secret marks were first introduced in 1907. That statement, he says, is based on a presumption from the letter Ex. 33 which was produced in original. In that letter the Controller asked the manufacturers of the paper to make arrangement that each sheet of paper shall bear a secret mark, that the mark for preference should be a letter and the letter should be changed at intervals of six months and his office informed confidentially. It is urged that as this letter is one accepting tender of the manufacturers it does not necessarily follow that secret marks had not been in use beforehand. But the inference drawn by Mr. Coster is supported by other evidence on the record. The cartridge papers that were used for other documents in 1906 and 1907 were proved Exs. 18 and 17 and on these no letter was found in water-marks. These were taken out at random from a large number of records produced from the Sessions Judge's record room and it has not been shown that on any cartridge paper used before 1907 was there any letter or other secret mark in the water-mark whereas in papers filed in 1908 a letter water-mark appears, it having been the letter B in that year. It would have been easy for the accused to have shown that a letter-mark if it had been in existence previously was to be found in some of these documents. But no attempt was made to do this. We hold on the evidence of Mr. Coster which is admissible that there can be no reasonable doubt that the second sheet of Ex. 2 was not in existence in 1905.

We think the jury were probably confused and did not properly appreciate the cumulative effect of the different classes of evidence. After taking their verdict the learned Sessions Judge asked them a further question as he intended to refer this case. He asked them to give their reasons for their doubt and their reply was: "To our mind the only part of the evidence that seems to bear on the question is the circumstantial part of it and that does not seem conclusive." It would appear therefore that the jury entirely overlooked the direct evidence to which we have already referred.

On behalf of the accused considerable reliance was placed on the fact that the endorsement on the back of the stamp which constitutes the first sheet of Ex. 2 indicates that the stamp was sold to Kanai

Lal. It seems very doubtful whether this entry is any evidence of that fact. But it is unnecessary to discuss this point as it appears at the trial not to have been disputed that this stamp may have been actually sold to Kanai Lal. What is pointed out by the prosecution is that the stamp of five rupees is not the proper stamp for the Ekrarnama written on it. It is further suggested that such a stamp might have been among Kanai Lal's papers unused and that the accused had access to those papers. This appears to have been so having regard to the contention that the accused was a party to the arrangement with Joy Narain and there is direct evidence that the accused's brother actually took some interest in the widow's affairs. We think that it is extremely probable that this stamp was found by the accused and the finding of this stamp had suggested to him the idea of forging this document.

It is further contended that there is no evidence that the accused used the document knowing it to be forged. It was not to be expected that the prosecution should give direct evidence on this point. But it is impossible to conceive that the accused could have received this document acknowledging a *benami* transaction in his favour believing it to be genuine if in fact there never had been such a *benami* transaction. It is also contended that if we hold that the accused used the document we should hold that he is liable for the offence punishable under sec. 471 read with sec. 465 and not for an offence punishable under sec. 471 read with sec. 467. It is said that he did not use the documents relying on it as a valuable security. Whether he did so or not, the nature of the offence does not depend on the use to which the document was put. If it was used fraudulently or dishonestly and if it purported to be a valuable security the punishment provided by sec. 467 and not that provided by sec 465 would be that to which the accused would be liable under sec. 471.

It is further contended that having regard to the unanimous verdict of the jury and to the fact that we have held that there has been some misdirection by the learned Sessions Judge we should put ourselves in the place of the jury and find as to what their verdict would have been if they had been rightly directed. This argument is based on a misconception of the provisions of sec. 307, Cr. P. C. That section requires us to give due weight to the opinion of the Sessions Judge and of the jury after considering the entire evidence and then to acquit or convict the accused. It does not require us to attempt to reconstruct the verdict of the jury. In giving due weight to the opinion of the jury we should always hesitate to reverse a unanimous verdict unless we hold it to be unreasonable. In the present case we hold that that verdict having regard to the cumulative effect of the evidence is not a reasonable one and that there cannot be any doubt as to the accused's guilt.

We accordingly accept this reference. The accused Sagarmal is acquitted of the first charge that of having committed the offence of forging the Ekrarnama Ex. 2 punishable under sec. 467, I. P. C. We convict him of the offence of fraudulently and dishonestly using as genuine the Ekrarnama Ex. 2 knowing or having reason to believe it to be a forged document, and under sec. 471 read with sec. 467, I. P. C. we sentence him to four years' rigorous imprisonment.

The accused must surrender to his bail and serve out this sentence.

H. C. S. *Reference accepted.*

PRIVY COUNCIL

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

LORD DUNEDIN.
LORD SHAW.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1923,
Heard, 13 and 14, December.
1924,
Judgment, 22, January.

HARI BAKHSH, Appellant,
v.
BABU LAL and anr., Respondents.

Hindu law—Mitakshara joint family—Separation amongst brothers, if effects separation as between brothers and their descendants—Onus of proving jointness or separation as between a brother and his descendants—Admission by father who takes up position adverse to son, if admissible against son— Stare decisis, *proper application of.*

A separation and partition between brothers constituting a joint Mitakshara Hindu family does not, by implication of law, effect a separation as between a brother and his descendants amongst themselves, so as to make it necessary to prove that the latter agreed to continue to be a joint Hindu family.

BALABUX LADHURAM *v.* RUKHMABAI (1), BALKISHEN DAS *v.* RAM NARAIN SAHU (2) *and* MUSSTT. JATTI *v.* BANWARI LAL (3) *distinguished.*

To understand and apply the decision of any Court, it is necessary to see what were the facts of the case in which the decision was given and what was the point which had to be decided.

Admissions made by a father in the course of a dispute in which as an interested party he affirmed that he and his coparceners had separated and in which he took a position adverse to his son are not admissible in evidence against the son.

(1) L. R. 30 I. A. 130: s. c. I. L. R. 30 Cal. 725; 7 C. W. N. 642 (1903).

(2) L. R. 30 I. A. 139: s. c. I. L. R. 30 Cal. 738; 7 C. W. N. 578 (1903).

(3) L. R. 50 I. A. 192: s. c. 28 C. W. N. 785 (1923).

This was an appeal from a decree, dated the 2nd July 1917, of the Chief Court of the Punjab, which reversed a decree, dated the 15th May 1914, of the District Judge of Delhi.

The question at issue in the appeal was whether the parties, who are Hindus governed by the Mitakshara, are joint or separate members of a family.

The District Judge found that the parties were joint. The Chief Court on appeal took the opposite view and dismissed the suit, but on review varied the decree in Plaintiff's favour.

The facts and findings thereon of the lower Courts are fully set out in the judgment of the Judicial Committee.

Sir G. Lowndes, *K. C.* and *Mr. E. B. Raikes* for the Appellant.

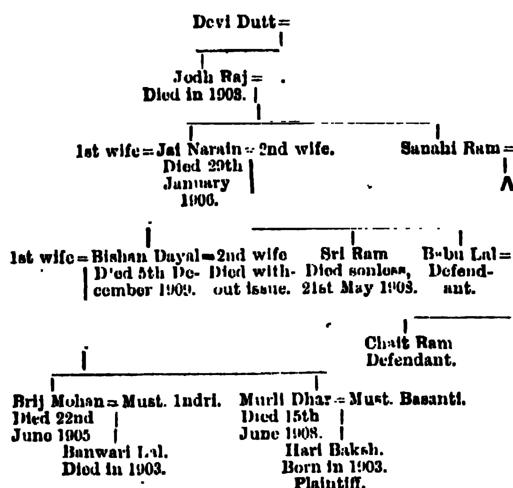
Messrs. A. M. Dunne, *K. C.* and *W. Wallach* for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Plaintiff from a decree, dated the 2nd July 1917, of the Chief Court of the Punjab, which reversed a decree, dated the 15th May 1914, of the District Judge of Delhi, and dismissed the suit. The suit is for the partition of property alleged by the Plaintiff to be joint property of the parties.

The parties are Hindus of the Bakkal Aggarwall caste, and are subject to the law of the Mitakshara. The following pedigree shows how the parties are related to each other :—

HARI BAKHSH v. BABU LAL.



Jai Narain and Bishan Dayal had daughters, to whom it is not necessary to refer.

The plaint in this suit, dated the 21st November 1910, was presented to the Court of the District Judge of Delhi by Hari Bakhsh, a minor, by his guardian and next friend, Musammat Basanti, who is his mother. The Defendants to the suit are Babu Lal and his son, Chait Ram.

The case of the Plaintiff was that he and the Defendants are the surviving male members of a joint Hindu family possessed of joint property, to a half-share of which he claimed to be entitled on partition, and he claimed to be entitled to a decree for partition and for accounts, and other reliefs. The District Judge of Delhi gave the Plaintiff the decree which he claimed. The Chief Court of the Punjab, on the 2nd July 1917, in appeal, dismissed the suit. On an application for review the Chief Court varied its decree dismissing the suit by granting the Plaintiff a decree for partition of the Maliwara house and a declaration that the Katra Ashrafi house at Delhi is the property of the family, and that the Plaintiff has equal rights in it with the Defendant, Babu Lal. To the application for review the two Defendants were Respondents, and it does not appear why the declaration was not made against Chait Ram as well as against Babu Lal.

The case of the Defendants was a denial that they and the Plaintiff were members of a joint family, and a denial that the property which the Plaintiff claimed to have partitioned was joint family property. Several defences were set up. The Defendants alleged that Bishan Dayal and his sons formed a separate joint family, and that they, after 1903, had separated from each other and had partitioned the property to which they were entitled; they further alleged that Sri Ram had adopted Chait Ram as his son. Their Lordships will at once deal with these allegations before proceeding to consider what was the main and substantial defence, if proved, to the suit, which was that in a separation and partition of 1903, in which Jai Narain and his branch had separated from Sanahi Ram and his branch, Jai Narain and his sons had between themselves separated, and he had partitioned between his son Bishan Dayal on the one side and his sons Sri Ram and Babu Lal on the other side the property which had fallen to him Jai Narain and his branch in the partition with Sanahi Lal.

The District Judge found that there was absolutely no proof of the alleged partition between Bishan Dayal and his sons after 1903. It was the fourth issue framed by the District Judge. It is not clear that that issue was discussed or considered in the appeal to the Chief Court, but in this appeal nothing was said to suggest that the finding of the District Judge on the fourth issue was wrong, and their Lordships consider that the finding of the District Judge may be accepted as

conclusive that there was no separation or partition between Bishan Dayal and his sons after 1903 or at any time.

The object of alleging that Chait Ram had been adopted by Sri Ram is obvious. If that adoption had been proved the Plaintiff could not in any event have been entitled on a partition to one-half of the property in question in this suit, or to more than one-third of it, and the Defendants would between them have been entitled to two-thirds of it. The District Judge and the Chief Court concurred in finding that the alleged adoption was not proved. Such an adoption by a brother of the only son of his brother would be most unusual, and their Lordships accept that concurrent finding as correct.

The first common ancestor of the parties shown in the pedigree is Devi Dutt. He, with his son, Jodh Raj, carried on business as merchants at Basan, in the State of Jaipur. Jodh Raj removed from Basan to Delhi, and at Delhi he and his sons carried on business as cloth merchants. They had also branch shops at Calcutta and at Cawnpore. In 1903 the shops which belonged to the joint family, then consisting of Jodh Raj, his sons and grandsons, were known as: (1) Jodh Raj Narain, at Delhi; (2) Jai Narain Khemka, at Delhi; (3) Sri Ram-Ram Lal, in which a stranger was a partner, at Delhi; (4) Murli Dhar Deoki Nandan, in which strangers were partners, at Delhi; (5) Jodh Raj Sanahi Ram, at Calcutta; and (6) Jai Narain Sanahi Ram, at Cawnpore.

It is an admitted fact that at the time when Jodh Raj died, in 1903, Jodh Raj, his sons Jai Narain and Sanahi Ram, and their respective descendants constituted a joint Hindu family possessed of the joint property already mentioned. It is also an admitted fact that in 1903, after Jodh Raj had died, Sanahi Ram and his son separated from Jai Narain and his descendants, and that on that separation the then joint property of the family at Delhi, Calcutta, and Cawnpore was partitioned between the two branches into which the joint family had separated, and that in that partition, which will hereafter be referred to as the partition of 1903, the shops (1), (2) and (3) above mentioned fell to Sanahi Ram and his branch, and the shops (4), (5) and (6) fell to Jai Narain and his branch.

The case of the Defendants is that in the partition of 1903 Jai Narain and his sons also separated from each other and ceased to constitute a joint family. The District Judge held that the onus of proving that Jai Narain and his sons had separated from each other was upon the Defendants, who alleged it. It has been argued on behalf of the Defendants before their Lordships in this appeal that the onus of proving that Jai Narain and his sons had separated was not upon the Defendants, and that it was for the Plaintiff to prove that they had not separated. Their Lordships will presently express their opinion on that question, but they will first consider whether the evidence which was before the District Judge and the Chief Court proves or does not prove that Jai Narain and his sons separated, and for that purpose it is necessary to state some facts which have not so far been referred to by them.

Bishan Dayal lived in Cawnpore and had been in charge of and had managed the shop there. Bishan Dayal married twice, and after his second marriage he and his daughter-in-law, Musammat Basanti, had quarrelled, and he offered, through her brother, Rs. 30,000 as an inducement to her to hand over to him the custody of his grandson, Hari Bakhsh, the Plaintiff. That offer was refused, and Bishan Dayal

HARI BAKHSH v. BABU LAL.

determined to oppose a claim which Musammat Basanti was making on behalf of her son, Hari Bakhsh, for the partition of the property now in question in this suit. On the 7th August 1909, a suit was instituted in the Court of the Subordinate Judge of Cawnpore on behalf of Hari Bakhsh by his mother, Musammat Basanti, against Babu Lal, his son Chait Ram, and Bishan Dayal for the partition of the property now in question in this suit. Subsequently Musammat Basanti was added as a Plaintiff in that suit, and Musammat Sarasuti, the widow of Sri Ram, and Musammat Indri, the widow of Brij Mohan, were added as Defendants. The Additional Subordinate Judge of Cawnpore, before whom that suit was, on the 15th April 1910, framed the issues for trial and ordered that the parties should file all their documents on that day. The Additional Subordinate Judge probably considered the evidence which the parties had brought before him, and having come to a conclusion that the Court of the Subordinate Judge had not jurisdiction to hear and determine that suit for partition, he, on the 29th August 1910, returned the plaint to be presented in the proper Court. It is not now necessary for their Lordships to consider whether the Additional Subordinate Judge had or had not jurisdiction to hear and determine that suit. They refer to it with an object which will presently appear.

As has been already mentioned, Bishan Dayal was a Defendant to the suit for partition which was brought in the Court of Cawnpore on the 7th August 1909. He made his Will on the 26th November 1909, and in it stated that in Sambat 1960, his step-brothers, Sri Ram and Babu Lal, had separated from him. In that suit of 1909 Bishan Dayal filed a written statement on the 30th November 1909, in which he alleged that Jai Narain in the partition of 1903 had divided the property which had fallen to his share between him, Bishan Dayal, on the one side and Sri Ram and Babu Lal on the other side. Bishan Dayal died on the 5th December 1909. On the part of the Defendants, it has been contended in this appeal that the statements of Bishan Dayal in his Will and written statement, above mentioned, are admissible in evidence in this suit as against the Plaintiff, and prove that Sri Ram and Babu Lal had separated in 1903 from Bishan Dayal, that the family then ceased to be a joint family, and that the share of the joint family which fell to Jai Narain and his descendants in the partition of 1903 was partitioned between Bishan Dayal on the one side and Sri Ram and Babu Lal on the other. It appears to their Lordships that these statements of Babu Lal, who was then an interested party in the disputes and was then taking a position adverse to Hari Bakhsh, cannot be regarded as evidence in this suit and are inadmissible.

Excluding from consideration the statements of Bishan Dayal in his Will and written statement, the only admissible evidence not open to objection and not ambiguous and inconclusive is, if genuine, a letter which purports to have been written by Bishan Dayal to his brother Babu Lal, dated "Phagan Sudi 2, Sambat 1965" (22nd February 1909), which was for the first time produced by the Defendant Babu Lal on the 14th October 1911. That letter (Ex. D. 14) as translated is as follows :—

"Compliments from Bishan Dial to Sri Ram-Babu Lal.

"Jai Narain in your presence separated us, the three brothers, on Asarh Badi 10, Sambat 1960. The whole work of Delhi remained with you, the two brothers, and the work at Cawnpore fell to my lot. This partition was effected by Jai Narain. We,

HARI BAKHSH *v.* BABU LAL.

the three brothers, agreed to his settlement and do not object to it. But the account of Sambat 1960 is not yet settled. Whatever is due under that account will be paid by you, the two brothers. I have nothing to do with it. The property situate at Basan and the houses in Delhi will remain joint. We of our own accord have written this. No one can object to it

"Dated Phagan Sudi 2, Sambat 1965.

"What is written above is correct.

"(Sd.) BISHEN DIAL.
"(In Hindi characters.)
"Witnessed by—
"CHHOTE LAL, Khemka.
"(In Hindi characters.)
"Witnessed by—
"GANGA RAM, Bhot.
"(In Hindi characters.)
"Witnessed by—
"SUNDER MAL, Khemka.
"(In Hindi characters.)
"Witnessed by—
"HARI RAM, Kanodia.
"(In Hindi characters.)
"Witnessed by—
"SHEO NARAIN.
"(In Hindi characters.)"

Their Lordships are informed by Counsel engaged in this appeal that Asarh Badi 10, Sambat 1960, was the 20th June 1903.

The only witness at the trial who said that the letter was in the writing of Bishan Dayal was the Defendant, Babu Lal. The only witnesses of the five to the letter who spoke to it at the trial were Chota Lal, Hari Ram and Sheo Narain, and not one of them said that it was written or executed in his presence. Sheo Narain in his evidence at the trial said that Bishan Dayal told him that it was a *farkhati*—that is, a release. At the trial before the District Judge Babu Lal said as to it (Ex. D. 14):—

"The release to which (I) certified yesterday was with me. I have given (I gave it) it to my Pleader, Anand Sarup, for production (at the trial at Cawnpore). They said they would produce it when necessary. I cannot say if they produced it or not. After the close of the case I got back the release from my pleader."

Anand Sarup was the Defendants' pleader at the hearing of the suit before the Additional Subordinate Judge at Cawnpore. Ex. D. 14 was, if a genuine letter, one which should have been filed on behalf of the Defendants in the Court of the Subordinate Judge of Cawnpore on the 15th April 1910, in obedience to his order of that date. It was, if genuine, a most important document—in fact, the most important document for their case. It never was filed or produced at the trial before the Additional Subordinate Judge. If it was in the possession of Anand Sarup at any time, he should have been called as a witness at the trial before the District Judge of Delhi to speak to the fact and to explain why it was not filed or produced in the Court of the Additional Subordinate Judge. He was not called as a witness before the District Judge of Delhi and no explanation of his absence was offered. The District Judge found, as a fact that Ex. D. 14 was a forgery. The Chief Court, on the contrary, held that Ex. D. 14 was a genuine document executed by Bishan Dayal. Their Lordships, after a careful consideration, find that Ex. D. 14 is not a genuine document, and was manufactured for the purpose of being used in evidence at the trial before the District Judge of Delhi.

Excluding Ex. D. 14 and the statements in the Will and written statement of Bishan Dayal, which have been already mentioned, from evidence which can be considered in this suit, there is no documentary evidence which proves either that Bishan Dayal and his brothers, Sri Ram and Babu Lal, had or had not separated. The learned and able Counsel engaged in this appeal have been compelled

HARI BAKHSH v. BABU LAL.

to admit that fact, and that all the other evidence in the suit is as consistent with the brothers never having separated as with the brothers having separated. The District Judge found that the brothers had not separated; the Chief Court, which treated Ex. D. 14 as evidence, found that they had separated. Their Lordships agree with the District Judge that it is not proved that the brothers ever did separate.

It remains to be considered whether on the separation and partition between Jai Narain and his brother, Sanahi Ram, in 1903, it is to be presumed, unless the contrary is proved by the Plaintiff, that Jai Narain and his sons, Bishan Dayal, Sri Ram and Babu Lal, and Jai Narain's grandsons, Brij Mohan and Murli Dhar, all of whom had then been born and were then living, ceased to be amongst themselves members of a Hindu joint family consisting of Jai Narain and his descendants then living. It must be remembered that they were Hindus governed by the law of the Mitakshara, and that each of them had on his birth become a co-parcener in any ancestral property which had come to Jai Narain. The share which Jai Narain took as the share of him and his branch on his separation from his brother, Sanahi Ram, was ancestral property.

It has been contended in this case on behalf of the Defendants that the effect of the separation and partition between Jai Narain and his brother, Sanahi Ram, in 1903, after the death of their father, Jodh Raj, was to cause, by implication of law, a separation between Jai Narain and his descendants and to make them cease to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family, and it was contended on behalf of the Defendants that that proposition is to be inferred from the decisions of the Board in *Balabux Ladhuram* v. *Rukhmabai* (1), *Balkishen Das* v. *Ram Narain Sahu* (2) and *Musstt. Jatti* v. *Banwari Lal* (3). It appears to their Lordships that the proposition contended for is a proposition which cannot reasonably be inferred from the decisions of the Board or any of them which have been cited. To understand and apply a decision of the Board or of any Court it is necessary to see what were the facts of the case in which the decision was given, and what was the point which had to be decided. In *Balabux Ladhuram* v. *Rukhmabai* (1), it appears that three Hindu brothers, Girdhari Lahl, Kunyaram and Ladhuram, owned a shop which had been founded by their father, and that in 1869 or 1870 Kunyaram separated from his brothers, took out his share, amounting to about Rs. 11,000 and started a shop of his own. In that case Lord Davey, in delivering the judgment of the Board, said :—

"It appears to their Lordships that there is no presumption, when one co-parcener separates from the others, that the latter remain united. . . . Their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other fact."

The remaining members of the joint family in that case were the brothers, Girdhari Lahl and Ladhuram. The Board was not considering, and had not to consider, whether, if Girdhari Lahl, for example, had sons living when Kunyaram separated from his brothers, Girdhari

(1) L. R. 30 I. A. 130: s. c. I. L. R. 30 Cal. 725; 7 C. W. N. 642 (1903).

(2) L. R. 30 I. A. 139: s. c. I. L. R. 30 Cal. 738; 7 C. W. N. 578 (1903).

(3) L. R. 50 I. A. 192: s. c. 28 C. W. N. 785 (1923).

HARI BAKHSH v. BABU LAL.

Lahl and his sons would cease to be as between themselves a joint family. That was not the case and did not arise in the case before the Board.

In *Balkishen Das* v. *Ram Narain Sahu* (2) the four members of a Hindu joint family, who were cousins, entered into an *ikrarnama* which stated that defined shares in the whole estate of the joint family had been allotted to the several co-parceners. It was there held that the agreement defining the shares effected a separation in estate, and that evidence of some of the co-parceners having continued to enjoy their shares in common would not affect their tenure of their property or their interest in it.

In *Musst. Jatti* v. *Banwari Lal* (3) four Hindu brothers who were living as a joint Hindu family executed a deed by which the assets of the family were described and divided between them, and one of the four brothers, Ishar Das, was finally paid out, and thereafter the business was carried on by the three remaining brothers, to whose separate accounts the profits of the business were carried in equal shares. In that case Lord Dunedin in delivering the judgment of the Board, after quoting the passage above set out from Lord Davey's judgment, approved of and adopted the statement of the trial Judge in the suit, who said :—

"There is absolutely no material on the file from which it can be inferred that the three brothers continued united or reunited as co-parcenary members of a joint Hindu family, while Defendant's own books show the contrary. . . . . I have therefore not the least hesitation in finding that on the separation of Ishar Das the family of the parties ceased to be a joint Hindu family in the strictest sense of the term; or, in other words, its members ceased to be co-parceners."

The members ceased to be co-parceners of each other, but it is not suggested that if one of those members happened to have had sons who were his co-parceners when Ishar Das separated from his brothers, such sons and their father would cease to be co-parceners constituting together a joint and undivided family.

If their Lordships were to hold in this case that it is to be presumed in law that the separation and partition effected in 1903 by Jai Narain and his brother, Sanahi Ram, involved necessarily a separation between Jai Narain and his sons, their Lordships would, it appears to them, be introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara, for which no authority has been brought to the attention of their Lordships.

In conclusion, their Lordships find that Jai Narain and his sons did not separate, that no separation between Bishan Dayal and his brothers, Sri Ram and Babu Lal, or between any of them, has been proved, and they will humbly advise His Majesty that the decree of the Chief Court of the Punjab should be set aside, and the decree of the District Judge of Delhi of the 15th May 1914, should be restored and affirmed. The Defendants (Respondents) must pay the costs of this appeal and of the appeal to the Chief Court.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors : *Messrs. Ranken, Ford & Chester* for the Respondents.

G. D. M.

(2) L. R. 30 I. A. 139: s. c. I. L. R. 30 Cal. 738; 7 C. W. N. 578 (1903).

(3) L. R. 50 I. A. 192: s. c. 28 C. W. N. 785 (1923).

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1923,
Heard, 10 and 11, December.
1924,
Judgment, 29, January.

MUSAMMAT LAJWANTI and ors., Appellants,
v.
SAFA CHAND, since deceased, and ors., Respondents.

Hindu law—Adverse possession of property by Hindu widow as such—Title acquired, if stridhan *or widow's estate—Widow's estate, not a life-estate.*

A Hindu widow is not a tenant for life but has a widow's estate in her deceased husband's estate, and if possessing as a widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as stridhan *but she makes them good to her husband's estate.*

This was an appeal from a decree, dated the 23rd March 1917, of the Chief Court of the Punjab, which reversed a decree, dated the 28th November 1912, of the District Judge of Gurdaspur.

This litigation referred to the estate of Jawahara Mal who died in 1852 leaving three widows.

The Plaintiff-Appellant was a posthumous daughter of the deceased by his second wife and she claimed the property as his daughter and heir after the death of the last surviving widow Jai Devi.

The relationship of the parties appears from the following pedigree :—

Bhim Sen. — Ram Bhuj. — Jawahara Mal. — Gowhur Sen.

Bhim Sen: Hem Raj. Jamiat Raj.
Ram Bhuj: Safa Chand and other sons and grandsons (Defendants).
Gowhur Sen: Sons and grandsons.

Jawahara Mal:
1st wife Mt. Bhagbari, d. 1862. — Hira Nand, (alleged posthumous son).
2nd wife Mt. Lachmi, d. 1900. — Mt. Lajwanti, (posthumous daughter), Plaintiff Appellant.
3rd wife Mt. Jai Devi, d. 1910.

At the commencement of the suit by Musammat Lajwanti the Respondents were in possession of the property, mutation having been effected in their names by the revenue authorities after Jai Devi's death, and they claimed to be rightly entitled thereto as the nearest reversionary heirs of Hira Nand, an alleged posthumous son of Jawahara Mal who had died in infancy.

The District Judge made a decree for possession of half the property in favour of the Appellant and from that decree both parties appealed to the Chief Court of the Punjab, which reversed the decree of the lower Court and dismissed the suit.

The learned Judges held that the birth and death of Hira Nand were established and that consequently the Respondents as his reversionary heirs were entitled to the property.

Messrs. L. DeGruyther, K. C. and *Wallach* for the Appellants contended that even if Hira Nand did exist the Respondents' title had been destroyed by the adverse possession of the widows.

They referred to sec. 28 of the Limitation Act, IX of 1908; *Krishna Behari Roy* v. *Brojeswari Chowdhranee* (1) and *Sham Koer* v. *Dah Koer* (2).

Sir G. Lowndes, K. C. and *Messrs. H.*

(1) L. R. 2 I. A. 283 : s. c. I. L. R. 1 Cal. 144 (1875).
(2) L. R. 28 I. A. 132 : s. c. I. L. R. 29 Cal. 664; 6 C. W. N. 657 (1902).

MUSAMMAT LAJWANTI *v.* SAFA CHAND.

N. Sen and *Bishan Narain* were heard for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—Jawahara Mal, a Datt Brahmin, living in the Punjab, died in 1852. He was survived by three wives, but at the time of his death had no children. Shortly after his death, as alleged, his eldest wife had a posthumous son named Hira Nand, who died after a few months. He undoubtedly had a posthumous daughter by his second wife, who is Plaintiff in this action. He had three brothers, the eldest Bhim Sen, who in turn had two sons Hem Raj and Jamiat Raj. The other two brothers were Ram Bhuj and Gowhur Sen, who both had sons and grandsons who are some of the Respondents in this case. He and his brothers were possessed of considerable property, ancestral and otherwise. After his death his widows were entered in the settlement records as proprietors of a fourth share of certain Mouzahs. In 1865 a new settlement was being made, and in furtherance of the entries to be made therein an action was commenced by Hem Raj in 1867 asking that the entries of all parties except himself should be deleted in respect of certain Mouzahs. Hem Raj instituted the action in two capacities. He was sole heir of his father Bhim Sen, his brother Jamiat Raj having renounced all his rights in his favour, and he was also, he alleged, the adopted son of Jawahara Mal and as such his heir. He cited all the members of the joint family and the two widows of Jawahara Mal, the eldest widow having died in 1862. The first question that had to be determined was whether the Mouzahs, as to which he made exclusive claim, were the separate property of Bhim Sen and Jawahara Mal, or whether they were family property. As to certain of the Mouzahs it was determined that they were the separate property acquired by Bhim Sen and Jawahara Mal. That being so he was entitled to one-half as sole heir of his father. His claim to the exclusive possession of the other half depended upon whether he could establish his adoption and this was found against him. Appeals were taken as to different Mouzahs by all the parties concerned. The case went to the Chief Court and the Chief Court finally decided as follows :—

His claim to the one-half was confirmed. As regards his claim to the other half it was said that he had abandoned his claim in virtue of adoption, and it was pointed out that his uncles, on Jawahara Mal's death, would always be preferable to him. That disposed of his claim, but the judgment then went on to deal with the questions that had arisen on the various appeals between the different Defendants. The judgment continued thus :—

"The only other question for decision with regard to these Mouzahs is whether the widows are entitled to hold the half-share left by Jawahara Mal for their lives. They clearly are so entitled as, according to the facts as found above, the fathers of the Appellants who took the inheritance were separate in food and estate from Jawahara Mal at the time of his death."

This final judgment was given in 1869 and the widows were duly entered as proprietors of certain Mouzahs in respect of their widows' estate of the estate of their late husband Jawahara Mal. They entered into possession. The elder of the two—that is to say, the original second widow—lived till 1900, when she died. The Mouzahs were then possessed by the third and surviving widow till her

death in 1910. On her death the daughter of the second wife commenced the present suit to have declared her right to the Mouzahs as heir of her father Jawahara Mal. Her claim is opposed by various descendants of Jawahara Mal's brothers who claim as heirs of Hira Nand, to whom the property went on his birth after his father's death, they alleging that the long possession of the widows was only by reason of an arrangement that they should hold the Mouzahs as maintenance. Certain persons who might have been Respondents backed up the Plaintiff and were added as Plaintiffs, a very unnecessary proceeding, as no decree could pass in their favour. As already stated, the Plaintiff denied that Hira Nand ever existed. The District Judge held that Hira Nand never had existed. He then decreed half the property to the Plaintiff and half to certain of the Respondents on grounds which no one supports and which need not here be specified. Both parties appealed. The learned Judges of the Chief Court reversed that judgment and found that Hira Nand did exist, and that in consequence the Respondents are entitled as heirs to his estate. They mention a question as arising on adverse possession of the widows, but they did not really deal with the argument that arises thereon. Appeal has been taken from that decree.

Their Lordships will assume that the judgment is right in saying that Hira Nand did exist, but if he existed, then, in the litigation which arose in 1867 and was finished in 1869, his heirs who either are, or are represented by, the various Respondents in this case, were entitled totally to extrude the widows from the Mouzahs in question. All that the widows were entitled to was maintenance. The allegation that they were allowed to possess the Mouzahs in name of maintenance was not admitted to be proved and further it is straight in the teeth of the judgment of the High Court of 1869 already quoted. It is clear, therefore, that though the judgment may have been wrong there has been adverse possession by the widows from 1869 to 1910 and the Respondents' title is destroyed by sec. 28 of the Limitation Act. It was then argued that the widows could only possess for themselves; that the last widow Devi would then acquire a personal title; and that the Respondents and not the Plaintiff were the heirs of Devi. This is quite to misunderstand the nature of the widows' possession. The Hindu widow, as often pointed out, is not a tenant for life but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate. The result is the Mouzahs are Jawahara Mal's estate, the Respondents having no title to attack them, and as such the Plaintiff is entitled as heir to her father to take them.

An attempt was made to say that the result as above being founded on the Mitakshara law a different result should be arrived at because of a custom in the Punjab. Their Lordships are not able to consider any such plea because the record was void of averment and of proof of the precise custom which would lead to a different result from that obtained under the Mitakshara law. The result is that the appeal must be allowed and judgment pronounced, in favour of the Plaintiff, with costs here and in the Courts below, and their Lordships will humbly advise His Majesty accordingly.

MUSAMMAT LAJWANTI *v.* SAFA CHAND.

Solicitor: *Mr. H. S. L. Polak* for the Appellants.

Solicitors: *Messrs. Ranken, Ford & Chester* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 341 OF 1922.

NEWBOULD, J. B. B. GHOSE, J. 1924, Heard, 9 and 10, April. Judgment, 10, April.	KHAJEH SALAUDDIN and ors., Judgment-debtors, Appellants, *v.* MUSST. AFZAL BEGUM, Decree-holder, Respondent.

Civil Procedure Code (Act V of 1908), Or. 32, r. 4 (2), guardian ad litem, *appointment of—Guardian* ad litem *in the suit, if and when continues as such in execution proceedings—Court of Wards Act (IX, B. C., of 1879), secs. 4, 51, 56—Manager, Court of Wards, when competent to be appointed guardian* ad litem *for minor judgment-debtors in proceedings to execute decrees of the Original Side—Limitation Act (IX of 1908), Sch. I, Art. 183—Revivor extending the period of limitation, order for transmission of decree, if constitutes.*

In cases of decrees merely for payment of money, the guardian ad litem *appointed in the suit does not continue as such without fresh appointment in the execution proceedings; the litigation having terminated by a final decree, there is no longer any* lis pendens.

KINSMAN *v.* KINSMAN (1) *followed.*

KRISHNA PROSAD SINGH *v.* GOSTHA BEHARI KUNDU (2) *distinguished.*

As soon as proceedings are started in the Mofusil to execute a decree of the Original Side of the High Court, which has been transferred to a Mofusil Court, sec. 51 of the Court of Wards Act becomes applicable, and the Court of Wards' manager is the only person to be appointed guardian ad litem *of the minor judgment-debtors in such a proceeding.*

The order of the Master on the Original Side for transmission of a decree for execution, with a certificate of non-satisfaction, upon an application for transmission and not for execution, not being a judicial determination that the right to execute the decree still subsisted does not constitute revivor so as to extend the period of limitation under Art. 183 of the First Schedule to the Limitation Act (IX of 1908).

CHATTRAPAT SINGH *v.* SAIT SWAMI MAL (3) *followed.*

This was an appeal preferred on the 11th September 1922 against an order of the Subordinate Judge, 1st Court, Zilla Dacca (Babu Probodh Chandra Basu), dated the 5th June 1922.

The Respondent No. 1 is the transferee by assignment in writing, dated the 10th May 1918, of a decree for dower money which her daughter, since deceased, obtained in the Original Side of the High Court on 24th February 1909 against the Appellants who are minors and the Respondent No. 2 who attained majority before the filing of the execution petition. The transferee applied on 30th April 1920 for transfer of the said decree of High Court for execution to the Court of the District Judge, Dacca. The Master on the Original Side passed an order on 17th May 1920 for such transfer and a copy of the decree together with a certificate of non-satisfaction was sent to the Court of the District Judge for execution. The decree was then transferred to the Subordinate Judge, 1st Court for execution.

(1) 1 B. & M. 622 (1831).
(2) 5 C. L. J. 434 (1907).
(3) I. L. R. 43 Cal. 903: s. c. 20 C. W. N. 859; 23 C. L. J. 645 (F. B.) (1916).

KHAJEH SALAUDDIN *v.* MUSST. AFZAL BEGUM.

The estate and persons of the minor judgment-debtors were under Court of Wards, Dacca. Application for execution was filed on 2nd December 1921 and this was beyond twelve years from the date of decree of the Original Side. In this application for execution the minor judgment-debtors were described as represented by Babu Anil Nath Basu, Solicitor, High Court, who was appointed their guardian *ad litem* by the High Court in the suit, and the decree was sought to be executed by attachment of the minor judgment-debtors' money in the hands of Mr. H. C. F. Meyer (manager, Dacca Nawab's estate under the Court of Wards). The latter thereupon appeared and preferred objections to the execution under secs. 47 and 151 of the Code of Civil Procedure, that he might be appointed the minors' guardian in the execution case, that the execution could not proceed with Babu Anil Nath as their guardian *ad litem* and that the application for execution was time-barred under Art. 183 of the 1st Schedule of the Limitation Act. The third judgment-debtor who had attained majority appeared and stated he had no objection to the decree being executed as against him. The execution Court determined that the application for execution was not barred and that Mr. Meyer had no *locus standi*.

Mr. B. L. Mitter and *Babu Surendra Nath Guha* for the Appellants.

Babus Probodh Kumar Das and *Radhika Ranjan Guha* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

On the 24th February 1909 one Mussammat Johena Begum obtained a decree for Rs. 25,000 and costs against her two minor children and her minor step-son. On the 8th October 1920 an application was made to this Court on the Original Side for an order that the certified copy of this decree together with a certificate of non-satisfaction be transmitted to the Court of the District Judge of Dacca for execution. This application was made by one Afzal Begum who alleged that she was the assignee of the decree. On the 7th May 1920, the Master on the Original Side of this Court transferred the decree to the Dacca Court for execution. With the copy of the decree was forwarded a certificate signed by a Judge of this Court under Or. 21, r. 6. The District Judge of Dacca transferred the execution case to the Subordinate Judge, 1st Court. On the 2nd December 1921 an application for execution of this decree was filed in that Court and that is Execution Case No. 120 of 1920. In that application three judgment-debtors were named and were described as represented by H. C. F. Meyer, manager, Court of Wards, Dacca. The Court of Wards' manager objected to the execution of the decree and his objection was dealt with as Miscellaneous Case No. 42 of 1921. The execution case was kept pending until the disposal of the miscellaneous case. But in the end the assignee of the decree-holder allowed the execution case to be dismissed on the allegation that there was some mistake in the application for execution. On that execution case being dismissed the miscellaneous case was also dismissed. Then on the 2nd December 1921 a second application for execution was made and in this application the minors were described as "being represented by Babu Anil Nath Basu, Vakil, High Court, who has been appointed guardian *ad litem* by the High Court." This gentleman is a solicitor who had been appointed guardian *ad litem* of the

minors in the Original Side. In this application the assignee of the decree-holder asked for attachment of the money of the minor judgment-debtors in the hands of H. C. F. Meyer, manager of the Court of Wards, Dacca. In this execution case also the manager filed a petition objecting to the execution of the decree which was numbered Miscellaneous Case No. 20 of 1922. Objection was taken on several grounds with most of which we are not concerned in the present appeal. The learned Subordinate Judge held that the manager had no *locus standi* to represent the minors in this case but he nevertheless went into the merits of his objection and decided amongst others the issue of limitation against him.

This appeal is preferred on behalf of two of the minor judgment-debtors by Mr. Meyer. The third judgment-debtor had attained majority before this appeal was filed. As the appeal has been argued before us the main point that arises is whether the lower Court was right in holding that the applications for execution are proceedings in suit and the guardian *ad litem* appointed in the original suit would be guardian *ad litem* in the execution proceeding unless he be removed by an order of the Court and a new guardian *ad litem* appointed. We are unable to agree that the guardian *ad litem* appointed in the suit continues as such without a fresh appointment during the execution proceeding. As was observed by Lord Lyndhurst in *Kinsman* v. *Kinsman* (1) in order to constitute *litis pendentia* there must be a continuance of *litis contestatio*, and therefore if the suit is ended by decree there is no longer any *lis pendens*. The learned Vakil who appeared for the Respondent was unable to show us any authority to support the proposition that the guardianship by the guardian *ad litem* appointed during the suit continued after the litigation had been terminated by the final decree. He drew our attention to certain rulings in which it had been held that the guardian for the suit continued during subsequent appeals from the decree. But this is irrelevant to the question whether he continued as such during the execution proceedings. We are speaking now of simple decrees as the decree in this suit for the payment of money and not with relation to mortgage decrees or decrees for delivery of accounts. The only case out of those cited which appears at all relevant on this point is the case of *Krishna Prosad Singh* v. *Gostha Behari Kundu* (2). It was there held that where a person is named as the uardian *ad litem* in the application for execution and notice under sec. 248, C. P. C. is issued upon him as such guardian it must be presumed that he has been appointed guardian by implication by the Court. But to hold that a person who has been named in the execution proceeding as guardian *ad litem* may under certain circumstances be presumed to have been appointed is a very different matter from holding that the guardian during suit continues to be the guardian without fresh appointment in the execution proceeding. However, this case is clearly distinguishable on the ground that it was decided under the Civil Procedure Code of 1882. Under the Code now in force of 1908 a guardian *ad litem* of a minor cannot be appointed without his consent and there can therefore now be no presumption of appointment from the mere issue of notice.

We must hold therefore that the ap-

(1) 1 R. & M. 622 (1831).

(2) 5 C. L. J. 434 (1907).

pointment by the High Court of Babu Anil Nath Basu as guardian *ad litem* during suit was no bar to the appointment of the Court of Wards' manager as guardian *ad litem* in the execution proceeding. We are also of opinion that when the Court of Wards' manager peared and asked to be appointed as guardian *ad litem* he should have at once been so appointed under the provisions of sec. 51 of the Court of Wards Act. Though this section was not applicable to the original suit in consequence of the provisions of sec. 56 it became applicable as soon as the execution proceedings were started at Dacca. In spite of its finding that the manager had no *locus standi*, the Court did determine the issue treatin him as a party to the suit; so we can determine whether his findin on this contested issue of limitation was a correct finding. Obviously the second application for execution would be time-barred on the face of it. The Respondent relied on the proceeding resulting from the petition filed by Afzal Begum on the 30th April 1920 as a revivor to extend the period of limitation under Art. 183 of the First Schedule to the Limitation Act. We hold that the Full Bench decision in *Chattrapat Singh* v. *Sait Swami Mal* (3) is authority for holding that this application was not a revivor. We have called for the original petition from the Original Side of this Court and we find that it contains no prayer for execution of the decree. The only prayer contained in the petition has been set out above. On this petition the order passed was first: - "Let notice issue." Then on the 17th May 1920 there was the following order:- "Upon reading the notice and affidavit of service and upon hearing the attorney for the applicant (the other parties not appearing and no cause being shown) the usual order is made for transmission. Leave granted to proceed with execution." It is contended that this was a judicial determination that the right to execute the

see how there could have been any such determination.

The only questions which arose were whether there had been a valid assignment of the decree and whether there had been any recorded satisfaction of the decree. Until the application for execution was made there was no need for the judgment-debtors, even if notice had been served on them, to appear and contest the application. They could well wait until the assignee sought to execute the decree. Further it does not appear that any guardian *ad litem* was appointed for the minors who could have opposed this application on their behalf if it had been thought necessary to do so. Though the judgment-debtors Appellants are described as infants in the petition no guardian *ad litem* is named in the petition, and it is clear that no such guardian was appointed by the Court. If as we hold there was no revivor the application for execution was barred by limitation and should have been rejected on that ground.

It is contended that Khajeh Nuruddin who has since attained majority has filed an application in the Lower Court consenting to the decree being executed as against him. No order was passed on that petition and we must hold under r. 4, Or. 41, C. P. C., that the order should be set aside in his favour also.

The result is that this appeal is decreed. The order of the Lower Court is set aside and the application for exe-

(3) I. L. R. 43 Cal. 903: s. c. 20 C. W. N. 889 23 C. L. J. 645 (F. B.) (1916).

cution filed on the 2nd December 1921 is rejected.

The Appellants will get their costs from the decree-holder Respondent in this and in the lower Court. We assess the hearing fee at ten gold mohurs.

H. D. C.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES No. 2328 OF 1921 AND No. 418 OF 1922.

SUHRAWARDY, J. CHOTZNER, J. 1924, 19, February.

KAMALESH RAY and anr., Plaintiffs, Appellants, v. DWARIKA NATH KOTAL, Defendant, Respondent.

Co-sharer landlord, if can sue for his own share of the rent without impleading the other co-sharers or without proving separate collection or praying for apportionment of rent. A simple suit for rent, if can be converted into one for apportionment of rent—Apportionment suit, necessary parties for.

A co-sharer landlord is not entitled to sue for his own share of the rent without making the other co-sharers parties or without proving separate collection or praying for apportionment of rent, and a simple suit for rent cannot be converted into a suit for apportionment of rent.

A suit for apportionment of rent should be properly framed so as to implead all the co-sharers and the tenants who are necessary parties.

ISSUR CHANDRA v. RAM KRISHNA (1) *and* SATYES CHANDRA v. HAJI JILFAR RAHMAN (2) *referred to and followed.*

These were appeals preferred on the 11th of November 1921 against a decree of the Additional Subordinate Judge of Zillah Burdwan (Babu Gopal Das Ghosh), dated the 30th June 1921, affirming a decree of the Additional Munsif at Kalna (Babu Rupamay Chatterjee), dated the 1st of May 1920.

The facts and circumstances of the case will appear from the following judgment of the lower Appellate Court:—

"Plaintiffs say that they are co-sharer landlords having 11/18th share. They allege that on partition, in a civil suit, amongst the co-sharers, the Plaintiffs' claimed share has been established and that they are hence entitled to get the said share of the Defendants' rent. They sue for their own share of the rent in these two suits, alleging that the Defendants hold these lands in suit under these Plaintiffs and their co-sharers and have not paid the rent for 1322 to 1325 Pous.

The defence is that the Plaintiffs are not the landlords of the Defendants. That the co-sharer, who is not a party to this suit, is the landlord. That the suits are barred by *res judicata*. There was a plea of payment and objection under secs 12 and 15 of the Bengal Tenancy Act.

The learned Munsif found from the evidence all these points in favour of the Plaintiffs. But he dismissed these suits because the Plaintiffs are co-sharer landlords and have sued for their own share of rent, without making the other co-sharer party and without proving separate collection of rent or praying for an apportionment of rent.

The partition decree is dated the 13th October 1917. The years in suit are 1322 to 1325. By this decree the Plaintiffs have got 11/18th share of the Defendants' rent and the other co-sharers have got the rest. The allegations in the plaint clearly show that the Plaintiffs are

(1) I. L. R. 5 Cal 902 (1880).
(2) 27 C. L. J. 438 (1917).

KAMALESH RAY v. DWARIKA NATH KOTAL.

fractional landlords and sue for their own share in these *jamas*. Of course there is no objection that these suits are not maintainable for the defects for which they have been dismissed. But the defence is an absolute denial of relation of landlord and tenant. There is absolutely no evidence of separate collection or for the matter of that any collection at all by the Plaintiffs. On these facts the case of *Protap* v. *Kamala* (3) has no application to these suits. So in my opinion the learned Munsif has rightly dismissed these suits for these defects."

Babus Satya Charan Sinha, Indu Bhusan Roy and *Promotho Nath Mukerjee* for the Appellants.

Babu D. N. Bagchi for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

These appeals arise out of suits brought by the Plaintiffs for realization of rent from the Defendants to the extent of 11/18th share on the allegation that such share was allotted to them by partition. The defence was that the Plaintiffs were not entitled to recover a share of the rent as there was no separate collection. Both the Courts have found that the Plaintiffs are not entitled to recover rent on the ground that a co-sharer landlord cannot sue for his own share of the rent without making the other co-sharers parties or without proving separate collection or praying for apportionment of rent. The learned vakil who appears for the Appellants contends that these cases may be treated as cases for apportionment of rents. He bases his argument on the partition decree among the owners of the land in which the Plaintiffs' share is found to be

(3) 10 C. W. N. 818 (1906).

11/18ths. We are of opinion that we cannot convert a simple suit for rent into a suit for apportionment of rent. A suit for apportionment of rent should be properly framed so as to implead all the co-sharers and the tenants who are necessary parties. The law with regard to such suit has been laid down in the case of *Issur Chandra* v. *Ram Krishna* (1) which has been explained in the case of *Satyes Chandra* v. *Haji Jilfar Rahman* (2). The view expressed in the last case is thus stated: "A co-sharer cannot as a matter of right, claim from the tenants what he estimates to be his proportionate share of the rent."

The result is that the view taken by the Courts below is correct and that these appeals are dismissed with costs.

J. N. R. *Appeal dismissed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 239 OF 1924.

NEWBOULD, J.
MUKERJI, J.
1924,
Heard, 4, July.
Judgment,
10, July.

HIRA LAL GHOSH, Petitioner,
v.
THE KING-EMPEROR, Opposite Party.

Witness—Omission to read over deposition to witness in presence of accused—Illegality vitiating the trial—Criminal Procedure Code (Act V of 1898), sec. 360—Defect not cured by sec. 537.

The omission to read over his deposition to a witness, in the presence of the accused or of his pleader, is not an irregularity curable under sec. 537 of the Criminal Procedure Code, but an illegality vitiating the trial.

Per NEWBOULD, J.—*Having regard to the general object of Chap. XXV of the Criminal Procedure Code, which is to ensure the accuracy of the record and afford*

(1) I. L. R. 5 Cal. 902 (1880).
(2) 27 C. L. J. 488 (1917).

HIRA LAL GHOSH *v.* THE KING-EMPEROR.

information to the accused as to what the evidence at the trial is, compliance with sec. 360 (1) of the Code is imperative and not only directory.

HOWARD *v.* BODINGTON (1), LIVERPOOL BOROUGH BANK *v.* TURNER (2) *and* GOVERNMENT OF ASSAM *v.* SAHEBULLA (3) *referred to.*

Practice of not complying with the provisions of sec. 360 (1) condemned.

JYOTISH CHANDRA MUKERJEE *v.* EMPEROR (4) *referred to.*

Statement of Objects and Reasons and Draft Bill (III of 1914) cited.

Per MUKERJI, J.—*A witness should be given an opportunity of explaining and correcting contradictions in his deposition, and the statement which he finally declares to be true is to be taken to be the one he intended to make.*

Sec. 360 is not only for the benefit of the witness but also of the accused. It is mandatory, and the failure to comply with its provisions deprives the accused of the very valuable right of checking the depositions of the witnesses.

EMPEROR *v.* JOGENDRA NATH GHOSE (7), JYOTISH CHANDRA MUKERJEE *v.* EMPEROR (4), HARO NATH MALO *v.* SONAI MIA (13) *and* QUEEN *v.* ISSUR RAUT (9) *approved of.*

IN RE OKHOY KUMAR (11) *explained.*

RE: SINGIRI ERADU (12) *and* BOGRA *v.* EMPEROR (6) *referred to.*

This was a Rule granted on the 18th March 1924 against the conviction under sec. 161, I. P. C. and s . passed upon the Petitioner by the Magistrate, Alipore (Mr. Abdul Gafiar), dated the 14th December 1923, which order was confirmed on appeal by the Sessions Judge of Alipore (Mr. G. N. Roy) on the 11th February 1924.

The accused was one of the jurors assisting the Assistant Sessions Judge in trying a case under sec. 304, I. P. C. These proceedings were started at the instance of the senior defence pleader engaged in the case. The latter, Babu Hit Lal Guha, declared that the accused went to his house on the 3rd day of the trial, and asked for a bribe, suggesting that the bribe was for the foreman. A petition was directed to be placed before the trial Judge (Assistant Sessions Judge), and thereafter there was an enquiry by the Assistant Sessions Judge who found that a *primâ facie* case had been made out. The case was then taken up by the Police Magistrate, Alipore, and resulted in conviction.

It appeared that the depositions of five witnesses had been signed by them, but there were no certificates that the depositions of these witnesses had been read over to them in the presence of the accused or his pleador. The depositions of the remaining two witnesses bore neither their signatures nor any such certificates.

An appeal from the said conviction was dismissed by the Sessions Judge.

Against this the Petitioner moved this Court and obtained the present Rule on the ground, amongst others—

that the mandatory provisions of sec. 360, Cr. P. C. not having been complied with, the conviction is bad in law and should be set aside.

Mr. Bagram (with *Babus Satindra Nath Mukerjee* and *Manindra Lal Bose*) for the Petitioner.

(1) L. R. 2 P. D. 203, 211 (1877).
(2) 30 L. J. Ch. 379 (1860).
(3) I. L. R. 51 Cal. 1 (1923).
(4) I. L. R. 36 Cal. 955, 959 (1909).
(6) I. L. R. 34 Mad. 141 (1910).
(7) I. L. R. 42 Cal. 240 (1914),
(9) 8 W. R. Cr. 63 (1867).
(11) 7 C. L. R. 393 (1880).
(12) 2 Weir. 485 (1894).
(13) 28 C. W. N. 119 (1922).

.HOSH *v.* THE KING-EMPEROR.

Khondkar, Deputy Legal Remem-.ncer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

NEWBOULD, J.—The question we have to decide is whether an omission by a Court to comply with the provisions of sec. 360, Cr. P. C. vitiates the trial. The provisions of the section are mandatory, and in the case of two witnesses these provisions were totally disregarded. The test to be applied in deciding "whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience" is to be found in the judgment of Lord Penzance in the case of *Howard* v. *Bodington* (1), following the conclusion expressed by Lord Campbell when sitting as Lord Chancellor in the case of the *Liverpool Borough Bank* v. *Turner* (2) to which reference was made by the learned Chief Justice of this Court in *Government of Assam* v. *Sahebulla* (3). "In each case you must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory." The general object to be secured by Chap. XXV of the Code, which includes sec. 360, is to ensure the accuracy of the record, and also that the accused should know and understand what evidence is given at the trial. The reading over the evidence to the witness is so essential to the framing of an accurate record that I feel bound to hold that the direction in sec. 360 that the evidence shall be read over to the witness is imperative and not only directory. It follows, therefore, that the omission to read over their evidence to these two witnesses was an illegality which vitiated the trial. It is not necessary to consider whether this omission has in fact caused a failure of justice, since sec. 537 can have no application.

We have reason to believe that the practice which was condemned by Jenkins, C. J., in 1909, when delivering his judgment in *Jyotish Chandra Mukerjee* v. *Emperor* (4), still continues. We anticipate that the result of our decision in this case may have serious consequences, but that is no reason why we should fail in our duty to insist that the subordinate Criminal Courts should hold their trials in accordance with the clear provisions of the Code of Criminal Procedure.

Before the last amendment of this Code, in the Statement of Objects and Reasons attached to the first Draft Bill (III of 1914), the following passage occurs—" At present it is believed that sec. 360, which requires the Court to read over the evidence of each witness to him in the presence of the accused or his pleader, is not always observed in practice and occasions unnecessary inconvenience. The amendment " (*i.e.*, cl. 83 of the Bill) provides accordingly for a witness reading over his deposition himself, and further that the deposition need only be read in the presence of the accused if the accused so desires." In the Bill introduced in the Imperial Legislative Assembly on 20th September 1917 this clause was omitted. This Court, when consulted on the Bill, strongly urged that sec. 360 of the Code be amended as was suggested by cl. 83 of the Bill as originally framed.

(1) L. R. 2 P. D. 203, 211 (1877).
(2) 30 L. J. Ch. 379 (1860).
(3) I. L. R. 51 Cal. 1 (1923).
(4) I. L. R. 36 Cal. 955, 959 (1909).

HIRA LAL GHOSH *v.* THE KING-EMPEROR.

The Legislature having deliberately decided that the inconvenience caused by the provisions of this section did not justify an alteration of the law on this point is a further reason, if any is necessary, why we should insist on a strict observance of this clear provision of the law.

I have had the advantage of reading the judgment my learned brother is about to deliver. As I am in agreement with the views expressed by him, I have thought it unnecessary to refer in my judgment to other points that were argued before us.

The Rule is made absolute. The conviction of the Petitioner and the sentence passed on him are set aside, and we direct that he be re-tried according to law.

MUKERJI, J.—Provisions corresponding to those contained in sec. 360 of Act V of 1898 have been on the Statute Book ever since the Code of Criminal Procedure came into existence in 1861. The section corresponds to the section bearing the same number in Act X of 1882 and to sec. 339 of Act X of 1872 and appeared in Act XXV of 1861 as sec. 198. In the last mentioned Act there was a provision contained in sec. 199 for attaching a memorandum to the evidence of each witness, signed by the Magistrate and stating that the evidence was read over to the witness in a language which he understood, naming the language in which it was explained, and if the fact was so, that the witness had acknowledged the evidence to be correct; and when the evidence had not been taken down by the Magistrate with his own hand, the memorandum was to further state that the evidence was taken down in the presence and hearing of the Magistrate and under his personal direction and superintendence. This provision was subsequently repealed, and a memorandum is no longer necessary. Under the Codes of 1861 and 1872 the evidence was to be read over, when the personal attendance of the accused was dispensed with, in the presence of his agent, while later on the word "agent" was substituted by the word "pleader." Under the Codes of 1861 and 1872, if the evidence was taken down in a language different from that in which it was given, and the witness did not understand the language in which it was taken down, the witness might require the evidence to be interpreted to him in the language in which it was given or in a language which he understood; by the Act of 1882 it was enacted that the evidence so taken as aforesaid was to be interpreted in that way, and the necessity of a request on the part of the witness was done away with. Inspite of a proposed amendment the law has undergone no alteration in the amendments effected by Act XXIII of 1923.

Sub-sec. (*1*) of sec. 360 provides that the evidence shall be read over to the accused or his pleader and shall, if necessary, be corrected. Evidently such correction may be made at the instance of the Court itself or of the accused or his pleader or anybody else; there is no restriction on that score. Sub-sec. (*2*) deals with corrections or memorandum to be made where the witness denies the correctness of the record. Sub-sec. (3) makes a provision so that the witness may understand what has been recorded. If the provisions of this section, as well as of sec. 361 are strictly observed, the accused as well as the witness will understand exactly what the evidence has been, and will be in a position to see that a correct record has been made of it. Apart from omissions or inaccuracies that may occur in making the record, a witness, when the evidence is read over to him, may some-

HIRA LAL GHOSH v. THE KING-EMPEROR.

times desire to supplement his answer or modify it or explain the sense of it. Before a deposition is closed a witness should be given an opportunity of explaining and correcting any contradictions it may contain, and only the statement which the witness finally declares to be the true one must be taken to be the statement he intended to make. The accused should not be deprived of the benefit of this opportunity being given to the witness. Moreover, if any corrections or alterations or additions are to be made, it is only fair that they should be made to the knowledge of the accused, for it may sometimes happen that he may have something to say as to why they should or should not be made. These considerations lead me to dissent from the view that has sometimes been taken to the effect that sec. 360, Cr. P. C. was enacted only for the protection of the witness. That undoubtedly was one of the objects: but the other object, namely, to safeguard the interests of the accused is equally clear from the wording of the section itself.

The wording of the section is mandatory. The object of the provision being to ensure the accuracy of the record, and also that the accused should know and understand the evidence that is given at the trial, the provisions must be held to be obligatory and not merely directory. In the case of *Jyotish Chandra Mukerjee* v. *Emperor* (4) a Sessions Judge refused to follow the provisions of the section on the ground that it would involve a great waste of time and observed: "The section seems to me directory and not obligatory. If the witness detects a mistake he can come back and say so. This is the universal practice in Sessions Courts, my experience extending to about six such Courts." ***Optima est legum interpres consuetudo.*** Sir Lawrence Jenkins, C. J. observed that he did not agree with the view, for the custom indicated by the learned Judge could not alter the plain words of the Act.

The failure to comply with the provisions of the section affects both the witness and the accused, as indicated above: and the effect of such failure or non-compliance may be judged from two distinct points of view, *viz.*, as affecting the witness himself and as affecting the accused.

So far as it affects the witness in a subsequent trial of the witness himself, arising out of the deposition so recorded, there is some conflict of judicial opinion as regards the effect of a failure to observe the strict provisions of this section. A tendency is seen in some of the rulings to disregard an informality or irregularity, which, however patent, is not calculated to throw doubt upon the authenticity of the deposition, especially where the witness has admitted its correctness and has not been prejudiced by the omission to comply strictly with the provisions. In cases, however, where all the guarantees of authenticity, which the law prescribes, have been violated, there is a consensus of opinion that the deposition will not be admitted in evidence. As instances of the former class may be quoted the cases of *Rakhal Chandra Laha* v. *Emperor* (5) and *Bogra* v. *Emperor* (6). As instances of the latter class may be cited the cases of *Emperor* v. *Jogendra Nath Ghose* (7) and *Mohendra Nath Misser* v. *Emperor* (8). So far as the witness himself is concerned the consi-

(4) I. L. R. 36 Cal. 955, 959 (1909).

(5) I. L. R. 36 Cal 808 (1909).
(6) I. L. R. 34 Mad 141 (1910)
(7) I. L. R. 42 Cal. 240 (1914)
(8) 12 C. W. N. 845 (1908).

HIRA LAL GHOSH *v.* THE KING-EMPEROR.

derations which arise are of a wholly different character from those which arise in the case of the accused, and they need not be referred to here. Nor again is it profitable to refer to the authorities which deal with the effect of non-compliance with the provisions of Or. 18, r. 5, C. P. C.

Turning now to the effect of the non-compliance of the proceedings as against the accused, it is obvious in the first place that such non-compliance deprives the accused of a very valuable right which the law secures for him. In requiring that the reading over shall be done in the presence of the accused or his pleader the legislature obviously intended to give the accused or his pleader an opportunity of checking the correctness of the deposition. That this was the intention has been held by this Court in the case of *Emperor* v. *Jogendra Nath Ghose* (7). In that case the record had been handed over to a witness to read the deposition after it had been recorded, and this Court observed as follows: "We are of opinion that this is not a sufficient compliance with the provisions of sec. 360, sub-sec. (*1*) of the Criminal Procedure Code, inasmuch as that sub-section requires that the evidence should be read over in the presence, that is to say, in the hearing of the accused, in order that the accused should have an opportunity of correcting any mistake in it." That being so, failure to comply with the provisions may deprive the accused of advantages which may accrue to him by the observance thereof. In the case of *Queen* v. *Issur Raut* (9), where, under the Code of 1861, the Magistrate had recorded in English the depositions of witnesses given in the vernacular, the witnesses not understanding English, and there was no memorandum such as was required by sec. 199 of the Act that the depositions had been explained to the witnesses in a language which they understood, this Court (Kemp and Glover, JJ.) observed as follows:—"Such being the case the evidence was not recorded as the law directs. We are also unable to understand how the prisoners could cross-examine witnesses whose evidence-in-chief was taken down in a language foreign to the accused, and of which no attempt at explanation was made. There has therefore been an error in law in the procedure of the case by which the accused have been materially prejudiced, and this Court acting as a Court of Revision quashes the trial and sentence and directs the prisoners to be discharged. We also direct the Sessions Judge to call the attention of the Cantonment Magistrate to the provisions of the Code of Criminal Procedure which relate to the examination of witnesses and accused parties and to enjoin upon him a strict observation of these provisions which are the only guarantee this Court can have that the examination is conducted fairly and properly." In *In the matter of Mahesh Chandra Banerjee* (10), Norman, J., refrained from expressing any opinion as to the correctness or otherwise of the above decision observing as follows:—"I may say, however, that I should require to re-consider the case further before I can fully assent to the ruling on this subject in *Queen* v. *Issur Raut* (9)." In the case of *In re Okhoy Kumar* (11), Garth, C. J. and Maclean, J., held that sec. 339 of Act X of 1872 being for the protection of witnesses only,

(7) I. L. R. 42 Cal. 240 (1914).
(9) 8 W. R. Cr. 63 (1867).

(9) 8 W. R. Cr. 63 (1867).
(10) 4 B. L. R. App. 1, 11 (1870).
(11) 7 C. L. R. 398 (1880).

the fact that witnesses did not understand their deposition when read over, although they may not have required them at the time to be interpreted, affords no grounds for an application by the accused to set aside a conviction. The case of *Queen* v. *Issur Raut* (9) does not appear to have been brought to the notice of the learned Judges who decided the case of *In re Okhoy Kumar* (11). Moreover, it would appear that in that case the depositions were in point of fact read over in English, and the pleader for the prisoners, and one of the prisoners himself understood English. There was, therefore, a compliance with a portion of sec. 339 while the last part of it, which enabled the witnesses to require the depositions to be translated in a language which they understood, was not complied with; but in fact, there was no such requisition by the witnesses. The language of this part of the section which corresponded to sub-sec. (3) of sec. 360 of Act V of 1898 was widely different, as has already been pointed out. The Madras High Court (Collins, C. J. and Parker, J.) in the case of *Re: Singiri Eradu* (12) set aside the acquittal of an accused on the ground that the trial was vitiated by a material irregularity when the deposition of each witness was read over to him while the examination of the next witness was proceeding, it being held that under the circumstances the accused could not pay attention to the evidence so read over. This decision was referred to by Miller, J., in the case of *Bogra* v. *Emperor* (6) and it was observed as follows:—"It was held by Collins, C. J. and Parker, J., in *Re: Singiri Eradu* (12) that procedure identical with that adopted by the Sessions Judge in the present case is materially irregular. The deposition taken in the Sessions Court was irregularly taken, and it may be that the conviction based upon such evidence could not be sustained." In the case of *Rakhal Chandra Laha* v. *Emperor* (5), where the deposition of a witness was read over in the presence of one out of several accused persons, Jenkins, C. J. and Mookerjee, J., observed as follows:—"In the case before us, so far at least as one of the original accused persons was concerned, the deposition was read over in the presence of his pleader, and was undoubtedly admissible in evidence as against that accused." In the case of *Jyotish Chandra Mukerjee* v. *Emperor* (4), Jenkins, C. J., held that the omission to read over the depositions under sec. 360, Cr. P. C., under the special circumstances of that case, was not fatal. It does not appear from the report what those special circumstances were; but it is evident from the judgment itself that objection on the ground of non-compliance was taken on behalf of the Crown and it does not appear that the accused relied upon it as a ground of their appeal.

There is, therefore, abundant support for the proposition that the accused is vitally interested in the due compliance with the provisions of sec. 360, Cr. P. C., and a failure in that respect amounts to a material irregularity which ordinarily must be taken as causing him prejudice. Such a material irregularity proceeding from the disregard of the express provision of the law, is, in my judgment, nothing short of an illegality, and, as such, not curable under sec. 537, Cr. P. C. The same view has been taken in the case of

(6) I. L. R. 34 Mad. 141 (1910).
(11) 7 C. L. R. 393 (1880).
(12) 2 Weir. 435 (1894).

(4) I. L. R. 36 Cal. 955, 959 (1909).
(5) I. L. R. 36 Cal. 808 (1909).

HIRA LAL GHOSH *v.* THE KING-EMPEROR.

Haro Nath Malo v. *Sonai Mia* (13), where the depositions were not read over to the witnesses at all on the ground that it was not the practice to do so except in "Sessions triable cases."

In the case before us the evidence was not read over to the witnesses at all. The depositions of five of the prosecution witnesses bear at their foot the signatures of the witnesses and we are asked to presume from those signatures alone that the witnesses had actually read the depositions before they put their signatures down; and as regards two of the prosecution witnesses their signatures even do not appear, and it is admitted that, so far as their depositions are concerned, there was no attempt made to comply even with the spirit of the section. There is, therefore, no escape in the present case, from the conclusion that the whole trial was conducted in utter disregard of the imperative provisions of the law as contained in sec. 360, Cr. P. C. and was, therefore, a nullity.

I accordingly agree in the order passed by my learned brother that the Rule should be made absolute, the conviction of and the sentence passed on the Petitioner set aside and the Petitioner tried again in accordance with law.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 333 OF 1924.

NEWBOULD, J. CHAKRAVARTI, J. 1924, 26, June

BISSESWAR, Accused, Petitioner, *v.* THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), secs. 239, 181 and 182—Place of trial—Jurisdiction—Magistrate, if has power to try offences committed outside his jurisdiction in pursuance of conspiracy entered into within his jurisdiction—Joinder of such offences with those committed within jurisdiction, if permissible.

If a conspiracy is entered into in District A and acts are committed in pursuance of that conspiracy in District B, the Magistrate of District A can try the offence of conspiracy but cannot try the accused in the same trial for offences committed outside his District.

Sec. 239, Cr. P. C. cannot give jurisdiction to a Magistrate who has not jurisdiction under the provisions of any of the sections in Chap. XV of the Criminal Procedure Code.

The mere fact that the offences could have been tried jointly under sec. 239, Cr. P. C., if committed within the jurisdiction of a Magistrate, will not give him jurisdiction to try the offences committed outside his jurisdiction.

ABDUL SALIM *v.* KING-EMPEROR (1) *referred to.*

This was a Rule granted on the 28th April 1924 against the conviction of the Petitioner and the sentence passed on him by the Police Magistrate of Alipore (A. Gaffur, Esq.), on the 6th February 1924, which order had been confirmed on appeal by the Sessions Judge of Alipore (G. N. Roy, Esq.), on the 31st March 1924.

The facts are briefly as follows:—One Bisseswar along with others were charged with conspiracy to commit theft and of receiving stolen property and assisting in concealment thereof and were tried jointly by the Police Magistrate of Alipore. The conspiracy was alleged to have been entered into at Kidderpore and Behala within the jurisdiction of the Alipore Magistrate and the latter offences were committed in respect of some goods in transit from the Howrah Station to Calcutta and so within the jurisdiction of the Howrah Magistrate or

(13) 28 C. W. N. 119 (1922).

(1) 26 C. W. N. 880 (1921).

the Chief Presidency Magistrate, Calcutta. Ultimately all the accused were acquitted except Bisseswar, who was convicted of receiving stolen property and assisting in concealment thereof under secs. 411 and 414, I. P. C. Against this conviction Bisseswar obtained the present Rule.

Mr. Camell and *Babu Satindra Nath Mukerjee* for the Petitioner.

Mr. Khundkar, Officiating Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This Rule raises an interesting point on the question of jurisdiction. The facts as found so far as they are necessary for dealing with this point are as follows :—The Petitioner and others were charged with conspiracy to commit theft and also offences punishable under secs. 411 and 414, I. P. C. They were also charged with specific offences punishable under the two last sections. Ultimately all the accused except the Petitioner were acquitted. The Petitioner was also acquitted on the charge of conspiracy but convicted of the offences punishable under secs. 411 and 414. The property which was found to be stolen property was abstracted from a consignment of goods on their way from the Howrah Station to the business premises of Messrs. Allen Brothers and Company. The important point in this connection is that during this transit the goods were always in the jurisdiction of either the Howrah Magistrate or the Chief Presidency Magistrate of Calcutta. The conspiracy between the accused was alleged to have been entered into at Kidderpore and Behala and other places. Kidderpore and Behala are within the jurisdiction of Alipore and the case w[illegible] tried by the Alipore Police Magistrate and the appeal heard by the Sessions Judge of Alipore. The lower Courts relying on the decision of this Court to which one of us was a party in *Abdul Salim* v. *King-Emperor* (1) have held that the conspiracy charge although not established rendered the joint trial of all the accused on these charges legal. But the lower Courts have overlooked the important point of difference between the facts of this case and the present case. It is not now disputed that on the authority of this ruling the accused in this case could have been jointly tried if all the offences with which they were charged had been alleged to have been committed within the territorial jurisdiction of the Magistrate who tried the case. But what is urged is that sec. 239 cannot give jurisdiction to a Magistrate who has not jurisdiction under the provisions of any of the sections in Chap. XV of the Code of Criminal Procedure; in other words, the point may be put in this way :—If a conspiracy is entered into in District A and acts are committed in pursuance of that conspiracy in District B, the Magistrate of District A can try the conspiracy but cannot try the accused in the same trial for acts committed outside his District. We think that the proposition is correct and that unless there is something to be found in Chap. XV which would enable the Magistrate in Alipore to try the accused for offences committed outside his jurisdiction the mere fact that the offences could have been tried jointly under sec. 239, Cr. P. C., if committed within his jurisdiction, will not give him jurisdiction to try them. It is suggested that sec. 182 would give the Magistrate jurisdiction, but we are unable to hold that it can be applied to the facts of the present case. The only clause which it is

(1) 26 C. W. N. 680 (1921).

BISSESWAR v. THE KING-EMPEROR.

suggested might make them triable is the clause which runs thus:—Where the offence consists of several acts done in different local areas it may be inquired into or tried by a Court having jurisdiction over any of such local areas. But none of the offences charged consisted of several acts of which some were done in the local area over which the trying Magistrate had jurisdiction. The conspiracy was complete on the agreement and the acts done in other local areas over which the trying Magistrate had no jurisdiction, were not part of the conspiracy. Also the acts of receiving or retaining stolen property charged against this Petitioner were not acts done within the jurisdiction of the Alipore Magistrate. Cl. (3) of sec. 181 has also been referred to. But this is of no assistance to the prosecution, since although now the offences of theft and the possession of stolen property may be enquired into by a Court having jurisdiction either where the offence of theft was committed or where the property was possessed, in the present case the allegation is that both the theft and the possession by the Petitioner were outside the Alipore jurisdiction.

Taking this view we must make this Rule absolute and set aside the conviction and sentence passed on the Petitioner on the ground that the trying Court had no jurisdiction. His bail-bond will be discharged. This order will be no bar to the authorities taking further steps for the prosecution of the Petitioner on charges under secs. 411 and 414, I. P. C., in a Court having jurisdiction if they think it necessary to do so.

J. N. R. *Rule made absolute.*
H. C. S.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
1923,
Heard, 23 and 25, October.
Judgment, 10, December.

RAMLAL HARGOPAL, Appellant,
v.
KISANCHANDRA and ors., Respondents.

Civil Procedure Code (Act V of 1908), secs 104 (2), 109 and Sch II, para. 20—Award of arbitrator concerning matters outside the Court's jurisdiction—Court, if may entertain application to file the award—Proceedings void—High Court's order on appeal from decision of first Court filing or refusing to file award—Privy Council, appeal to, if lies—Jurisdiction, objection to, entertained and given effect to by Judicial Committee though not urged in India.

Sec. 104 (2) of the Civil Procedure Code which precludes a second appeal from an order passed in appeal from a decision filing or refusing to file an arbitrator's award deals with internal appeals within the limits of British India. There is nothing in sec. 104 to take away the general right of appealing to the Crown given by sec. 109 of the Code.

Held—*That as there was no substantial question decided by the award which affected property within the jurisdiction of the Court in which application was made to file the award, the proceedings before it and of the High Court on appeal were liable to be set aside as incompetent.*

Though the objection was not urged in the Courts in India, the Judicial Committee felt bound to take notice of it as it was an objection to the jurisdiction and to give effect to it when it was manifest on the facts admitted and proved that there was defect of jurisdiction.

RAMLAL HARGOPAL v. KISANCHANDRA.

This was an appeal from a decree, dated the 13th January 1919, of the Court of the Judicial Commissioner of the Central Provinces (Berar jurisdiction) which reversed a decree, dated the 22nd December 1917, of the second Additional District Judge of Amraoti.

The appeal arose out of an application, under sec. 525 of the Civil Procedure Code, 1882 (sec. 20 of Sch. II of the Civil Procedure Code, 1908), made by the contesting Respondents, that an award made in a matter referred to arbitration without the intervention of the Court be filed.

The facts leading up to the application may be stated shortly as follows.

The ancestor of the parties, Mahanandram Puranmal, founded a temple in Hyderabad, Deccan.

In 1897 Government made grants in favour of the temple of three villages, two of them in Berar and the third in Hyderabad State.

In 1907 the 1st and 2nd Respondents and a deceased brother filed a suit for a declaration that they were co-trustees of the temple with the Appellant and for an account.

That suit was dismissed by the District Judge on the ground that the sanction of the Commissioner had not been obtained for its institution. The members of the family thereafter submitted their differences to arbitration.

The arbitrator made his award on the 22nd April 1907, and it was signed by all the parties to the dispute.

On the 25th September 1907 the Respondents applied under sec. 525 of the Code of Civil Procedure, 1882, to the Court of the Additional District Judge, East Berar, Amraoti, praying for the award to be filed in Court.

The application was opposed by the Appellant who contended *inter alia* that the jurisdiction over the subject-matter of the arbitration meant jurisdiction over the whole of the property comprised in the award, and as the property in respect of which the award was made was situated partly within, and partly without, the territorial jurisdiction of the Court, there was no jurisdiction in the Court to entertain the application; and that the suit related to a public charitable trust and could not be maintained as it had been instituted without the previous sanction of the Commissioner.

The District Judge decided both these contentions against the Appellant, but he held that the award as originally made had been superseded and should not be allowed to be filed and he dismissed the application.

On appeal the Court of the Judicial Commissioner held that the villages in suit formed trust properties created for purposes of a religious or charitable nature but that sec. 539 of the Civil Procedure Code, 1882, was "no bar to a suit asking for joint management of endowed property by the descendants of the founder, and that there could be a valid reference to arbitration in such a case." They accordingly allowed the appeal and directed that "the award with the exception of the portion which has been admitted to be *ultra vires* should be filed."

The facts of the case, the course of the litigation in the Indian Courts and the arguments of Counsel before the Board are fully set out in the judgment of the Judicial Committee.

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Appellant.

Sir G. Lowndes, K. C. and *Mr. L. M. Parikh* for the Respondents.

RAMLAL HARGOPAL *v.* KISANCHANDRA.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—One Mahanandram Puranmal, many years ago, opened a shop in Hyderabad in the dominions of the Nizam and carried on a considerable business, which has been continued to this day by his descendants under his name as the name of the firm. He also founded two temples within the dominions of the Nizam, and a third in British India, not however—and this is important—within the District of Berar. Three jagir villages, one within the Nizam dominions and two within British India and the District of Berar, were subsequently granted by Government for the support of the worship in these temples.

Puranmal was succeeded by his son Premsukh, who had three sons, Ramgopal, Hargopal and Chimanram. The family, however, has remained undivided, and the business and landed property have remained in common.

Hargopal seems to have died before his father Premsukh; and on the death of the latter, Hargopal's son, Ramlal, the present Appellant, took up the management of the temples, the three villages granted for their support and the family property and business, and his name was entered in the various registers accordingly.

In 1907, the representatives of the other two families brought a suit against Ramlal claiming, that they might be declared co-trustees of one of the temples and entitled to exercise control of the income and expenditure of the two jagir villages in Berar. The District Judge of East Berar in whose Court the suit was brought, dismissed it, holding that he had no jurisdiction to try it. An appeal was threatened, and then the parties came together and agreed to refer all their disputes to the award of their family priest. He heard the parties, and finally on the 22nd April 1907, made his award which was countersigned by all the parties to the dispute. It is a long document, comprising 57 paragraphs, some narrative, some dispositive. He classified the disputes under four heads :—

(1) Relating to the management of the three jagir villages.

(2) To the management of the three religious institutions.

(3) The estate or family property descended from the ancestor Puranmal.

(4) "Monthly alllowances and other miscellaneous matters."

This last head included questions relating to a field bought by the son of Ramlal, payment of arrears of allowances, and sums to be given for the expenses of marriages and funerals.

The general tenor of the award was the recognition of the equal rights of the three families and the institution of committees of three, comprising a representative of each family, giving in each case precedence to some one named member, making Ramlal the principal or managing member of the committee for the jagir villages, and a representative of one of the other branches, managing member of the committee for the religious institutions and provisions of a similar nature with regard to the family property: the effect being to establish the rights of all the branches with certain advantages of precedence and priority given to Ramlal.

Notwithstanding that Ramlal had submitted all matters in dispute to the arbitrator and had signed the award in apparent consent to its provisions, he refused to carry it out, and thereupon the application which is the subject of this

RAMLAL HARGOPAL *v.* KISANCHANDRA.

appeal, was made in the Court of the District Judge of East Berar.

It was an application on behalf of the Respondents under sec. 525 of the Code of Civil Procedure that the award should be filed in Court, and it was resisted by the present Appellant on a great number of grounds. Upon this there followed a litigation which by reason both of its complexity and its length, is open to very serious criticism as it carefully avoided a question which lay *in limine*, and which if decided as it ought to have been would have saved all further proceedings. In a matter which ought to be of a short and summary nature, no less than seven separate orders or decrees have been made and judgments have been delivered and read to their Lordships.

The application for an award having under the section to be treated as a suit, pleadings were delivered by both parties and issues were raised. Some of the objections to the filing of the award have been finally disposed of, a remarkable one being the contention that the family priest was not the real arbitrator, but a name put in as a cloak for or benami for that of a Judge of a Hyderabad Court, and that the Judge did not actually take part, as according to the real agreement of the parties it was intended that he should.

The other serious issues were that as the matter concerned a public charity, there could be no reference to arbitration; that the District Court of Berar had not jurisdiction over the matter to which the award related and was therefore the wrong Court to which to make application under sec. 525; that the previous decision of the District Court of Berar had already determined these two points in favour of the present Appellant and thus had made each of them *res judicata* as between the parties; that the previous consent of the Commissioner of Berar was necessary, and lastly that the arbitrator had exceeded his powers by having made orders for which he had no warranty given to him by the submission to arbitration.

The District Judge in his first judgment delivered on the 31st May 1910, confined himself to deciding certain issues, of which the material ones were number 2, the question of jurisdiction. and number 15, the question of the necessity of the sanction of the Commissioner before the suit, as being a suit relating to a charity, could be maintained. On issue number 2, he decided that he had jurisdiction, and as regards issue number 15, he said that the point had not been up to that date properly raised.

The matter then came before another District Judge to determine whether, as contended, there could be no award as the property constituted a public charitable trust, and as an additional point whether this question had not already been determined adversely to the applicant by the decision in the previous suit and, therefore, must be deemed *res judicata*. Some other issues also came before the Judge, but the only one he deemed it necessary to decide was that concerning *res judicata*. This point he decided adversely to the applicant, and therefore he dismissed the suit. His decree is dated the 30th April 1913.

There was then an appeal to the Court of the Judicial Commissioner of the Central Provinces. The learned Judges said that there were many pleas in defence, but that they were at present only concerned with the reasons which led the Judge of the Court below to dismiss the suit. They even declined to determine whether the trust was or was not a public charitable trust, saying that

RAMLAL HARGOPAL *v.* KISANCHANDRA.

the only thing they were going to decide was whether the District Judge was right in holding the question to be *res judicata*. They held that he was wrong and remanded the suit to the District Court. This was on the 30th June 1915.

When the case next came on before another District Judge, he addressed himself to the question of the jurisdiction of the Court, and as on the previous occasion, as to whether this point had been already decided in the former suit and had become *res judicata*. These points he decided in favour of the Appellant on the 3rd December 1915.

The next stage of the case seems to have been reached on the 2nd September 1917, when another District Judge decided that the trust was not one for public purposes, and that in any case the awarded that the trust was not one for public right in respect of such a trust; but he held that the arbitrator had exceeded his powers, and that a subsequent agreement between the parties, or the subsequent action of the arbitrator, had superseded or vitiated the award, and therefore the suit was dismissed again.

From this judgment there was another appeal, and the Court of the Judicial Commissioner gave its decision on the 13th January 1919.

The first point dealt with in this judgment was the question whether the arbitrator had exceeded his powers. It is here necessary to state that the arbitrator, when dealing with the management of the three religious institutions, did not confine himself to settling the disputes between the three branches of the family, but proceeded to express his opinion that the business of such institutions does not go on well as long as they are not placed in the hand of a public committee, and that it seemed to him proper that they should be made over to a public committee after four years' time, namely, in 1911; and he accordingly directed that in 1911 a public committee should be appointed, and that the management of the temple should be entrusted to it, and the movable and the immovable property made over to it.

As to this direction, the Appeal Judges said that the parties were agreed that this clause, meant to secure the rights of the public, was *ultra vires*, inasmuch as the object of the reference was to settle which members of the family should have the management, and the parties did not intend to surrender their rights to a public body. But they proceeded to hold that these clauses were separable from the rest, and that under the new Code of Civil Procedure of 1908 the Court could separate them and enforce the rest.

As to the point that the award was vitiated or superseded by the action of the arbitrator or the agreement of the parties, they held that in substance the parties had agreed to an amended or additional reference upon which the amended award followed, and that therefore it was not bad.

The Judges next held that a suit to remedy a particular infringement of an individual private right in regard to trust property did not fall under sec. 92 of the Civil Procedure Code of 1908 and therefore did not require the sanction of the Commissioner of Berar before it was begun. They then dealt with some minor points and with the extraordinary objection that the family priest was not the true arbitrator intended by the parties —points which have not been relied upon before their Lordships. They said that these were all the matters which had been argued before them, and they therefore thought that the award—with the excep-

RAMLAL HARGOPAL *v.* KISANCHANDRA.

tion of the portion admitted to be *ultra vires*— should be filed, and they allowed the appeal.

Even then, the matter was not ended, because the parties objecting to the award presented an application for a review of the judgment, urging first that the award so far as it was binding, dealt only with the management of the temples up to 1911, and as this year had long since been past, the award was now fruitless; secondly, that at any rate the award left undetermined the question of management after 1911 and was therefore incomplete; and thirdly, that the arbitrator had exceeded his powers because he was only authorised to deal with the management and not with the legal transfer of the property, and he had ordered mutation of names upon the revenue register.

As to these matters, the Appeal Court said that their view of the award was that while intending to provide for a public committee which should have begun in 1911, the arbitrator had also provided for the management of the institutions by divers members of the family until that committee should be appointed, and that if the provision for the appointment of a public committee was *ultra vires*, the management would remain with the family in the manner directed by the award. They also held that the arbitrator had implied authority to direct the mutation of names, and they dismissed the appeal.

In the application for review which contained also other matters which the Court seems to have passed by as futile—as they probably were—there occurs the following paragraph 8 :—

"That the pleas of absence of jurisdiction and maintainability of the suit in the absence of the sanction of the Advocate-General should have been decided in favour of the applicant."

This paragraph is not noticed in the judgment upon review which was given on the 3rd September 1919.

As regards the maintainability of the suit in the absence of the sanction of the Advocate-General, whose place for this purpose is taken by the Commissioner for Berar, that matter had been in substance already determined by the High Court in its first judgment, though it is true that technically the Court only applied itself to the contention that this point was already determined as between the parties and had become *res judicata*.

As to the plea of absence of jurisdiction, it seems very uncertain what the applicants for review intended to convey by this phrase. They may have meant that the Court at Berar was not the Court which had jurisdiction to file the award. They may have meant that there would be no jurisdiction unless the Commissioner for Berar gave his previous sanction. They may have meant that the Court had no jurisdiction because the award dealt with a public charity. At any rate, their advocate apparently failed, among the mass of points which he must have presented on review, to bring the question of jurisdiction as such before the Court on this last occasion; and accordingly there is no pronouncement upon it, and their Lordships are left in this respect without assistance. From this final order the present appeal was brought.

For the Respondents, a preliminary objection was taken. It was said that by virtue of the Code of Civil Procedure of 1908, no appeal lay from this particular order or decree to His Majesty in Council, unless special leave should be given by virtue of His Majesty's general preroga-

tive. Under sec. 104 of the Code, no appeal is to lie from any order passed in appeal on the question of filing or refusing to file an award, and it was said that the order of the Court of the Judicial Commissioner was an order passed in appeal from the decision of the District Judge refusing to file the award. To this it was replied that under sec. 109, an appeal lies to His Majesty in Council from any decree or final order passed on appeal by any Court of final Appellate jurisdiction, such as the Court of the Judicial Commissioner.

It was contended for the Respondents that if these two clauses were in seeming variance, the particular would supersede the general, and that sec. 104 dealt with particular cases.

Their Lordships think that the objection fails. They construe the provision in sub-sec. 2 of sec. 104 as dealing with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge. If any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with sec. 100, which limits second appeals from Appellate decrees by District Judges. That section deals with decrees only while the decisions on these arbitration questions are styled orders. There is therefore nothing in sec. 104 to take away the general right of appealing to the Crown given by sec. 109, and the preliminary objection taken on behalf of the Respondents fails.

The points urged before their Lordships were as follows :—

(1) The District Judge of Berar had no jurisdiction to deal with the award, this point being sub-divided into two branches —absence of local territorial jurisdiction and absence of previous sanction by the Commissioner.

(2) As supplementary to 1, that no argument to the contrary could be listened to by their Lordships because the points had previously been determined between the parties and were *res judicata.*

(3) That the management of a public religious trust could not be referred to arbitration.

(4) That the arbitrator had exceeded his powers.

(5) That the subsequent variations vitiated the award.

It is clear that if the objection that the Court of the District Judge of Berar had no jurisdiction over the subject-matter of the award, as required by para. 20 of the 2nd Schedule of the Code of Civil Procedure, is good, no further points can arise. This point was taken on behalf of the present Appellant at the outset, but seems nevertheless never to have been directly insisted upon during the numerous subsequent proceedings. No doubt it was urged that the point must be deemed to have been already decided in favour of the Appellant in the previous suit. But their Lordships have not been referred to any place in these lengthy proceedings where they might find an argument in favour of the Appellant's contention, if it were to be decided upon as *res integra.* It seems clear to their Lordships that the Judges in the Court of the Judicial Commissioner never imagined that they had to deal with the point, and it is not—except in the indirect and derivative way already mentioned—taken in the printed case lodged on behalf of the Appellant before this Board.

RAMLAL HARGOPAL v. KISANCHANDRA.

If it was any other point except a point of jurisdiction, their Lordships would pay no attention to it; but they are bound to take notice of an objection to the jurisdiction, however late in the day it may be raised, if it be that on the facts admitted or proved it is manifest that there is a defect of jurisdiction; and their Lordships find this defect in the present case.

It was contended on behalf of the Appellant that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court; in fact, that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. Their Lordships deem it unnecessary to rest their judgment on any such general proposition. In their view there is no substantial question decided by the award which affects property within the jurisdiction of the Berar Court. No one of the three temples is within that jurisdiction, and two of them are within the dominions of the Nizam and outside British India. A large part of the award relates to family questions and money payments to be made by members of the family; and all the members of the family are within the Nizam's dominions. It was urged that two of the villages which form the principal endowments of the temples are situated in Berar. But their Lordships cannot find that there was any dispute concerning the ownership or management of the villages nor any denial that the revenues must be appropriated to the three temples.

It can hardly be said that there was any dispute as to the application of the revenues, but if there were any, it was a dispute as to their application after they had reached Hyderabad.

It is the duty of the Court in which an award has been filed, to proceed to pronounce judgment according to the award, and upon that a decree is to follow.' Their Lordships cannot see that any decree could be framed upon this award which would affect any person or property within the jurisdiction. The result is that on this ground the appeal succeeds, and the judgment of the Court of the Judicial Commissioner must be reversed, and the suit must be dismissed; but inasmuch as this point was never properly insisted upon in the Courts below, or, indeed, in the Appellant's printed case here, their Lordships are of opinion that there should be no costs either of this appeal or in the Courts below, and they will humbly advise His Majesty accordingly.

Solicitor: *Mr. Hy. S. L. Polak* for the Appellant.

Solicitor: *Mr. E. Delgado* for the Respondents Nos. 1-3.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 32 OF 1923.

MOOKERJEE, J. SUHRAWARDY, J. 1923, Heard, 20, December. Judgment, 21, December.	GANESHCHANDRA PAL, Plaintiff, Appellant, v. CHANDRAMOHAN DATTA, Defendant, Respondent.

Consent decree, interpretation of—Whether tenancy for an unlimited time transformed by it into one for a term—Bengal Tenancy Act (VIII of 1885), secs. 49, 89, 178, sub-sec (1), cl. (1)—Under-raiyat, if may contract out of provision of sec. 49 by compromise—Compromise of a suit, if subject to the incidents of an ordinary contract between the parties.

A suit to eject an under-raiyat whose tenancy at its inception was for an unlimited time, there being no written lease, ended in a compromise which pro-

GANESHCHANDRA PAL *v.* CHANDRAMOHAN DATTA.

vided inter alia *that the tenant would pay to his landlord " for the past period a sum of Rs. 20 as premium in addition to the annual rent of Rs. 12-8 and shall thereafter pay, at the end of each nine years, Rs. 44 as premium, etc." and that in case of default of payment of the premium in accordance with the stipulated terms, the tenant would be liable to be ejected. In a subsequent suit for ejectment on the ground of default:*

Held—*That the aforesaid provision in the consent decree did not transform the tenancy which at its inception, was for an unlimited time into a tenancy for a term held under a written lease within the meaning of sec. 49 of the Bengal Tenancy Act.*

ALI *v.* NAYAN (2), ABDUL KARIM *v.* ABDUL RAHAMAN (3) *and* AMINUDDI *v.* ANANDA (4) *distinguished.*

RAJKUMARI DEBI *v.* BARAKATULLA MONDAL (1) *referred to.*

That the tenant could be ejected only after a notice as contemplated in sec. 49 (b) and in execution of a decree.

Held further—*That the stipulation in the compromise for ejectment on default of payment of the premium was of no avail, because in view of the provisions of sec. 178, sub-sec. (1), cl. (c), it was not open to the landlord and the tenant to contract themselves out of the provision of sec. 49.*

A compromise, followed by a consent decree, is none the less a contract between the parties and subject to the incidents of a contract because there is superadded the command of the Judge.

(1) I. L. R. 39 Cal. 278; s. c. 16 C. W. N. 6 (F. B.) (1911).
(2) 15 C. L. J. 122 (1903)
(3) 15 C. L. J. 672 (1911).
(4) 28 C. L. J. 507 (1918).

WENTWORTH *v.* BULLEN (5) *and* HUDDERSFIELD BANKING CO. *v.* LISTER (6) *referred to.*

This principle is in essence recognised in sec. 147A, Bengal Tenancy Act, providing for a compromise of suits between landlords and tenants.

This was an appeal under cl. 15 of the Letters Patent from a judgment of the Hon'ble Mr. Justice Newbould, dated the 14th May 1923, in Appeal from Appellate Decree No. 1172 of 1921 against the decision of Babu Lalbehari Chatterjee, Subordinate Judge, Hughli, dated the 17th February 1921, confirming that of Babu S. P. Bose, Munsif, Serampore, dated the 17th June 1920.

The judgment of Newbould, J., was as follows :—

NEWBOULD, J.—This appeal arises out of a suit in ejectment. The Plaintiff's case is that he is a raiyat and the principal Defendants held under him as under-raiyats. In 1907 the Plaintiff brought a suit for the ejectment of the Defendants after notice under sec. 49 (*a*) of the Bengal Tenancy Act. That suit ended in a compromise.

The only question in this appeal is what is the proper interpretation of the decree passed embodying that compromise. Admittedly the Plaintiff has served no fresh notice on the Defendants before the institution of this suit. He can only eject the Defendants if cl. (*a*) of sec. 49 is applicable, that is to say, on the expiration of the term of a lease. In other words, the Plaintiff's case depends on whether the effect of the *solenamah* decree was that of a written lease for a term of years. The main provisions of

(5) 9 B. & C. 840 at p. 850; 33 R. R. 353 (1829).
(6) [1895] 2 Ch. 273.

GANESHCHANDRA PAL *v.* CHANDRAMOHAN DATTA.

the *solenamah* are that the Defendant No. 1 shall pay at the end of each 9 years a *selami* of Rs. 44 if he cultivates *pan* by other people and a *selami* of Rs. 22 if he or his sons or grandsons, etc., cultivate *pan* themselves. It further stipulates that if the Defendant does not comply with the stipulation, that is, if he makes default in the payment of *selami* the Plaintiff will be entitled to eject the Defendant from the *jote* and to get *khas* possession of the lands in suit. In the deed of compromise itself there is no reference to any renewal of lease.

On behalf of the Plaintiff-Appellant reliance is placed on the words "and on payment of such money shall enjoy the lands." I am unable to accept the contention that the effect of this *solenamah* decree was that of a written lease for a term within the meaning of cl. (*a*) of sec. 49. It is true, as it has been contended, that the parties might have compromised the former suit legally by arranging that the Defendant should have a lease as an under-raiyat for a term of 9 years with the option of renewal at the end thereof on payment of *selami*. But I am unable to hold that that was the actual effect of the compromise into which they entered. That being so since the Defendant did not hold under a lease the term of which has expired and as there has been no notice to quit served upon him he is not liable to be ejected.

I accordingly dismiss this appeal with costs.

[Against this judgment the present appeal under the Letters Patent was filed.]

Babus Surendra Chandra Sen and *Nandalal Dey* for the Appellant.

Babu Sib Chandra Palit for the Respondent

The JUDGMENT OF THE COURT was as follows :—

This is an appeal under cl. 15 of the Letters Patent from the judgment of Mr. Justice Newbould in a suit for ejectment.

In 1897, the first Defendant took the land from the Plaintiff, a raiyat, and thus became an under-raiyat. In 1907, the Plaintiff sued to eject the Defendant after service of notice under sec. 49, Bengal Tenancy Act. On the 13th June 1908 a decree was made in that suit by consent of parties. On the 20th November 1919, the Plaintiff instituted the present suit for ejectment on the theory that the Defendant had, in accordance with the provisions of the consent decree, forfeited the tenancy and was a trespasser in occupation. The trial Court dismissed the suit. That decision has been affirmed successively by the Subordinate Judge and by Mr. Justice Newbould. We are of opinion that the decree of dismissal must be maintained.

In 1907, when the Plaintiff sued to eject the Defendant after notice under sec 49, Bengal Tenancy Act, the Defendant was an under-raiyat. The tenancy was for an unlimited time and there was no written lease. The under-raiyat could, consequently, be ejected only in accordance with sec. 49. That section provides that an under-raiyat shall not be liable to be ejected by his landlord except (*a*) on the expiration of the term of a written lease and (*b*) when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord. This section was interpreted by a Full Bench of this Court in *Rajkumari Debi* v. *Barakatulla Mondal* (1). The Full Bench ruled that cls. (*a*)

(1) I. L. R. 39 Cal. 278: s. c. 16 C. W. N. 6 (F. B.) (1911).

GANESHCHANDRA PAL v. CHANDRAMOHAN DATTA.

and (b) must be read together and that when cl. (b) mentions a written lease, reference is made by implication to cl. (a) which speaks of a written lease for a term. In the case before us, there was no written lease for a term at the inception of the tenancy. The question thus arises whether the Defendant, at the commencement of this suit, held under a lease for a term. If the answer be in the affirmative, he is liable under sec. 89 read with sec. 19 (a) to be ejected by his landlord in execution of a decree made in a suit instituted on the expiration of the term of such written lease. The Plaintiff urges that by virtue of what happened in the suit of 1907, the Defendant holds under a written lease for a term. This contention must be tested by reference to the terms of the compromise which formed the foundation of the consent decree, dated the 13th June 1908. The compromise, as incorporated in the decree, provides that the Defendant shall pay to the Plaintiff for the past period a sum of Rs. 20 as premium in addition to the annual rent of Rs. 12-8 as. and shall thereafter pay, at the end of each nine years, Rs. 11 as premium if he should cultivate the land other persons, but only Rs. 22 if he himself or his sons or grandsons should carry on the cultivation by themselves. This did not, in our opinion, transform what was a tenancy for an unlimited time, held without a written lease, into a tenancy for a term held under a written lease. This is not a case, where as in *Ali* v. *Nayan* (2), *Abdul Karim* v. *Abdul Rahaman* (3) and *Aminuddi* v. *Ananda* (4), the lease is for a term of nine years with a covenant for renewal.

We are not unmindful that the compromise provides that if the Defendant should default in the payment of the same sum in accordance with its stipulation, the Plaintiff would be entitled to eject him from the land of the tenancy. But this is of no avail. Under sec. 89 a tenant can be ejected only in execution of a decree and this must be read with the provisions of sec. 178, sub-sec. (1), cl. (c), which ordains that nothing in any contract between a landlord and a tenant, made before or after the passing of the Bengal Tenancy Act, shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of the statute. It is consequently not open to a landlord and a tenant, whose mutual relation is governed by the provisions of the Bengal Tenancy Act, to contract themselves out of the provisions of sec. 19. We have been pressed, however, to hold that the position is different, where, as here, a decree has been made by consent on the basis of a petition of compromise. This contention is clearly untenable. As Sir James Parke, J., observed in *Wentworth* v. *Bullen* (5), the contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge. To the same effect is the principle enunciated in *Huddersfield Banking Co.* v. *Lister* (6), namely, that a consent order is a mere creature of the parties and if greater sanctity were attributed to it than to the original agreement itself, it would be giving to the branch an existence which is independent of the tree, for the consent order is only the order of the Court carrying out the agreement between the parties. This principle is in essence recognised in sec. 117A, Bengal Tenancy Act, which

(2) 15 C. L. J. 122 (1903).
(3) 15 C. L. J. 672 (1911).
(4) 28 C. L. J. 507 (1918).
(5) 9 B. & C. 840 at p. 850; 33 R. R. 353 (1829).
(6) [1895] 2 Ch. 273.

deals with the compromise of suits between landlords and tenants and provides that a decree passed in accordance with any lawful agreement, compromise or satisfaction shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by such agreement, compromise or satisfaction. In our opinion, an agreement to contract out of the requirements of sec. 49, Bengal Tenancy Act, if in reality there was such an agreement in the present case, would not operate to entitle the Plaintiff to eject the Defendant contrary to the provisions of the Bengal Tenancy Act.

The result is that the decree made by Mr. Justice Newbould is affirmed and this appeal is dismissed with costs.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 133 OF 1923.

CHATTERJEA, J. PANTON, J. 1923, 27, July.	ADWAITA CHANDRA SAHA, Appellant, Petitioner, *v.* THE CHITTAGONG CO., LD. AT SIRAJGANJ and anr., Opposite Party, Respondents.

Civil Procedure Code (Act V of 1908), secs. 2 (2), 144—Decree in suit and decree in proceeding under sec. 144, if different—Sec 49 and Or. 21, r. 18, assignee under, attaching creditor if—Set-off—Court's inherent power.

A obtained against B a mortgage decree, in execution whereof B's properties were purchased by A. The sale was, upon B's application under sec. 144, C. P. C., set aside and the properties restored to him with an order in his favour for mesne profits for Rs. 614 odd. C, who also obtained a decree for Rs. 1,635 against B, after having attached B's decree against A got himself substituted as attaching creditor and applied for execution of the decree against A who in his turn applied for execution of a money decree obtained by him against B for Rs. 1,129 odd and prayed for a set-off. It was contended that the decree for mesne profits being made under sec. 144 and not in a suit and C not being an assignee of one of the decrees, Or. 21, r. 18 was not applicable:

Held—*That as the determination of any question under sec. 144, C. P. C. comes within the definition of decree under sec. 2, C. P. C., there is no distinction between a decree in a suit and a decree in a proceeding under sec. 144; that C as attaching decree-holder was an assignee within the meaning of Or. 21, r. 18 and under sec. 49, C. P. C., subject to the same equities as B was; in any case the Court was not powerless to direct a set-off in this case under its inherent powers.*

This was an appeal preferred on the 7th of March 1923, against the order of Krishna K. Sen, Esq., Additional District Judge of Pabna in Zillah Pabna and Bogra, dated the 17th of February 1923, modifying the order of Babu Sarada Prosad Banerjee, Subordinate Judge, 2nd Court at Pabna, dated the 12th of December 1921.

The facts are as follows:—

One Adwaita Chandra Saha obtained a money decree for Rs. 1,129-12-6 pies against one Azgarali on 21st August 1912. He also obtained a mortgage decree against Azgarali. Subsequent to the money decree Adwaita executed his mortgage decree and Azgarali's properties were put up to sale and were purchased by him. Azgarali then applied for setting aside the sale and as a result thereof his properties were restored and an order, dated the 29th

August 1919, for the payment by Adwaita to Azgarali of the mesne profits amounting to Rs. 614 and odd sum was passed. Adwaita, however, in execution of his money decree attached the decree passed against him for mesne profits. This decree for mesne profits was also attached by a Limited Company called the Chittagong Company, Ltd. in execution of a money decree for Rs. 1,635, dated the 12th April 1920, obtained by the Company against Azgarali, the Company having not themselves substituted as attaching decree-holders. This was followed by an application of the Company, dated the 25th July 1921, for the execution against Adwaita of the decree of mesne profits obtained by Azgarali. On 26th July 1921, Adwaita applied for execution of his own decree and prayed for a set-off. Both the Courts below disallowed Adwaita's prayer. Adwaita then appealed to this Court.

Babu Gopal Chandra Das for the Appellant.—The real point in the case is whether an order passed for mesne profits under sec. 144, C. P. C. can be set off against a money decree passed in a suit. I submit that it can be so set off because under sec. 2, cl. 2, C. P. C., an order passed under sec. 144, C. P. C. is a decree. It makes no difference whether such a decree is passed in a suit or in a proceeding. The procedure applicable to suits has been made applicable to proceedings under sec. 144, C. P. C. Moreover the provisions as to set-off in the Civil Procedure Code are not exhaustive. It makes no difference that the decree has been attached by the Chittagong Company. [Vide *Bhujhawan Lal* v. *Sukhraj Rai* (1)]. The position of the attaching decree-holder is that of a representative of the decree-holder of the attached decree [*vide* Or. 21, r. 53, cl. (3) C. P. C.]. The re[illegible] the ap-presentative is subject to the same equities and liabilities as that [illegible] *Mohan* v. *Bishnupada* (2)]. [illegible] *Madan* [illegible] highly inequitable not to allow the[illegible] be[illegible]lant to set off the decree of his judgment-debtor against his own decree against the latter.

Babu Upendra Kumar Ray for the Respondents.—Or. 21, r. 18 does not apply to the facts of the case for three reasons:—(1) The cross-decrees are not in separate suits. The decree of Azgarali is in a proceeding under sec. 144 and not in a suit. (2) The attaching creditor is not an assignee within the meaning of Or. 21, r. 18, cl. 2. He is a representative for the purpose of execution only and his rights have been defined by the statute in Or. 21, r. 53, cl. (3).

(3) As both the Appellant and the Company have attached the decree of Azgarali, they are entitled to rateable distribution under sec. 73, C. P. C. No question of prejudice arises.

Babu Gopal Chandra Das was not heard in reply.

The JUDGMENT OF THE COURT was as follows:—

The question involved in this appeal is whether the decree obtained by the Appellant against one Azgarali and the decree obtained by Azgarali against the Appellant can be set off against each other.

It appears that the Appellant obtained a money decree for Rs. 1,129-12-6 pies against Azgarali on the 21st August 1912. Subsequently, in execution of a decree obtained by the Appellant against Azgarali upon a mortgage, the properties of the latter were put up to sale and purchased by the Appellant. Azgarali applied for

(1) I. L. R. 2 All. 866 (1880).

(2) 25 C. W. N. clxxx (1921).

GANESHC[illegible] DRA SAHA v. THE CHITTAGONG CO., LD. AT SIRAJGANJ.

deal[illegible] the sale and it was set aside [illegible] for restoration of the pro- [illegible] or Azgarali and for mesne profits [illegible] by the Appellant to Azgarali, [illegible]mely, Rs. 614-12-9 was passed on the 29th August 1919. In execution of his decree the Appellant attached the decree obtained by Azgarali against him. Subsequently on the 12th April 1920, the Chittagong Company, Ltd. obtained a decree for Rs. 1,635 against Azgarali and they attached Azgarali's decree against the Appellant and got themselves substituted as attaching decree-holders. The Company then applied for execution of Azgarali's decree against the Appellant on the 25th July 1921. The next day the Appellant applied for execution of his own decree and prayed for a set-off. This was disallowed by the Courts below and the decree-holder has appealed to this Court.

It appears that the main ground upon which the Courts below have disallowed the set-off is that the decree for mesne profits obtained by Azgarali against the Appellant was in a miscellaneous proceeding under sec. 144 of the Civil Procedure Code, and not in a suit. But the determination of any question under sec. 144 of the Code of Civil Procedure comes within the definition of a 'decree' under sec. 2 of the Code. That being so, we do not see that there is any distinction between a decree in a suit and a decree in a proceeding under sec. 144.

The learned Vakil for the Respondents has contended that the provisions of Or. 21, r. 18, C. P. C., do not apply because the decrees were not made in separate suits. But the observations made above apply to this contention also.

The second ground is that the Chittagang Company are not assignees of one of the decrees. But the Company as attaching decree-holders are assignees within the meaning of Or. 21, r. 18, and they are subject to the same equities as Azgarali was having regard to the provisions of sec. 49 of the Code.

Thirdly, it has been contended that sub-r. 3 of r. 18, Or. 21, C. P. C., does not apply to the present case, as the decree-holder in one of the cases is not the judgment-debtor in the other. But leaving aside the distinction between a suit and a proceeding under sec. 144, C. P. C., which we have already dealt with, the Appellant was the decree-holder in one suit and was the judgment-debtor in the proceedings under sec. 144, taken by Azgarali against him. Even if the case does not come within the purview of Or. 21, r. 18 as contended by the learned Vakil for the Respondents, we do not think that the Court is powerless to direct a set-off in this case under the inherent powers of the Court. The Appellant has got a decree for Rs. 1,129-12-6 against Azgarali and Azgarali obtained a decree for mesne profits though under sec. 144, against the Appellant for a lesser sum, namely, Rs. 614-2-9. There is no reason why Azgarali should be allowed to execute his decree against the Appellant while the latter has a much larger sum due to him under his decree, and if the decrees could be set off, had Azgarali applied for execution of his decree, we do not see why the Chittagong Company as attaching decree-holders and standing in his shoes, should be allowed to execute the decree.

The learned Vakil for the Respondents has argued that in any case there ought to be a rateable distribution as the Chittagong Company have obtained a decree for a larger sum, namely, Rs. 1,600 odd against the Appellant, but no assets have yet been realised and we do not think that we should be justified in making an order

for rateable distribution in anticipation of assets being realised.

In these circumstances we set aside the orders of the Courts below and send the case back to the Court of first instance for adjustment of the rights of the parties under the decrees in accordance with the observations we have made in our judgment.

The Appellant is entitled to his costs in this Court. We assess the hearing fee at one gold mohur.

S. C. C.

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 1256 OF 1923.

PEARSON, J.
GRAHAM, J.
1924,
Heard, 13, May.
Judgment, ,, 17, June.

SM. SARAJUBALA DEBI and ors., Petitioners,
v.
MOHINI MOHAN GHOSH and ors., Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 115—Addition of unnecessary issue—Prejudice—Irreparable injury—Interference by High Court with interlocutory order.

Although the High Court interferes as little as possible with interlocutory orders where an alternative remedy exists, it cannot be laid down as a hard and fast rule that the Court will under no circumstances interfere; and it can and will interfere with such orders where they may lead to a failure of justice or to irreparable injury.

DHAPI *v.* RAM PERSHAD (1), GOBINDA MOHON DAS *v.* KUNJO BEHARY DAS (2), AMJAD ALI *v.* ALI HUSSAIN JOHAR (3) *and* SIVA PROSAD RAM *v.* TRICOMDAS COVERJI BHOJA (4) *referred to.*

The High Court in revision set aside an order fra... were unnecessary ... suit, when it app... those issues wou... of time and money... tion to the matter in ... irreparable injury to the ...

This was a Rule granted on ... December 1923 against an order ... e Subordinate Judge, 5th Court at Dacca (J. C. Lahiri, Esq.), dated the 25th September 1923.

The facts of the case will appear from the judgment.

Mr. S. R. Dass, Advocate-General and *Babus Surendra Nath Guha* and *Prafulla Ch. Chakravartty* for the Petitioners.

Babus Provash Ch. Mitra and *Asita Ranjan Ghose* for the Opposite Party.

The JUDGMENT OF THE COURT was delivered by

GRAHAM, J.—We are invited in this Rule to set aside an order of the Subordinate Judge, 5th Court at Dacca, refusing to expunge two issues which have been framed in an account suit brought by the Petitioners Srimati Sarajubala Debi and others through Mr. F. W. Needham, representing the Court of Wards, against the Opposite Party (Defendant No. 1) Mohini Mohan Ghosh and others.

The facts which have given rise to the application, as stated therein, are as follows:—

The claim made in the suit covered the period from Ashar 1311, when the Defendant Mohini Mohan was appointed Naib of Delhi Kuromitola of the Bhawal Estate, up to the time when he was suspended in Ashar 1325 B. S. At the date when he was appointed, Kumar Ranendra Narayan Rai, Kumar Romendra Narayan Rai and Kumar Robindra Narayan Rai were the proprietors of the Bhawal Estate

(1) I. L. R. 14 Cal. 768 (1887).
(2) 14 C. W. N. 147 (1909).
(3) 15 C. W. N. 868 (1910).
(4) I. L. R. 42 Cal. 926 (1915).

SM. SARAJUBALA DEBI v. MOHINI MOHAN GHOSH.

in equal shares. On the 15th Jaist 1314 the Defendant No. 1 executed a *jamminnama* or service security bond in favour of the three Kumars stating therein that, as he had no immoveable property, his father would execute another bond as his surety and would pledge some immoveable property. That bond was in due course executed on the 19th Jaista 1315 and, as there was a mistake in it, and as the second Kumar Romendra Narayan Rai died on the 8th May 1909 (Bysack 1316), a rectified deed was executed on the 29th Ashar 1316 in favour of the two surviving Kumars and the widow of the second Kumar as his heir.

The first and third Kumars died on the 11th September 1910 and 13th September 1913 respectively leaving their widows, the Plaintiffs Nos. 1 and 4, as heirs, and subsequent thereto the Court of Wards declared all the three widows to be disqualified proprietors, and assumed charge of the properties.

In the year 1920 an individual dressed in the garb of a *sanyasi* appeared on the scene and claimed to be the second Kumar, but the Board of Revenue after making an enquiry found that the second Kumar was dead and that the claimant was an impostor. In the meanwhile the Defendant No. 1 had been dismissed from his post and had been called upon to explain and adjust his accounts, and on his failing to do so, the suit out of which the present application has arisen was filed on the 25th June 1921.

In his written statement filed on the 18th November 1922 the Defendant No. 1 raised *inter alia* the plea that, as the second Kumar was alive, his widow the Plaintiff No. 2 had no right or title in the estate, and that therefore neither she nor the Court of Wards on her behalf could sue for accounts in respect of those properties, and an issue (No. 3) was accordingly framed in these terms :—

"Can Plaintiff No. 2 maintain this suit? Is her husband alive?"

Upon the Plaintiff's raising objection the Subordinate Judge held that, as the suit was based on *kabuliyats* executed by the Defendant No. 1 in favour of Plaintiff No. 2 and the Court of Wards, and as the validity of the *kabuliyats* was not questioned, the issue suggested did not arise, and it was accordingly struck off. The Defendant No. 1 then on the 14th July 1921 filed an additional written statement alleging that he had been induced to execute the *kabuliyats* on misrepresentation as to the death of the second Kumar, and in consequence of coercion and threats that he would be dismissed it he did not execute them. They were not therefore, it was urged, binding upon him, and he asked that issues might be framed upon his additional written statement. The Plaintiffs objected, but the Court yielding to the Defendant's prayer accepted the additional written statement and framed thereon issues Nos. 9 and 10 in the following terms :—

"9. Were the documents mentioned in the plaint executed under undue influence, misrepresentation, and a mistake of facts as alleged in the written statement?

10. Is the second Kumar Romendra Narayan Rai alive? If so, is the suit maintainable at the instance of Plaintiff No. 2?"

The Plaintiffs then filed a petition stating that the suit was maintainable even assuming that the second Kumar was alive, and praying that issue No. 10 might be tried on that supposition, and the Court on the 13th January 1923 held that, if the Kumar was alive, the suit was not

SM. SARAJUBALA DEBI v. MOHINI MOHAN GHOSH.

maintainable and refused to expunge issue No. 10.

Subsequently the Plaintiffs by another petition gave up so much of the claim as related to the Defendant's service prior to the death of the second Kumar on the 8th May 1909, and prayed that in the circumstances issues Nos. 9 and 10 might be expunged, but the Court by its order of the 25th September 1923 refused to expunge them, and the Plaintiffs thereupon moved this Court and obtained the present Rule.

A preliminary objection was taken on behalf of the Opposite Party to the hearing of the Rule on the ground that the application was not properly stamped, and it was submitted that upon the affidavit filed by the Petitioners no case has been made out for the exercise of the discretion vested in us to allow the court-fee to be put in after the due time. We do not think there is any substance in this objection, and on the facts stated in the affidavit we are of opinion that the explanation ought to be accepted and the court-fee allowed to be put in, and we order accordingly.

Coming to the merits it is urged on behalf of the Petitioners that the two issues referred to above are unnecessary for the decision of the suit, which is based upon a contract for service and in which no question of title to immoveable property is involved; that, if the question of title is allowed to be raised, the scope of the suit will be unnecessarily widened resulting in serious delay and expense out of all proportion to the real issue involved and that in fact the entire character of the suit will be changed. It was further suggested that the Defendant No. 1 having made common cause with the *sanyasi* claimant has sought to raise these issues with the ulterior object of helping him in his campaign against the Plaintiffs, it being pointed out that any finding arrived at in this case would not be binding upon the claimant, who is not a party to the litigation, though it would be upon the Plaintiffs.

On behalf of the Opposite Party it is urged that the long established practice of this Court has been not to interfere in the exercise of its Revisional Jurisdiction with interlocutory orders where another and an adequate remedy is open to the applicant that that remedy will be available by means of an appeal after the suit has been decided, and that no case has been made out for our interference.

We are not much impressed with this *non possumus* argument. No doubt it has been the settled practice of this Court to interfere as little as possible with interlocutory orders where an alternative remedy exists. It cannot however be laid down as a hard and fast rule that the Court will under no circumstances interfere. On the contrary there is ample authority for the view that this Court can and will interfere with such orders where they may lead to a failure of justice, or to irreparable injury, see *Dhapi* v. *Ram Pershad* (1), *Gobinda Mohon Das* v. *Kunjo Behary Das* (2), *Amjad Ali* v. *Ali Hussain Johar* (3) and *Sira Prosad Ram* v. *Tricomdas Coverji Bhoja* (4). The question is whether the conditions referred to above are present here so as to justify us in interfering. The decision of the matter appears to depend upon two considerations, *viz.*, first, whether the proposed additional issues are relevant and necessary; and secondly, whether, if they are not so, the trying of them is

(1) I. L. R. 14 Cal 768 (1887).
(2) 14 C. W. N. 147 (1909).
(3) 15 C. W. N. 353 (1910).
(4) I. L. R. 42 Cal. 926 (1915).

likely to lead to a failure of justice, or to irreparable injury to the Petitioners. The first of these is the really crucial point because, if the issues are necessary and proper, it could hardly be urged with logic or propriety that they may involve a failure of justice, or irreparable injury, since, if they are material and necessary issues, the Defendant is entitled to go to trial upon them, however great the expenditure of time and money may be. But are they necessary? *Primâ facie* one would be inclined to say that the trial of such an issue as to title, involving the mass of evidence, documentary and otherwise necessary to the decision thereon, is wholly outside the scope of a suit for accounts, especially in view of the fact that the claim for the period prior to May 1909 was withdrawn. Whatever may have been the legal position in regard to the period up to May 1909, it would seem that after July 1909, when the father of the Defendant No. 1 executed the deed of rectification in favour of the two Kumars and the widow of the second Kumar, it was no longer open to the Defendant No. 1 to refuse to account to the widow. There can be no question that subsequent to July 1909 the Defendant No. 1 was permitted to make his collections by virtue of that deed executed by his father indemnifying the two Kumars and the widow in respect of acts done by the Defendant No. 1, and that all collections made after that date were made on account of the two Kumars and the widow. In view of those facts it appears to us that the Defendant cannot be allowed to raise the question whether he is liable to account to the widow, and to set up the title of a third party.

There can be no doubt that under sec. 51 of the Court of Wards Act (IX of 1879) the Court of Wards alone was legally competent to institute the suit. The second Kumar had been held by competent authority after due inquiry to have died in 1909, and unless and until it is established in a Court of law that he is alive and that his title subsists, the Manager under the Court of Wards was the only person legally competent to institute the suit on behalf of the estate.

Having regard to these facts and considerations we hold that the trial of these two issues in the present suit is unnecessary.

The next question is whether, assuming them to be unnecessary and irrelevant, the trial of them is likely to lead to a failure of justice, or to irreparable injury to the Petitioners. We think that both possibilities undoubtedly exist, indeed that there is something more than a bare possibility that one or both of these consequences may ensue. It is clear from the materials before us that, if the issue of title is tried, it will involve the importation of a mass of evidence both documentary and oral. Applications have already been made for the examination on commission of a number of witnesses. It seems to us to be eminently undesirable that all this evidence should be gone into in a simple account suit. It is plain moreover that very great delay in the disposal of the suit would necessarily result. The value of the suit is stated to be Rs. 1,926 odd, and it has been suggested before us that, if these issues are included, the cost of the litigation may amount to something like a lac of rupees. That may be an exaggerated estimate. The fact however remains that the trial of these issues will undoubtedly entail an expenditure both of time and money wholly out of proportion to the matter in dispute, and the delay consequent upon the scope of the suit being thus widened might be ex-

SM. SARAJUBALA DEBI *v.* MOHINI MOHAN GHOSH.

tremely prejudicial to the Plaintiffs and result in their failing to obtain justice. Nor can there be any doubt that, if the issues are unnecessary, as we hold they are, the trial upon them is likely to cause irreparable injury to the Plaintiffs since they will be put to the enormous extra expenses involved, and, as far as can be seen, with little prospect of recovering those expenses, even if they succeed in the suit. It may be true that the Plaintiffs are persons of substance and well able to bear the extra expense. That however is beside the point and cannot alter the fact that the Plaintiffs may suffer irreparable loss. It is plain from the materials before us that the Defendant No. 1 is not a person of any substance, and in fact it was on that account that the second *jamminnama* was taken from his father. That being so it becomes problematical whether in the event of their success in the litigation the Plaintiffs would be able to recover the costs from the Defendant.

The suggestion that these issues should be added is presumably due to an apprehension in the mind of the Defendant No. 1 that after the suit has been decided, and if the decision be adverse to him, he may hereafter still find that he is accountable to the *sanyasi* claimant in the event of his succeeding in establishing that he is the second Kumar. Assuming that such an apprehension exists the object in view would seem to be to secure a speedy decision of the account suit without in any way prejudicing the Defendant, and we suggested subsequent to the hearing of the Rule that the parties should consult together with a view to arriving at a solution of the difficulty satisfactory to both sides. In the result the learned Advocate-General intimated on behalf of the Petitioners that both the Manager under the Court of Wards and the widow (Plaintiff No. 2) were prepared ..idence of the ap- indemnity in favour of ... convincin and ... No. 1 indemnifying him agai... ated by inde- ... al evidence whatsoever. It seems to us tha... iven by a fair offer and that the Defendant ...lf in can have no reasonable excuse for refus... to accept it.

Upon a careful consideration of all the facts and circumstances we are of opinion that the trial of the suit ought not to be complicated by dragging in these issues which are outside its scope and wholly irrelevant and unnecessary, and the trial of which would inevitably prolong the litigation to the serious prejudice of the Plaintiffs. We accordingly make the Rule absolute, direct that the issues in question Nos. 9 and 10 be expunged and that the suit be now proceeded with according to law on the indemnity bonds being executed by the Manager under the Court of Wards and by the Plaintiff No. 2 in accordance with the offer made by them.

The costs of this Rule will be paid by the Opposite Party to the Petitioners. We assess the hearing fee at three gold mohurs.

N. G.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 28 OF 1924.

SANDERSON, C. J.	KING-EMPEROR
CHOTZNER, J.	*v.*
1924,	ABINASH CHANDRA BOSE
24, July.	and ors., Accused.

Criminal trials—Maps made for use at such trials—High Court's direction as to how they should be prepared—Facts seen and facts spoken to by witnesses, how to be shown—Bengal Police Regulation, Part V, Rule 173, as amended.

The person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the

SM. SARAJUBALA v. ABINASH CHANDRA BOSE.

likely to lead to a *it on a separate sheet of* irreparable injury *to the map as an index* first of these *spots being marked as A, B,* cause, if th

per, it was a Reference under sec. 307, Cr. P. C. made by the Sessions Judge of Faridpur (Mr. S. C. Mallik), on the 12th April 1924, as he disagreed with the unanimous verdict of the jury who found the accused not guilty of the charge framed against them under secs. 120B, 302/34 and 394, I. P. C.

The facts of the case will appear from the judgment.

Mr. K. Chaudhuri, Mr. Mashi and *Babu Jahnavi Charan Das* for the Accused.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is a Reference by the learned Sessions Judge of Faridpur under sec. 307 of the Criminal Procedure Code.

The case involved a charge of murder, and a conspiracy to murder, against three persons Abinash Bose, Abinash Sarkar and Kali Charan Barai. They were charged with having murdered one Abdul Aziz Khan.

There is no doubt that a brutal murder was committed and that the decapitated body of Abdul Aziz was found on a piece of land, overgrown more or less with jungle, called Roybagan, near the village Jhowkhola, and that his head was found in another part of Roybagan.

The case for the prosecution, shortly stated, was that Abdul Aziz and two of his relations who were Kabulis lived together carrying on a joint business in cloth. Abdul Aziz was an illiterate man: and one Nirode used to act as a sort of clerk for him writing out his *khatas*, making out his accounts, and he used to go with Aziz to collect the amounts due to him. After the collections had been made, Aziz was in the habit of going to Calcutta for the purpose of buying cloth for the business. It was alleged that on the 31st of December the three accused persons and Nirode were together at the house of Abinash Sarkar. Abinash Bose enquired of Nirode whether Aziz had made his collections and whether he would shortly go to Calcutta to buy cloth: and, when Nirode informed him that most of the collections had been made and that he, Aziz, would shortly go to Calcutta, one of the accused, namely, Abinash Sarkar, asked if they could not murder one of the Kabulis, as they had large sums of money and stated that if they could kill one of them, they would get a considerable sum of money.

In my opinion there is considerable improbability about such a story.

One of the accused, Kali Charan, had come to the village some 14 or 15 days before this. Nirode was closely connected with the deceased man as I have already said. It seems to be an extraordinary thing that Abinash Sarkar should make such a proposition as that, to which I have referred, to a man like Kali Charan, who had come to the village only 14 or 15 days before, and to a young man like Nirode upon whose co-operation, as far as I know, Abinash Sarkar at that time had no ground for relying. The alleged proposition seems to have been made as if it were almost a matter of ordinary occurrence, and, the murder, it was alleged, was in fact carried out the next day at Roybagan.

There are some circumstances with regard to the actual murder which strike me as being improbable and difficult to accept. Nirode said that when the deceased man was sitting down, taking a

KING-EMPEROR v. ABINASH CHANDRA BOSE.

drink from a cocoanut, a *dao* was handed to him by one of the others, who instructed him to strike Aziz on the head and he was told that if he did not do so, the others, *i.e.*, the accused, would murder him.

It seems to me a curious thing that the actual striking of the man should have been entrusted to Nirode, who was a young man and who had shown himself by no means anxious to have anything to do with the murder. However, according to his evidence, he did strike a blow which was ineffective, but, according to his evidence, it was not this blow which killed the deceased man, but it was the acts of two of the accused which finally effected the murder.

The case rested to a large extent upon the evidence of Nirode Bose who became an informer. It is quite true that in some respects there was evidence which materially corroborated the story of Nirode, as for instance, that the deceased man, Nirode and Kali Charan went together into the Roybagan and that the murder must have been committed shortly afterwards.

On the other hand, there are circumstances which the jury would be entitled to take into consideration, and which might affect their minds when considering how and by whom the murder was committed, as for instance, the fact that the witnesses who are supposed to have first discovered the body did not take the course which they would naturally do under such circumstances, that is to say, communicate at once with the chowkidar, but went away and said nothing about it until the enquiry made by the police.

The case was tried by a jury of seven, and the verdict of the jury was a unanimous one of not guilty. The jury when asked by the learned Judge for their reasons said: "The evidence of the approver is not sufficiently convincing and his evidence is not corroborated by independent witnesses. The medical evidence does not tally with the version given by Nirode. Nirode tried to save himself in his evidence."

In my judgment, although it is impossible to say that the case for the prosecution was not a serious one against the accused persons, as has been pointed out by the learned Counsel appearing for the Crown, still I am not prepared to say that the verdict of the jury, in view of the evidence, was a perverse one or was such that this Court ought to interfere.

For these reasons, in my judgment, the accused should be acquitted.

Before parting with the case I think it is necessary to refer once more to the way in which maps in criminal cases are prepared.

I am of opinion that the person who makes the map ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map, but on a separate sheet of paper annexed to the map as an index thereto, the spots being marked as A, B, C, D, etc.

If this course is not adopted the map, although it may be prepared perfectly *bona fide*, may turn out to be misleading. For instance, in this case, my learned brother and I on looking at the map obtained a wrong impression as to certain parts of the case. We were fortunate enough to have the assistance of the learned Counsel for the Crown, who was familiar with all the evidence and who was able to remove that impression. I mention this because it goes to show that if the Court, sitting on appeal, may receive a wrong impression from what appears

KING-EMPEROR v. ABINASH CHANDRA BOSE.

upon the map, the jury may similarly be misled.

In this case, the Sub-Inspector, when he was investigating the case and examining the scene of the murder, found certain things. In one place he found blood upon the ground; in another he found a piece of cloth and hair; in another place he found leaves spattered with blood; in another place a brick spattered with blood. All these matters he could have legitimately marked on the map. But he did not mark any of them on the map, although he saw them himself. On the other hand, he did mark on the map that which he himself did not see: for instance, he marked on the map the places "where the first blow was struck," "where the second blow was struck" and "where the third blow was struck."

He was not present when the blows were struck. The question whether any of those blows was struck and if so, at what place or places they were struck, would depend upon the evidence which would be given before the Court and which might or might not be accepted by the jury.

The learned Counsel who appeared for Abinash Bose informed us that in consequence of the action which has been taken by this Court, maps which are prepared for the Criminal Sessions Court in Calcutta are now made in accordance with the directions of the Court and it is to be hoped that the maps to be prepared in future for use in the District Courts will be prepared on the above-mentioned principle.

In this connection attention may be drawn to the amendment of r. 173 of the Police Regulations, Bengal, Part V, which was made by the Government of Bengal in 1920, in consequence of a representation which was made by this Court. That representation contained a statement that in the opinion of the Judges it would be better if the particulars derived from witnesses examined by police officers on the spot, which are now put on the face of the map, were put on a separate sheet of paper annexed to the map as an index thereto, the spots being marked on the map as A, B, C, D, etc. But particulars such as "pointed out by witness A as the place where the fight began, or where the man fell when struck" should not appear on the map itself. We direct that the accused be acquitted and be released from custody.

CHOTZNER, J.—I agree.

N. G.

CRIMINAL REVISIONAL JURISDICTION.

REF. No. 226 OF 1923.

GREAVES, J. DUVAL, J. 1924, Heard, 1 & 2, April. Judgment, 8, April.

RAJIB LOCHAN SHAW, Complainant, v. JOGESH CHANDRA DAS GUPTA, Accused.

Criminal Procedure Code (Act V of 1898), Sch. II, charge under sec. 477A, I. P. C., pending at the time the amended Criminal Procedure Code came into force—Procedure of the new Code, if applies—Committing Magistrate's discretion, interference with.

Where at the time of the commencement of a case charges under sec. 477A, I. P. C. were exclusively triable by the Court of Sessions, but an amendment of the Code of Criminal Procedure Code subsequently passed made it triable as well by a Magistrate with first class powers:

Held—*That, as the amendment of the law was a matter of procedure only, the amended Act applied notwithstanding that the case was commenced before the amended Act came into force and the Magistrate had power to deal with the case.*

RAJIB LOCHAN SHAW v. JOGESH CHANDRA DAS GUPTA.

IN RE JOSEPH SUCHE & CO., LD. (1), JAMES GARDNER v. LUCAS (2) *and* KIMBRAY v. DRAPER (3) *referred to.*

Where the Magistrate's discretion in not committing a case to the Sessions cannot be said to have been improperly exercised, it should not be interfered with.

This was a Reference made by the Additional District Magistrate of Mymensingh (Mr. B. D. Hazra), recommending that the proceedings pending before the Deputy Magistrate of Tangail, against the accused under secs. 408 and 477A, I. P. C. may be committed to the Court of Sessions for trial.

The facts of the case and the grounds of the Reference would appear from the following letter of Reference :—

"The accused Jogesh Chandra Das Gupta was an accountant and cashier commonly styled as Khajanchi in the employ of Babu Hem Chandra Choudhury, Zamindar of Hemnagar in this District. During the tenure of his service as Khajanchi he is alleged to have defalcated large sums of money belonging to the estate and falsified the accounts. When this was detected, a case was instituted at the Gopalpur Thana. The Police Officer of Gopalpur after a protracted enquiry submitted a charge-sheet against the accused under secs. 408 and 477A, I. P. C., on the 19th April 1923.

The case is reported to the High Court for orders with the recommendation that the case may be ordered to be committed to the Court of Sessions for trial on the following grounds. *First*, that when the enquiry commenced the case was under the law then in force triable exclusively by the Court of Sessions so far as the offences under sec. 477A, I. P. C. are concerned. Under the amendment introduced from 1st September these offences are also triable by a Magistrate of the 1st class. An authoritative decision is necessary as to whether the amended provision applies to a case commenced under the old law. *Second*, that the amount of defalcation and the extent of falsification of accounts demand that the punishment in case of conviction should exceed what lies in the power of a 1st class Magistrate to award. *Third*, it is urged that if in case of conviction on one or more counts, the Court of Sessions awards adequate punishment, it will not be necessary to prosecute the other charges and there will thus be a saving in expenses on both sides. The trying Magistrate has shown no cause.

The Opposite Party appeared by pleader and urged that in case of conviction a 1st class Magistrate could award adequate punishment, and that under the amended law he can try the case. These views do not commend themselves to me."

Mr. Jackson, Babus Ramani Mohan Chatterjee and *Rebati Mohan Chatterjee* for the Complainant.

Babus Narendra Kumar Bose and *Iswar Chandra Chakravarti* for the Accused.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference by the Additional District Magistrate of Mymensingh recommending that the case may be ordered to be committed to the Court of Sessions for trial.

The complainant supports the Reference and the accused opposes it.

The case commenced in February 1923 in the Court of the Deputy Magistrate of Tangail and involved charges against the accused under secs. 408 and 477A of the Indian Penal Code.

At the time the case commenced the

(1) L. R. 1 Ch. Div. 48 at p. 50 (1875).
(2) L. R. 3 A. C. 582 at p. 603 (1878).
(3) L. R. 3 Q. B. 160 at p. 178 (1868).

RAJIB LOCHAN SHAW v. JOGESH CHANDRA DAS GUPTA.

charges under sec. 477A were exclusively triable by the Court of Sessions. Since the amended Code of Criminal Procedure came into force charges under sec. 477A are triable by a Magistrate with first class powers. One of the grounds for the Reference is that the Additional District Magistrate desires a decision as to whether the amended provision of the Code of Criminal Procedure, authorising a Magistrate with first class powers to try offences under sec. 477A, applies to cases commenced before the amending Act came into force. Another ground for the Reference is that the amount of defalcation and the extent of falsification of accounts alleged demand, in case of conviction, a punishment in excess of what a Magistrate with first class powers can award. This is two years' rigorous imprisonment in the case of each charge subject to a limit of 4 years. The last ground suggested is economy. It is said that if the matter is dealt with by the Court of Sessions and if conviction follows on one or more counts, it will be unnecessary to prosecute other charges as adequate punishment can be conflicted in respect of the one or more counts established. The Magistrate framed charges in respect of one item only under secs. 408 and 477A of the Indian Penal Code on the 14th September 1923. The complainant asked that charges should be framed against the accused in respect of some seven items in regard to which defalcation and falsification of accounts were alleged but the charges framed relate to one item only of Rs. 10,000, the offences alleged being carried out by inserting under a heading Howlat in the Bakian a sum of Rs. 29,987-13-0 instead of Rs. 19,987-13-0.

With regard to the first point to which the letter of Reference relates we were referred on behalf of the complainant to certain passages in Hardcastle's Statute Law, 3rd Edition, at pp. 319 and 351, in support of the proposition that as the case commenced before the amended Criminal Procedure Code came into force the provisions of the Criminal Procedure Code before the amendment alone applied. We think, however, that as the amendment of the law, which enables a Magistrate with first class powers to try charges falling under sec. 477A of the Indian Penal Code, is a matter of procedure only that the amended Act applies notwithstanding that the case was commenced before the amended Act came into force, which was on 1st September 1923, and we think that the Magistrate has power to deal with the case *In re Joseph Suche & Co., Ltd.* (1). "It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that where enactments merely affect procedure, and do not extend to rights of action they have been held to apply to existing rights." And see also *James Gardner* v. *Lucas* (2). "It is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that you should proceed in another and different way, clearly these bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be." And

(1) L. R. 1 Ch. Div. 48 at p. 50 (1875), per Jessel, M. R.

(2) L. R. 3 A. C. 582 at p. 603 (1878), per Lord Blackborn.

RAJIB LOCHAN SHAW *v.* JOGESH CHANDRA DAS GUPTA.

see again *Kimbray* v. *Draper* (3), where Blackburn, J., stated that a statute dealing with procedure applies *primâ facie* to all actions, pending as well as future. So far therefore as regards the first point raised by the Reference we hold that the Magistrate has power to hear the case.

The second point raised by the Reference involves an interference with the discretion which the Magistrate has exercised, namely, not to commit the case to the Sessions but to deal with it himself. We see no reason to believe that the Magistrate's discretion has not been properly exercised and accordingly we are not prepared to interfere with it. Although the Magistrate if he convicts cannot pass a longer sentence than two years in respect of any one offence it is open to him to pass a like sentence in respect of each offence of which he convicts the accused, up to a limit of four years, and to direct how the sentences are to run.

The third point raised by the Reference we need not deal with. In the result we are not able to accept the Reference and we reject it.

We desire to add for the information of the trying Magistrate that he should consider whether it is not advisable to frame an additional charge in respect of one or other of the other defalcations or falsifications alleged, up to the limit of his powers as set out in sec. 234, Cr. P. C.

DUVAL, J.—I agree.

J. N. R. *Reference not accepted.*

(3) L. R. 3 Q. B. 160 at p 163 (1868)

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 448 OF 1923.

SUHRAWARDY, J.
PAGE, J.
1924,
1, February.

THE EAST INDIAN RY. CO., Petitioners,
v.
JOGPAT SINGH, Opposite Party.

"Loss" in risk-note, Form B, and in Chap VII of the Railways Act (IX of 1890), meaning of the term—Onus of proof of loss, on whom lies—Sec. 72 of the Act, object and effect of—The law as it stood before the passing of the Act.

Except in cases where the Plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the risk-note which pro tanto exempt it from liability unless and until evidence has been adduced which satisfies the Court that a loss has occurred.

GHELABHAI PUNSI *v.* E. I. RY. CO. (5), E. I. RY. *v.* NILKANTA ROY (6), GREAT INDIAN PENINSULAR RAILWAY COMPANY *v.* JITAN RAM (7) *and* EAST INDIAN RY. CO. *v.* KANAK BEHARI HALDER (8) *referred to.*

The term "loss" as used in the risk-note and in Chap. VII of the Railways Act does not mean pecuniary loss to the owner of the goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit, and occurs when it loses possession of the goods and for the time being is unable to trace them.

HEARN *v.* L. & S. W. RY. CO. (9) *and* MILLEN *v.* BRASCH (10) *followed.*

SECRETARY OF STATE FOR INDIA *v.* JIWAN (11), EAST INDIAN RY. CO. *v.*

(5) I. L. R. 45 Bom. 1201 (1921).
(6) I. L. R. 41 Cal. 576: s. c. 19 C. W. N. 95 (1913).
(7) [1923] Pat. 82.
(8) 22 C. W. N. 622 (1918).
(9) 10 Exch. 793, 799 (1855).
(10) 10 Q. B. D. 142 (1882).
(11) I. L. R. 45 All. 380 (1923).

THE E. I. RY. CO. *v.* JOOPAT SINGH.

KISHAN LAL (12), EAST INDIAN RY. *v.* MAKHAN LAL (13), E. I. R. *v.* KALI CHARAN RAM (14), G. I. P. RY. *v.* RAMCHANDRA JAGANNATH (15) *and* HILL, SAWYERS & CO. *v.* SECRETARY OF STATE (16) *referred to.*

Proof of non-delivery or mis-delivery is by no means conclusive evidence as to whether or not a loss has been incurred. No inference can, in fact, be drawn from such evidence that the goods have been lost.

MADRAS AND SOUTHERN MAHRATTA RAILWAY CO., LD. *v.* MATTAI SUBBA RAO (17) *dissented from.*

E. I. R. *v.* KALI CHARAN RAM (14) *and* G. I. P. RY. *v.* JITAN RAM (7) *dissented from, on this point.*

The term "loss" denotes a fact, not a cause of action.

After the passing of the Act of 1874 the liability of carriers in India, including carriers by Railway, was not limited to a liability for negligence, but was a liability as insurers of the goods delivered to them.

CHOGEMUL *v.* COMMISSIONERS FOR THE IMPROVEMENT OF THE PORT OF CALCUTTA (2), CHANGA MAL *v.* THE BENGAL AND NORTH-WESTERN RAILWAY COMPANY (3) *and* IRRAWARDY FLOTILLA CO. *v.* BHUGWANDAS (4) *followed.*

The object and the effect of sec. 72 of the Act of 1890 is not to provide compensation for pecuniary losses suffered by the owners of goods consigned for conveyance to a Railway Company, but to lessen the burden of the obligation which prior to the passing of sec. 72 had lain on Railway Company, as insurers of such goods.

This was a Rule issued against the judgment of the Subordinate Judge, 3rd Court, Hooghly.

The facts of the case will appear from the judgment.

Babus Mahendra Nath Roy and *Ambicapada Chowdhury* for the Petitioners.

Babu Sentimoy Majumdar (for *Babu Hemanta Kumar Mitter*) for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

PAGE, J.—In this case some important and interesting questions are raised in respect of the obligations of a Railway Company towards the owner of goods consigned to it for transportation. On the 24th January 1922, 12 tins of *ghee* were consigned to the E. I. Railway at Arrah to be carried to Chandernagore, and there to be delivered to the Plaintiff, the Opposite Party. On the 21st August 1922, 7 of the tins were delivered to the Plaintiff at Chandernagore, but the Railway Company failed to deliver 5 of the tins. The issue in this case is whether the Plaintiff is entitled to recover damages for the non-delivery of the said goods. The Railway Company undertook to carry the goods on the terms of a risk-note which was signed by the consignor. The risk-note was in the form (B) which has been approved by the Governor-General in Council pursuant to sec. 72 (2) (*b*) of the Indian Railways Act (Act IX of 1890).

It ran as follows :—

Risk-note, Form B.

(To be used when the sender

(2) I. L. R. 18 Cal. 440 (1891).
(3) [1897] Punjab Rep. Civ. Jud. No. 6, p. 23.
(4) L. R. 18 I. A. 121 (1891).
(7) [1923] Pat. 82.
(12) I. L. R. 45 All. 580 (1923).
(13) I. L. R. 45 All. 575 (1923).
(14) [1922] Pat. 145.
(15) I. L. R. 43 Bom. 376 (1918).
(16) I. L. R. 2 Lahore 133 (1921).
(17) I. L. R. 43 Mad. 317 (1919).

THE E. I. RY. CO. v. JOOPAT SINGH.

elects to despatch at a 'special reduced' or 'owner's risk' rate articles or animals for which an alternative 'ordinary' or 'risk acceptance' rate is quoted in the tariff).

Arrah Station,
24-1-1922.

"Whereas the consignment of 12 tins *ghee* tendered by $\frac{\text{me}}{\text{us}}$ as per forwarding order No. 77194 of this date, for despatch by the E. I. Railway Administration or their transport agents or carriers to Chandernagore Station and for which $\frac{\text{I}}{\text{we}}$ have received railway receipt No. 77194 of same date, is charged at a special reduced rate instead of the ordinary tariff rate chargeable for such consignment $\frac{\text{I}}{\text{we}}$ the undersigned do, in consideration of such lower charge, agree and undertake to hold the said Railway Administration and all other Railway Administrations working in connection therewith, and also all transport agents or carriers employed by them respectively over whose Railway or by or through whose transport agency or agencies the said goods or animals may be carried from Arrah to Chandernagore *harmless and free from all responsibility for any loss, destruction or deterioration of or damage to* the said consignment, from any cause whatever except for the loss of a complete consignment or one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection thereto or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment; provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident."

By sec. 72 of the Railways Act it is provided that—"72 (1).—The responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee under secs. 152 and 161 of the Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it (*a*) is in writing signed by on behalf of the person sending or delivering to the Railway Administration the animals or goods and (*b*) is otherwise in a form approved by the Governor-General in Council.

(3) Nothing in the Common Law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a Railway Administration."

The learned trial Judge found (1) that the Railway Company had not proved that the five tins had been lost, and (2) that disappearance of the five tins was due to the wilful neglect of the servants of the Railway Company.

The first contention urged before us on behalf of the Railway Company, which is the Petitioner, was that in order to obtain the benefit of the risk-note it was not incumbent upon the Railway Company to prove that the goods were lost, inasmuch as the Railway Company admitted that the goods were lost, and that the

THE E. I. R. Ry. Co. v. JOGPAT SINGH.

KISH... only issue in the case was whether such loss was due to the wilful neglect of the Railway Company or of its servants, the onus of proving wilful neglect lying on the Plaintiff. In my opinion, this contention is unsound. In order to appreciate the object which the legislature had in view in enacting Chap. VII of the Railways Act, "it is necessary to ascertain what has been the history of the law relating to carriers by rail in this country. The first legislation on the subject is that contained in Act XVIII of 1854, sec. 11 of which is as follows: 'The liability of such Railway Company for loss or injury to any articles or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited, or in any wise affected by any public notice given, or any private contract made by them: but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants'. This continued to be the case until the passing of the Carriers Act, 1865. . . . . On the 10th September 1867 it was decided in the case of *E. I. R.* v. *Jordan* (1) by a Divisional Bench of this Court (Peacock, C. J., and Macpherson, J.) that Railway Companies in India were common carriers and liable as such, that is to say, as insurers of goods delivered to them. . . . . We now come to the Railways Act of 1879. Sec. 2 of that Act contains the following provision: 'Nothing in the Carriers Act, 1865, shall apply to carriers by Railway.' I cannot read these words in any other sense than as repealing all the provisions of the Carriers Act which relate exclusively to carriers by Railway, and confining the operation of the remaining provisions to carriers other than carriers by Railway, so that by the repeal of so much of the Carriers Act as related to Railways, and that of the whole of the Railways Act of 1854 the liability of carriers by Railway as it stood before the Acts of 1854 and 1865 was restored. . . . . It follows that after the passing of the Act of 1879 the liability of carriers in India including carriers by Railway, was not limited to a liability for negligence, but was a liability as insurers of the goods delivered to them." [*Per* Petheram, C. J., *Chogemul* v. *Commissioners for the Improvement of the Port of Calcutta* (2), see also *Changa Mal* v. *The Bengal and North-Western Railway Company* (3) and *Irrawardy Flotilla Co.* v. *Bhugwandas* (4)]. The object and effect of sec. 72 of the Railways Act of 1890 was, in my opinion, to limit the liability of Railway Companies during the transit of goods consigned to them for carriage, and to substitute the obligations of a bailee for the obligations of an insurer of such goods which prior to the passing of that Act were imposed upon them under the Common Law. Sec. 72 of the Railways Act, 1890, was enacted to confer a benefit upon Railway Companies and, in my opinion, except in cases where the Plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the risk-note which *pro tanto* exempt it from liability, unless and until evidence has been adduced which satisfied the Court that a loss has occurred [see *Ghelabhai Punsi* v. *E. I. Ry. Co.* (5), *E. I. Ry.* v. *Nilkanta Roy* (6) and *Great Indian Pen-*

(1) 4 B. L. R. O. C. 97 (1867).

(2) I. L. R. 18 Cal. 440 (1891).

(3) [1897] Punjab Rep Civ. Jud No 6, p. 28.

(4) L. R. 18 I. A. 121 (1891).

(5) I. L. R. 45 Bom. 1201 (1921).

(6) I. L. R. 41 Cal. 576; s. c. 19 C. W. N. 95 (1913).

THE E. I. RY. CO. v. JOGPAT SINGH.

insular Railway Company v. *Jitan Ram* (7)]. In the last case Mullick, J., observed: "It is clear that upon this special contract the burden of proof lies in the first instance upon the Defendants, that is to say, they must first prove that there was such loss as is contemplated by the first part of the risk-note, and when they have done so the onus will be shifted upon the Plaintiff to show that the loss is due to the wilful neglect of the Defendants or their servants as provided in the latter part." [See also *East Indian Ry. Co.* v. *Kanak Behari Halder* (8)].

It was further contended that, if it was incumbent upon the Railway Company to prove that the goods were "lost" within the meaning of that term as used in the risk-note, the Railway Company had discharged the onus which lay upon it by proving that the goods in question had not been delivered to the consignee. It was urged that "loss" as contemplated in the risk-note meant loss to the owner, and that such loss accrued whenever the person entitled to possession of the goods was wrongfully deprived of such possession by reason of the non-delivery, or the mis-delivery, of the goods or otherwise.

It was admitted and urged by both parties, in my opinion, rightly that the same construction must be put upon the term loss in the risk-note and in the section which comprise Chap. VII of the Railways Act, 1890.

Now, a distinction is drawn between suits for non-delivery of goods consigned to a carrier and suits for compensation for the loss of such goods in Arts. 30 and 31 of the 1st Schedule to the Limitation Act (IX of 1908) and, if the proper meaning to be attributed to the term "loss" is that for which the Railway Company contends, the learned Vakil who appeared for the Railway Company was constrained to admit, not only that the word "destruction" in the risk-note and in sec. 72 is mere surplusage, but also that it would follow that where goods consigned for carriage were not duly delivered because, for example, such goods were being deliberately detained by the Railway Company, or had been mis-delivered to a person other than the consignee, or had been converted by the Railway Company to its own use, in each of such cases the Railway Company would be entitled to pray in aid the provisions of sec. 72 which limits its liability in respect of "loss" to that of a bailee.

In my opinion, the meaning for which the Railway Company contends cannot reasonably be attributed to the term "loss" either in the risk-note or in sec. 72 and the kindred sections of the Railways Act, 1890.

In the course of the argument in *Hearn* v. *L. & S. W. Ry.* (9), in which case the question arose whether goods the delivery of which had been delayed were lost within the meaning of that term as used in the analogous provisions of the Carriers Act, 1830, S. T. Baron Martin put this question to Counsel, "Suppose a person delivered to a porter at a Railway Station a casket of jewels, and in consequence of his refusal to forward it the casket remained for some time at the Station, would that be a 'loss' within the Act?" and Baron Alderson asked, "Suppose the goods were known by the carrier to exist, but were not delivered by him for a month, would that be a 'loss' within the Act?" An affirmation that in such circumstances the goods have been lost, surely involves a distortion of the meaning of the word so extravagant

(7) [1923] Pat. 82, 85.
(8) 22 C. W. N. 622, 624 (1918).
(9) 10 Exch. 793, 799 (1855).

as to approach an abuse of the English language. That judicial authority is not wanting in support of the construction of the term "loss" for which the Railway Company contends would appear to be due, if I may say so with great respect, to the fact that the intention of the legislature in enacting Chap. VII of the Railways Act of 1890 has not always sufficiently been borne in mind. The object, and, in my opinion, the effect, of sec. 72 was not to provide compensation for pecuniary losses suffered by the owners of goods consigned for conveyance to Railway Cos., but to lessen the burden of the obligation which prior to the passing of sec. 72 had lain on Railway Cos., as insurers of such goods.

In my opinion, the construction which Baron Parke put upon the term "loss" in *Hearn* v. *L. & S. W. Ry. Co.* (9) is correct, and the same interpretation should be given to the term in the risk-note and in sec. 72 of the Railways Act. Baron Parke, in giving the judgment of the Court, which was to the effect that "where goods which ought to be declared and are not declared are detained by a carrier without being lost by him, he is liable for such detention," observed: "The statute then proceeds to enact that no carrier shall be liable for the loss of, or any injury to, any of the enumerated articles. This does not mean the loss of the monies of the carrier, but the loss of the article itself, or injury to it. In ordinary parlance, this appears to mean the loss by the carrier of the articles committed to him, or injury to them, whilst in his care, not the loss sustained by the owner by non-delivery of the article in due time or altogether, or the loss of the use of the article by him. By the term 'the injury' is clearly meant the injury to the article itself. . . . and the reason of the law must be considered as being to protect the carrier not in all cases where the owner of the articles sustained a damage from the neglect of the carrier to carry, but in cases of a similar nature to those recited, where the chattel was either abstracted altogether, or taken from the place where it ought to be and it was incapable of being delivered at the time it ought to be by reason of that sort of loss. We think this is the true construction of the clause and the carrier is exempted only from being responsible for a loss by him of the particular articles named." The same interpretation was given to the term "loss" in *Millen* v. *Brasch* (10). The facts in that case were that on 13th November 1879 the Plaintiff delivered to the Defendants, who were carriers for hire from London to Rome, a trunk to be sent from London to Liverpool by rail, and thence to be shipped to Italy. Through the negligence of the Defendants' servants the trunk was placed in a vessel bound for America, and was shipped to New York. The mistake was not discovered until 15th December 1879. The issue in the case was whether the trunk had been "lost," and Lindley, L. J., in giving the judgment of the Court observed: "The result comes to this if goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences. But whether goods not permanently lost are lost within the meaning of the Carriers Act, must depend upon whether they have been lost by the carrier as distinguished from lost to the owner: see *Hearn* v. *L. & S. W. Ry. Co.*

(9) 10 Exch. 793, 799 (1855).

(10) 10 Q. B. D. 142 (1882).

(9), and this, again, must depend on the facts of each particular case. If the carrier temporarily loses the goods, and delivers them within a reasonable time after he discovers them, he will not be liable; but if he keeps them after he has recovered them, the Carriers Act will not protect him from such consequent breach of the duty. The obligations on the part of the carrier to deliver the goods will remain or revive, and he will be responsible for future breaches of that obligation . . . . As we understand the facts, the Plaintiff's trunk was shipped and sent to New York as Hamburger's case, and was incapable of being traced and found until the mistake in the substitution of one package for the other was discovered; and the carriers had lost possession of the trunk, and did not in fact know where it was nor what had become of it. This was in our opinion, a loss of the trunk by the carriers."

In my opinion, the term "loss" as used in the risk-note and in Chap. VII of the Railways Act does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit, and such "loss" occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntarily or through inadvertence, loses possession of the goods, and for the time being is unable to trace them. The term "loss" denotes a fact, not a cause of action. A valid cause of action against a Railway Company in India for damages for the non-delivery of goods consigned to it for carriage must be based either on contract or on tort, and must arise from the breach of some duty owed to the Plaintiff by the Railway Company. Proof of the fact that a loss of the goods has occurred may sometimes found, sometimes defeat, such a cause of action. But a cause of action for loss without more is not known to the law. Non-delivery of goods consigned to a Railway Company for conveyance may be due to the fact that the goods are being deliberately detained by the Railway Company or that they have been mis-delivered to some person other than the consignee or that they are "lost." It does not, therefore, necessarily follow that by proving the non-delivery of such goods the "loss" of the goods is also proved, for non-delivery or mis-delivery of goods may be due to "loss," or may be due to other causes.

The question as to what is the meaning of the term "loss" in risk-note (B) and in sec. 72 of the Railways Act does not appear up till now to have arisen in the Calcutta High Court. In Civil Rule No. 972 of 1922 my brothers Richardson and B. B. Ghose, in a case where damages were claimed against the Assam Bengal Railway Company for non-delivery of goods consigned to it for transportation, held that it was incumbent upon the Plaintiff to prefer a written notice of his claim to the Railway Company in accordance with the provisions of sec. 77 of the Railways Act. In the course of his judgment Richardson, J., observed: "I have indicated that in my view a claim for compensation for non-delivery includes the case of the loss of the goods just as much as the case of the detention of the goods. If that be so, it seems to follow that the statutory notice is a condition precedent to a verdict being taken on that alternative footing, because on that footing the goods may have been lost. If it be conceded, though I do not decide, that

(9) 10 Exch. 793, 799 (1855).

THE E. I. RY. CO. *v.* JOGPAT SINGH.

where goods are wrongfully detained by a Railway Company no notice is necessary under sec. 77, a plea by the Company of want of notice must at least be met on that ground, and the Court must be asked to find that the goods were being detained and were not lost when they ought to have been delivered. Where detention is not pleaded or put in issue, a claim simpliciter for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of sec. 77."

The *ratio decidendi* of that case is consistent with the construction which I have placed upon the term "loss" in the risk-note, although the interpretation to be given to the term did not directly arise for determination in that case.

The view which I have expressed as to the meaning of the term "loss" in the risk-note and in sec. 72 is supported by three recent decisions of the Allahabad High Court [*Secretary of State for India* v. *Jiwan* (11), *East Indian Ry. Co.* v. *Kishan Lal* (12) and *East Indian Ry.* v. *Makhan Lal* (13)]. The same meaning has been attributed to the term "loss" by the Patna High Court in *E. I. R.* v. *Kali Charan Ram* (14), by the Chief Court of the Punjab in *Changa Mal's* case (3), in the Bombay High Court by Kajiji, J., in *G. I. P. Ry.* v. *Ramchandra Jagannath* (15) and in the Lahore High Court by Abdul Raoof, J., in *Hill, Sawyers & Co.* v. *Secretary of State* (16). In each of the last two cases, and in *G. I. P. Ry.* v. *Jitan Ram* (7), however, a Division Bench has held that "loss" means loss to the owner of consignor of the goods. It is to be observed that whereas Jwala Prasad, J., in *E. I. R.* v. *Kali Charan Ram* (14) held that when goods are not delivered by the Railway Company they are not "lost," Mullick and Bucknill, JJ., in *G. I. P. Ry.* v. *Jitan Ram* (7) held that goods which are not delivered or are mis-delivered are "lost" within the meaning of the term as used in risk-note (B) and in secs. 72 and 80 of the Railways Act. As I construe the term "loss," with great respect to these learned Judges, I am unable to accept either of these propositions as being correct. It appears to me that it is equally inaccurate to affirm that goods which are not duly delivered, or have been mis-delivered, are lost, as to assert that they are not lost. The true view would seem to be that in either case the goods may or may not be lost, and that proof of non-delivery or mis-delivery is by no means conclusive evidence as to whether or not a loss has incurred. Indeed, I go further, and beg leave to state that, in my opinion, from such evidence alone an inference could not reasonably be drawn that the goods had been lost. It was, moreover, conceded by the learned Judges who decided the case of *G. I. P. Ry.* v. *Jitan Ram* (7) "that if loss to the owner was meant, then there was no necessity for any reference to liability for destruction of the goods."

On the other hand, the Madras High Court in the case of *Madras and Southern Mahratta Railway Co., Ld.* v. *Mattai Subba Rao* (17), finding itself unable to accept the view that the term "loss" in the risk-note (B) includes "destruction, deterioration and damage," held that "if

(3) [1897] Punjab Rep. Civ Jud No. 8, p. 23.
(7) [1923] Pat. 82.
(11) . L. R. 45 All. 390 (1923).
(12) . L. R. 45 All. 630 (1923).
(13) . L. R. 45 All. 675 (1923).
(14) [1922] Pat 145.
(15) . L. R. 43 Bom. 886 (1918).
(16) . L. R. 2 Lahore 133 (1921).
(7) [1923] Pat. 82.
(14) [1922] Pat. 145.
(17) I. L. R. 43 Mad. 617 (1919).

THE E. I. RY. CO. v. JOGPAT SINGH.

goods entrusted to the care of the Company cease to have any resemblance to the goods of the description which they undertook to carry, it seems to us that the Company should be held to have lost the goods." Seshagiri Ayer, J., was of opinion that the term "loss" bore the same meaning in sec. 72 as that attributed to "total loss" in a policy of insurance. But, with great respect, the obligations undertaken by insurer under a policy of insurance differ *toto coelo* from those undertaken by a Railway Company under a contract of carriage, such as that contained in risk-note (B). The Railway Company undertook to carry the goods as a bailee on the terms of the risk-note, but the insurer under a policy of insurance is not in any sense a bailee of the goods covered by the policy, his undertaking being that he will indemnify the assured in respect of the pecuniary loss which the assured may suffer by reason of the happening of any or every specific peril set out in the contract of insurance.

For the reasons which I have given I have been unable to persuade myself that the construction which was put upon the term "loss" in the last-mentioned cases is correct, and I am unable to adopt it. The question then arises, were the five tins which the Railway Company failed to deliver in this case "lost" in the sense which I have indicated? In my opinion, the only inference which can reasonably be drawn from the evidence adduced at the trial is that the goods in question were lost, and there was no evidence which would justify the finding of the learned Judge that the five tins were not lost.

In these circumstances, the only issue which remains is whether the loss of these five tins was due to the wilful neglect of the Railway Company or of its servants, as provided in the risk-note. The learned Judge has decided that issue in a manner adverse to the Railway Company. Was there evidence from which the learned Judge could reasonably have arrived at that conclusion? Having regard to the following facts, namely, that *ghee* is a perishable article; that there was no satisfactory evidence adduced to prove that the five tins were put into Wagon No. 34395 at Dinapur; or that they arrived at Asansole and that no attempt was made by the Railway Company's servants between 11th February, when the Wagon arrived at Asansole, and the 28th April, to ascertain whether the goods loaded in the Wagon were safe and sound, I am unable to hold that there was not evidence adduced before the learned trial Judge which would justify him in finding that the loss of the goods was due to the wilful neglect of the Railway Company's servants: the other findings of the learned trial Judge are not challenged. In these circumstances the Rule, in my opinion, should be discharged with costs.

SUHRAWARDY, J.—I agree. The Rule is discharged with costs. We assess the hearing fee at two gold mohurs.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 65 OF 1922.

CHATTERJEA, J.
CUMING, J.
1924,
Heard, 29, 30 and 31, January and 4, 5 and 6, February.
Judgment, 6 and 18, February.

NIRANKA CHANDRA BASU, Defendant No. 3, Appellant,
v.
ATUL KRISHNA GHOSE, Plaintiff and 2 remaining Defendants, Respondents.

Amendment of plaint, for recovery of surplus sale proceeds, after three years from date of withdrawal of the money, if allowable—Purchase of putni ***by***

NIRANKA CHANDRA BASU *v.* ATUL KRISHNA GHOSE.

a defaulter, in auction sale, whether void or only voidable—Limitation Act (IX of 1908), Art. 62, limitation for claim for surplus sale proceeds withdrawn by Defendant—Sec 14, exclusion of period between setting aside of the sale by lower Court and reversing of that decision by Appellate Court, if allowable in computing period of limitation for suit for recovery of the surplus sale proceeds.

A putni *tenure having fallen into arrears was sold under Reg. VIII of 1919 on the 15th May 1916 and on the 29th May some of the* putnidars *brought a suit for setting aside the* putni *sale. During the pendency of this suit the* putni *again fell into arrears and was sold on the 16th November 1916, and the Plaintiffs* putnidars *applied for an amendment for setting aside the second sale also. The suit was decreed on the 21st February 1918, both the sales being set aside. The zamindar appealed and the High Court reversed the decision and confirmed the sales on the 23rd February 1920. In the meantime, on the 14th May 1917, one of the* putnidars *instituted a suit alleging that he had an 8 as. share in the purchase at the first sale because he had paid one-half the purchase money along with the ostensible purchaser, and praying* inter alia *that the second sale might be set aside. Before this, the said ostensible purchaser had on the 24th January 1917 withdrawn the surplus sale proceeds from Court. Subsequently the Plaintiff on the 31st May 1920 made an application for amendment of his plaint adding a prayer for recovery of one-half of the surplus sale proceeds:*

Held—*That so long as the* putni *sale was not set aside, the purchase by one of the defaulting* putnidars *was only voidable, and the sale having been confirmed, the question whether it was void or voidable did not arise, and did not affect the claim for the surplus sale proceeds.*

GOBINDA CHANDRA PAL *v.* DWARKANATH PAL (1) *referred to.*

That the claim for the surplus sale proceeds came under Art. 62 of the Limitation Act, under which a suit has to be brought within three years from the date on which the money was received by the Defendant. But as the money was withdrawn on the 24th January 1917 and the prayer for amendment of the plaint in respect of the surplus sale proceeds was made on the 31st May 1920, the claim for the surplus sale proceeds was barred by limitation.

In computing the period of limitation, the period between the date on which the sale was set aside by the lower Court in the first suit (21st February 1918) and the date on which the High Court reversed that decision and upheld the sale (23rd February 1920) could not be deducted, for the case did not come under sec. 14 of the Limitation Act, as the Plaintiff was not prosecuting the first suit and was not associated with the Plaintiffs of that suit, nor did it fall under any other section of the Act.

RANEE SURNO MOYEE *v.* SOSHEE MOKHEE BURMONIA (2), HUKUMCHAND BOID *v.* PRITHICHAND LAL CHOWDHURY (3), SANI RANI *v.* KANHAYE LAL (4) *and several other cases referred to and discussed.*

The power of the Court to amend the plaint should not be exercised where the effect is to take away from the Defendant a legal right which has accrued to him by lapse of time.

KALIDAS CHOUDHURY *v.* DRAUPADI DASSI (11), UPENDRA NARAYAN RAY *v.*

(1) I. L. R. 33 Cal 666 (1906).
(2) 12 M. I. A 244 (1868).
(3) I. L. R. 46 Cal. 670: s. c. 23 C. W. N. 721 (P. C.) (1918).
(4) I. L. R. 35 All. 227: s. c. 17 C. W. N. 605 (P. C.) (1913).
(11) 22 C. W. N. 104 (1917).

NIRANKA CHANDRA BASU *v.* ATUL KRISHNA GHOSE.

JANAKI NATH RAY (12) *and other cases followed.*

ZAHUR ALI KHAN *v.* RUTTA KOER (9) *referred to and distinguished.*

This was an appeal preferred on the 7th February 1922 against the decree of the Subordinate Judge of Zillah Burdwan (Babu Atul Chandra Banerjee), dated the 30th of September 1921.

The facts of the case were briefly as follows :—A *putni* tenure (Mahal Debibarpur) was held under the Maharaja of Burdwan. The *putni* fell into arrears and was sold under Reg. VIII of 1919 on the 15th May 1916 and was purchased in the name of one Mritunjoy Ghosh. On the 29th May some of the *putnidars* instituted a suit (Suit No. 309 of 1916) for setting aside the *putni* sale. During the pendency of that suit the *putni* tenure again fell into arrears and was put up to sale again on the 16th November 1916. The Plaintiffs in Suit No. 309 of 1916 applied for amendment of the plaint by adding a prayer for setting aside the second sale also. The suit was decreed on the 21st February 1918 by the Subordinate Judge, both the sales being set aside. The Maharaja of Burdwan who was the second Defendant in the suit appealed to the High Court against the said decree and the High Court on the 23rd February 1920 set aside the decree of the Subordinate Judge and upheld both the sales.

During the pendency of the above suit, the present suit was instituted on the 14th May 1917 by Atul Krishna Ghosh, one of the *putnidars*, on the allegation that in the first sale he had an 8 as. share in the purchase, because he had paid one-half the purchase money, and it was prayed that the second sale might be set aside and Plaintiff's title declared to and possession given him of 8 as. share of the *putni*. There were alternative prayers that if the sale were not set aside the purchasers in the second sale might be directed to convey an 8 as. share of the *putni* to the Plaintiff, and if that sale and the first sale were set aside, the Plaintiff prayed for declaration of his title to ⅓rd share of the *putni* by right of inheritance. In the meantime, *i.e.*, before even the institution of the suit, the ostensible purchaser in the first sale, Mritunjoy Ghosh, withdrew the surplus sale proceeds from Court on the 24th January 1917. Subsequently the Plaintiff on the 31st May 1920 made an application for amendment of his plaint by adding a prayer for recovery of one-half of the surplus sale proceeds. On the 30th September 1921, the Subordinate Judge held the sale under Reg. VIII of 1919 to be good, and gave the Plaintiff a decree for joint possession with Niranka Chandra Basu, purchaser at the second sale. The latter thereupon preferred the present appeal to the High Court.

Babus Gunada Charan Sen, Surendra Nath Bose (Sr.) and *Sachindra Prasad Ghose* for the Appellant.

Babus Mohendra Nath Roy and *Narendra Krishna Bose* for the Plaintiff-Respondent.

Dr. D. N. Mitter and *Sarat Kumar Mitter* for the Defendant No. 1 (Respondent No. 2).

Babus Atul Chandra Gupta, Krishna Choitna Ghose, Ramendra Mohon Majumdar (for *Babu Rama Prosad Mukherjee*) for the Defendant No. 2 (Respondent No. 3).

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of the suit for setting aside the sale of a *putni* tenure held under Reg. VIII of 1919, and for de-

(9) 11 M. I. A. 468 (1867).
(12) 22 C. W. N. 611 (1917).

claration of title to and possession of 8 annas share of the *putni* tenure. There were alternative prayers, namely, that if the sale be not set aside the Defendants Nos. 2 and 3 be directed to convey an 8 annas share of the *putni* to the Plaintiff, and if that sale (and an earlier sale of the *putni*) be set aside the Plaintiff prayed that his title to ⅓rd share in the *putni* might be declared.

It appears that the *putni* tenure (Mahal Debibarpur) was held under the Maharaja of Burdwan who is the Defendant No. 1 in this case. The Plaintiff as well as the Defendants Nos. 6 to 27 were the *putnidars*. The Plaintiff's share originally was one-third in the tenure by right of inheritance, and the remaining 2/3rds belonged to the Defendants Nos. 6 to 27. The *putni* fell into arrears and was sold under Reg. VIII of 1919 on the 15th May 1916 and was purchased in the name of Defendant No. 2. The Plaintiff says that in that purchase he had an 8 annas share, because he had paid one-half the purchase money, so that although he had ⅓rd share by inheritance he became a sharer to the extent of 8 annas by the purchase. On the 29th May 1916 the Defendants Nos. 6 to 9 instituted a suit (Suit No. 309 of 1916) for setting aside the *putni* sale. The present Plaintiff was Defendant No. 19 in that suit, the present Defendant No. 2 Mritunjoy Ghosh was Defendant No. 1 and the present Defendant No. 1 the Maharajadhiraj of Burdwan was the Defendant No. 2 in that suit. During the pendency of that suit the *putni* tenure again fell into arrears and was put up to sale again on the 16th November 1916. The Plaintiffs in Suit No. 309 of 1916 applied for amendment of the plaint by adding a prayer for setting aside the second sale also. Before that suit was disposed of, the present suit was instituted on the 14th May 1917 by the Plaintiff. The previous suit was decreed on the 21st February 1918 by the Subordinate Judge, both the sales being set aside. On the 20th November 1918, the Court below took up the present suit and dismissed it on the ground that, as both the sales had been set aside there was no cause of action for the present suit. On the 18th December 1918, the Plaintiff applied under sec. 151 of the Civil Procedure Code, for setting aside the order dismissing the present suit and for restoration of the suit. On the 26th April 1919, the Court granted the application of the Plaintiff and restored the suit. There was an application to this Court for reviving the order and a rule was issued: but it was discharged on the 23rd February 1920.

It appears that in the meantime the Maharaja of Burdwan appealed to this Court against the decree in Suit No. 309 of 1916. This appeal was decided on the same day, namely, the 23rd February 1920. The judgment of the Subordinate Judge was set aside and both the sales were upheld by this Court. Thereupon an additional issue (Issue No. 7), *viz.*, "whether the suit is barred by the rule of *res judicata*," was added at the instance of Defendant No. 7, the Maharaja, on the 24th June 1920 in the present suit. The learned Judge proceeded to decide this preliminary issue first, and by his judgment dated the 5th August 1921 held that the "question as to whether the second sale should be set aside or not is barred as *res judicata*." On the 30th September 1921, the other issues were taken up, and the Subordinate Judge held that the Defendant No. 3 was *benamdar* of the Defendant No. 2. The sale under Reg. VIII of 1919 was held to be good, but on the finding that the Defendant No. 2 pur-

NIRANKA CHANDRA BASU v. ATUL KRISHNA GHOSE.

chased the property in the *benami* of Defendant No. 3, gave a decree to the Plaintiffs for joint possession in respect of 8 annas share of the *putni* with the Defendant No. 3.

The Defendant No. 3 accordingly has preferred this appeal, and so far as this part of the case is concerned the only question we have to consider is whether the Defendant No. 3 was the *benamdar* of the Defendant No. 2, because, if the Defendant No. 3 was the real purchaser at the sale, he is the owner of the entire mahal by his purchase at the second sale, both the sales having been held valid by the High Court.

In determining the question whether Defendant No. 3 was *benamdar* or not, the principal point to be considered is, who paid the purchase money. The Plaintiff's case was that it was the Defendant No. 2, who paid the purchase money. The onus is no doubt upon the Plaintiff to prove it. There is no evidence on the record to show that Defendant No. 2 did pay any purchase money. Defendant No. 2 says in his deposition that he did not pay the purchase money. The Plaintiff himself does not depose that the purchase money was paid by the Defendant No. 2. On the contrary his statement goes to show that it was Defendant No. 3 who paid the money. He says: "I do not know whence Niranka Babu (the Defendant No. 3) paid the purchase money of the *nilam*. Niranka Babu took possession of the mahal after his purchase." The Plaintiff no doubt in his deposition stated that the Defendant No. 2 purchased in the name of Defendant No. 3. But the reason for making that assertion was, as appears from his cross-examination, "the Defendant Ram Chandra (brother of the Defendant No. 2) was instructing Niranka Babu and he was offering bids; (adds): at that time Mritunjoy was standing at their side. From that I infer that Niranka Babu was the *benamdar* of Mritunjoy." That fact surely is not sufficient for holding that the Defendant No. 3 was the *benamdar* of Defendant No. 2. Then there are certain alleged admissions of Defendant No. 3 that he was the *benamdar* of Defendant No. 2. The Plaintiff's witnesses Triguneswar Mitra and Atul Chandra Adak stated that the Defendant No. 3 requested them not to raise the bids as he was bidding for the *malik* and that he would be able to out-bid others as he would get the surplus sale proceeds through the Defendant No. 2. If, however, the Defendant No. 3 was really bidding for the *malik*, it did not matter what the price was, because he would get back the purchase money out of the sale proceeds through the Defendant No. 2. It might be that the Defendant No. 3 wanted to deter other bidders if he really requested the other bidders not to raise the bids, in order that he might purchase the property at a lower price. It is also to be observed that the object of purchasing the property *benami* would be defeated by disclosing publicly at the time of the sale that it was Defendant No. 2, the defaulting *putnidar*, who was purchasing the property in the name of the Defendant No. 3.

The evidence adduced on behalf of the Plaintiff does not show that the purchase money was paid by the Defendant No. 2. On the other hand, Defendant No. 3 has adduced evidence to show that the purchase money was paid by him. The property was sold at Rs. 10,000 on the 16th November 1916. The sum of Rs. 1,500 was deposited on that day and the balance, namely, Rs. 8,500, was deposited on the 23rd November 1916. On the

back of the challan by which Rs. 8,500 was deposited, the numbers of certain currency notes, some of which were of the value of Rs. 1,000 each were noted. The numbers of those notes exactly correspond to the numbers of certain currency notes which were received by the Defendant No. 3 on cashing a cheque for Rs. 10,000 in the Imperial Bank of India on the 22nd November. It appears that Rai Nalinakshya Bose Bahadur, the father of the Defendant No. 3, issued two cheques on the Imperial Bank, one for Rs. 1,100 on the 21st November 1916 and the second for Rs. 10,000 on the 22nd November. There was a third cheque for Demand Loan of Rs. 4,500, all the cheques being in favour of his son, the Defendant No. 3. The Imperial Bank of India certificates showing the numbers of notes issued on the 21st and on the 22nd November 1916, and the Loan Ledger of that Bank showing that Rs. 4,500 was paid as loan on the 22nd November 1916, support the above facts. The Current Account Ledger of the Bank shows a deficiency in the current account and the overdraft. This evidence certainly is very strong.

As stated above, on the 22nd November 1916 when the cheque for Rs. 10,000 was given by the father of Defendant No. 3 in his favour on the Imperial Bank of India another cheque for Demand Loan for Rs. 4,500 was drawn by him on the same day. From the papers produced by the Imperial Bank it appears that Government securities had been deposited by him for securing over-drafts which carried interests at 8 per cent. per annum, and if we are to accept the case of the Plaintiff, we have to hold that the father of Defendant No. 3 in order that the Defendant No. 2 might perpetuate a fraud, gave his son a cheque for Rs. 10,000 while he himself borrowed money on the same day at an interest of 8 per cent. per annum. We do not see any sufficient reason why the father of the Defendant No. 3 should act in this way. It is pointed out that the brother of Defendant No. 3 was married to a lady who had some property and *pujas* jointly with Defendant No. 2. It appears, however, that litigation was going between the wife of the brother of Defendant No. 3 and the Defendant No. 2 with respect to some of the joint properties. However that may be, no sufficient reasons have been shown why the father of the Defendant No. 3 should help the Defendant No. 2 in this way in order that he might effect a fraud.

It is pointed out by the learned vakil for the Respondent that the numbers of the currency notes received from the Imperial Bank were mentioned on the back of the challan, dated the 16th November 1916, and were subsequently penned through and then entered on the back of the second challan which throws suspicion on the matter. It was suggested, though somewhat faintly, that the numbers of the notes might have subsequently been entered on the back of the second challan in order to create evidence. But the witness Gouri Sanker Panja, a servant of the Defendant No. 3, who entered the numbers of the currency notes on the back of the challan explains the matter. He said: "By mistake the numbers of the said G. C. Notes were written on the back of (Ex. E) by me but on finding out my mistake penned this through." We do not see that any argument can be founded against the Defendant No. 3 on this mistake, because, whatever the intention might have been, there could be no doubt that it was by a mistake that the numbers of the notes were entered on the back of the first challan and when the

mistake was discovered they were penned through and the numbers were entered on the back of the second challan. As to the suggestions that the numbers of the notes were entered on the back of the second challan subsequently in order to create evidence, it is based on the ground that the challans which were produced in Court are those which are given to the party by the Collectorate and retained by the party, and that therefore Defendant No. 3 had an opportunity of having the numbers of those notes which he had received from the Imperial Bank, entered on the back of the challan. In the first place this is a mere suggestion; secondly, the challan is dated the 23rd November 1916 when the original challan filed in the Collectorate was certainly in existence; and it would be unreasonable to assume that a party would take the risk of making false entries on the back of the challan when the falsity could be proved by the production of the challan filed in the Collectorate. As already stated there is nothing to support this suggestion. The Defendant No. 3 examined himself. He speaks to the payment of the purchase money and of his having received the cheques from his father for the purpose of cashing them. He further speaks to having given Government securities to the Burdwan Raj as security for *putni* rents.

It appears that notice was issued on the tenants of the *putni* mahal on the 28th November 1916 by the Burdwan Raj that the Defendant No. 3 had purchased the *putni*, and the receipt of possession dated the 1st December 1916 stands in the name of Defendant No. 3. They would no doubt be in the name of the ostensible purchaser and they by themselves do not prove much.

The evidence shows that the Defendant No. 3 collect .. *putni* ma. *gomosthas*, c appointed a *go.* barpur and Raj. security bond was t. 30th March 1917. A Madhab Manna was ap. of Mouzah Nandal. No executed by him has been p. it appears that a decree w. against the heirs of this *gomos* suit for accounts, and the prelimina the final decrees in the case show tha. sum of Rs. 234 odd was decreed agai. the heirs of the said Beni Madhab Manna who died before the institution of the suit. The decree was executed against the heirs of the said *gomostha*: some property was sold and was purchased by a third party and the Defendant No. 3 got the decretal amount.

Both the Plaintiff and the Defendant No. 3 summoned certain tenants who produced *dakhilas*, and one of them, Ex. 3. which was produced at the instance of the Plaintiff shows that rent receipts were granted by the *gomostha* on behalf of Defendant No. 3. There are other *dakhilas* produced by witnesses for the Defendant No. 3 which show the same thing. Then the Defendant No. 3 has produced challans obtained from the Burdwan Raj on payment of *putni* rent after the second sale in the name of Defendant No. 3 through Dinanath, the *gomostha*. The fact that the name of Defendant No. 3 was entered in the *dakhilas* on payment of rent to the Raj, by itself does not prove that he was the real owner, because, in all *benami* transactions the name of the ostensible purchaser is entered in rent receipts, but taking all the facts together, especially

SHNA GHOSE.

posses- . he evi- ae purchase t No. 3, we the case of the e *gomostha* Dina- ar have been exa- dant No. 3 says that tances from Dinanath twice. Dinanath also says ing. Then there is evidence Dinanath that the balance of payable to the Burdwan Raj after ing the amount collected by him the tenants was paid by Defendant . 3, and that is the way in which rent was paid to the Burdwan Raj. This is supported by the evidence of the Defendant No. 3. We do not think that the Subordinate Judge was right in holding that the Defendant's story was an absolute myth.

The Plaintiff examined three tenants, Panchu Jalia, Surendra Nath Ghose and Prohlad Ghose. They said that they received *dakhilas* granted by the *gomostha* in the name of Defendant No. 3 and they asked why the name of the Defendant No. 2 was not entered in the *dakhilas* and were told that it would be so done after the suit which was then pending was disposed of.

It is to be observed that these witnesses were not cited originally, but were cited only on the 8th August 1921 after the judgment on the preliminary issue (the 7th issue) was pronounced, and in any case the evidence of the witnesses is not of any value.

The Subordinate Judge observed in his judgment: "A study of the records shows that no step, good, bad or indifferent, was taken on behalf of Defendant No. 3 in this suit to rebut the Plaintiff's allegation and Plaintiff's prayer. No witness was cited or summoned for Defendant No. 3 and no document was called for on his behalf and even the said cheques from the Bank were called for by the Defendant No. 2 and not by Defendant No. 3." It appears that this finding is erroneous and is based upon a misconception of facts. The cheques referred to by the Subordinate Judge had reference to the first sale, and not to the second sale in which alone the Defendant No. 3 was interested. The cheques referred to by the Court below were drawn on the Delhi and London Bank, whereas the cheques which had reference to the second sale were on the Imperial Bank of India. There are several petitions made by the Defendant No. 3 showing that he took steps for the production of witnesses and evidence. He took out processes upon the Secretary of the Bank for production of the account books. The petitions are dated the 29th August 1921, 9th May 1921 and 14th March 1921. All that can be said is that at the earliest stage of this suit, the Defendant No. 3 was not so active as he was at a later stage. It must be remembered, however, that at the earlier stage of this suit the previous suit (Suit No. 309 of 1916) was pending, and was not disposed of by the Court of first instance until the 21st February 1918, and by the High Court until the 23rd February 1920. It is pointed out by the Subordinate Judge that the Defendant No. 3 did nothing in that suit, his defence in that suit being that if the second sale was set aside he was entitled to get back the purchase money with compensation. It is true that the question of *benami* was raised in connection with the second sale by way of amendment. No issue, however, was raised on the point, and as a matter of fact the decision of the first Court in suit

NIRANKA CHANDRA BASU *v.* ATUL KRISHNA GHOSE.

(No. 309 of 1916) directed that the Defendant No. 2 would get the purchase money back, and it was not until the second sale was confirmed by the High Court that there was a claim against him for 8 annas share, and it became necessary then for him to fight out the case with respect to the claim for possession of 8 annas share of the *putni*. We have pointed out the steps taken by him for the production of evidence in his favour in this suit.

Lastly, there is evidence as to the negotiations for a compromise of the suit which throws considerable light on the real facts of the case. Sailendra Nath Mitra who was then the officiating Government pleader of Burdwan and Mahima Ranjan Bakshi, pleader, Assansole, who took part in the negotiations for the compromise, were called by the Plaintiff; and their evidence goes to show that the negotiations were carried on with the Defendant No. 3 on the footing that he was the purchaser of the *putni*. Triguneswar Mitra who is related to the Plaintiff, stated in his deposition: "Sailendra Babu said that he had heard from Mritunjoy Babu that at the time of the *nilam* there was an understanding between Mritunjoy and Niranka Babu that the latter would give back the mahal to Mritunjoy if he paid the purchase money to Niranka Babu with interest at 9 per cent. per annum, and Sailendra Babu said how could we expect to get without payment of interest." That might be so. There might have been an understanding that the property would be purchased by Defendant No. 3 and that the Defendant No. 2 would get it from him on payment of the purchase money. Assuming that there was such an understanding it does not show that the purchase was made by the Defendant No. 3 as *benamdar*. On the contrary it shows that it was the Defendant No. 3 who would purchase the property and that he would convey the property to Defendant No. 2 if the latter paid the money. We are accordingly of opinion that there is no evidence of the Defendant No. 3 being the *benamdar* of the Defendant No. 2.

We have said that the Plaintiff has no direct evidence showing that he paid the purchase money and the circumstantial evidence relied upon by the Plaintiff has also been dealt with by us.

The Court below has commented upon the fact that the statements made by the Defendant No. 2 as to the surplus sale proceeds withdrawn by him after confirmation of the sale, *viz.*, Rs. 9,000 are not consistent with each other. He stated in his deposition that he kept the money in the Bank. Subsequently he said that he kept the money with his aunt, and that therefore there is no consistent account about his keeping the money. We do not, however, see the force of the observations made by the Subordinate Judge on this point. If it is meant to suggest that the money was paid to Defendant No. 3 it would go to show that the money was originally supplied by Defendant No. 3 and that he was repaid by the Defendant No. 2. But there is no evidence to show that the Defendant No. 3 advanced any money to Defendant No. 2 before the sale or that the latter repaid it to the Defendant No. 3.

The Court below has also commented on the fact that the account books of the Defendant No. 3 were not produced by him. Those account books were in fact produced by him, but at a late stage of the case. He gave an explanation why these were not produced earlier. But whether that is satisfactory or not the Defendant No. 3 has shown that the pur-

chase money was paid out of the money obtained by him on cashing the cheque drawn in his favour by his father.

The learned vakil for the Plaintiff-Respondent has conceded that some of the reasons given by the Subordinate Judge for deciding against the Defendant No. 3 are not borne out by the record. On the whole we are of opinion that the Plaintiff has failed to prove that the Defendant No. 3 was a *benamdar* of Defendant No. 2. That being so, the decree of the Court below in favour of the Plaintiff for joint possession in respect of an 8 annas share of the *putni* mahal with the Defendant No. 3 must be set aside.

So far as the Maharaja of Burdwan is concerned the sale having been held to be good, is no longer interested in the question raised in the appeal and no ground has been urged against him. The cross-objection preferred by the Plaintiff has not been pressed. The appeal as against the Maharaja is accordingly dismissed.

The next question is whether the Plaintiff is entitled to get a decree for one-half of the surplus sale proceeds of the second sale. That sale, as stated above, took place on the 16th November 1916, and fetched a price of Rs. 10,000. The Defendant No. 2 withdrew Rs. 8,999-11-11 as the surplus sale proceeds on the 24th January 1917. The Plaintiff's claim to one-half of this amount is based upon the allegation that he was the owner of the *putni* taluk (to the extent of 8 annas) by virtue of his purchase of it at the first sale jointly with Defendant No. 2. The first point for determination so far as this part of the case is concerned is whether the Plaintiff was a purchaser at the first sale jointly with Defendant No. 2. The Court below has come to the finding that he was. It has found that there was an agreement between the Plaintiff and Defendant No. 2 to purchase the taluk at the first sale and that the Plaintiff paid half the purchase money. The evidence on the point has been placed before us and has been commented upon at length by both parties. The Plaintiff's case is that he paid Rs. 300, that being one-half of the money which had been paid into Court on the date the sale took place (*i.e.*, 15th May 1916), and that he paid a sum of Rs. 2,000 when the balance of the money had to be deposited on the 22nd May 1916. The Plaintiff says that he came to Burdwan a few days before the sale and that he expected that all the co-sharers of the *putni* mahals would pay their quota of the *putni* rent, and he further says that he had sufficient money with him for payment of his share of the *putni* rent which exceeded Rs. 300. It appears that he borrowed a sum of Rs. 1,500 a few days before the sale in order to pay off the rent due on account of some *putni* mahals held by him under the Burdwan Raj, and he says that he had a sum of Rs. 510 left with him after paying the rent due on account of the other *putnis*; but as his other co-sharers in the taluk Debibarpur did not pay their shares of the rent, he and Defendant No. 2 entered into an agreement to purchase the taluk jointly in the names of Defendant No. 2 and the Plaintiff's son Tarak. Bids were actually offered in those two names. The Plaintiff has not produced his account books and that certainly is a matter for comment. With regard to the balance of the purchase money which was to be deposited on the 8th day (the 22nd May) the Plaintiff adduced evidence to show that he paid Rs. 2,000 to Ram Chandra, the brother of Defendant No. 2 on account of the balance of his share plus certain inciden-

NIRANKA CHANDRA BASU *v.* ATUL KRISHNA GHOSE.

tal costs such as giving security, etc. It is to be observed that in the plaint as originally filed it was stated that a sum of Rs. 2,000 was paid on the 15th May and there is no mention of the payment of the sum of Rs. 300 on that day. It appears, however, as observed by the Subordinate Judge that the plaint was carelessly drawn up, and subsequently the plaint was amended.

It appears from the evidence that the financial condition of the Plaintiff was not good at the time. We have already referred to the fact that he borrowed Rs. 1,500 a few days before the sale and there is also evidence that he had to borrow money again, but that was sometime after (November, 1916). The evidence that he had Rs. 2,000 for payment of his share of the balance of the purchase money does not appear to be strong. There is the evidence, however, of one Mahima Ranjan, a pleader of Assansole, who swears that he was sent by his uncle Rash Behari to Burdwan with money in case his cousin Jotindra Mohan required it for purchasing another *putni* mahal. that the Plaintiff's son Radha Raman took two currency notes from him of the value of Rs. 500 each and that the said Radha Raman actually paid money for being deposited in the Collectorate on the 22nd May in the presence of the witness. The two currency notes of Rs. 500 were not as a matter of fact entered in the challan, but it is stated that the *podder* said that it was unnecessary to enter the notes in the challan.

There has been some discussion before us as to the ability of the Defendant No. 2 to raise the amount of money which was necessary for being deposited, and the Court below has found that the story of Defendant No. 2 as to the raising of the money was false. But it does not follow that [illegible] have raised mo[illegible] No. 2 was unabl[illegible] purchase money. [illegible] to consider is wheth[illegible] ment between the Pl[illegible] No. 2 for the purcha[illegible] whether the Plaintiff pa[illegible] of the purchase money. The [illegible] has produced two letters purporting to have been written by the Defendant No. 2 from Purulia. One is Ex. 8, dated the 23rd May 1916, which, if genuine, proves the case of the Plaintiff entirely, because, it contains a clear admission of Rs. 2,000 having been paid by the Plaintiff to Ram Chandra, the brother of Defendant No. 2, for the purpose of purchasing Debibarpur at the auction sale. The Defendant No. 2 denied that the letter was written by him. The Subordinate Judge has come to the finding that the letter was in the handwriting of Defendant No. 2. There is some similarity between his handwriting and the writing of the letter, but in the absence of any expert evidence on the point we do not think it safe to rest our decision on this letter. There are other circumstances however upon which the Court below has relied, and which we think have an important bearing on the case. The first is that joint bids were offered in the names of Tarak and Defendant No. 2. The Plaintiff's son Tarak was present in Court at the time of the auction sale and if joint bids were offered in the name of said Tarak, it is difficult to see why his name was joined unless it was agreed that the Defendant No. 2 and the Plaintiff should jointly purchase the property. The Defendant's case was that Tarak in whose name the bids were offered jointly with Defendant No. 2 was the son of Ram Chandra, the brother of Defendant No. 2. It appears, however,

chase money ... son of Ram Chandra, was obtained ... month old at that time according to the Plaintiff's evidence, and a year old according to the Defendants' evidence. Ram Chandra had other grown up sons and it is extremely unlikely that bids should be offered in the name of a child of so tender an age.

The Defendant's story is that when bids were going on in the joint names of the Defendant No. 2 and Tarak, Ram Chandra came and objected to his being mixed up in the matter of the purchase and thereupon the name of his son Tarak was struck out from the bid-sheet. But Ram Chandra admittedly executed a security bond on behalf of his brother, the Defendant No. 2, in favour of the zemindar (the Burdwan Raj) as security for the rent of the *putni* mahal purchased by the Defendant No. 2. The evidence as to when the name of Tarak was struck out from the bid-sheet is conflicting, but we think having regard to the evidence of the Nazir that it was struck out by Mr. Waddell, the Collector, and initialled by him, when the bids were closed and the bid-sheet was placed before him. The name of Tarak appears jointly with that of the Defendant No. 2 in the challan by which the earnest money was deposited on the date of the sale. It is said by way of explanation that Bhuban Banerjee who wrote out the challan was not aware of the fact that the name of Tarak had been struck out and in ignorance of that fact the challan was written out in the joint names after the sale. But as stated above the name of Tarak was struck out after the bids had been closed and the *challan* was corrected, as it appears, by the Naib Nazir.

The second circumstance is that during the negotiations for compromise of the present suit in the Lower Court, which however was not successful, the fact that the Plaintiff had paid money for the purchase of the *putni* at the first sale was set up in the presence of the Defendant No. 2. It appears from the evidence of Sailendra Nath Mitra, the then Government pleader of Burdwan, and Mahima Ranjan Bakshi, pleader, Assansole, that Defendant No. 2 stated that if the Plaintiff had paid money to Ram Chandra, he would ascertain it from his brother and repay him. Of course there was no distinct admission that the Plaintiff had paid any money. But the Plaintiff had set up a case of payment of Rs. 2,400 in his plaint and these negotiations for compromise took place long afterwards. It is improbable that Defendant No. 2 should not have asked his brother Ram Chahdra as to what sum, if any, had been paid by the Plaintiff for the purchase of the *putni* taluk. In these circumstances we are unable to differ from the finding that the Plaintiff paid one-half of the purchase money. It is next contended that the Plaintiff having admittedly purchased the property for the benefit of his son, the suit could not be maintained by him. But until there was a conveyance executed by him the interest in the property remained in him. Any disclaimer would not pass the interest to his son, and the son's position was that of a *benamdar*.

It is further urged that the purchase of the *putni* by one of the defaulters was void; but so long as the sale was not set aside it must be taken that it was only voidable. See *Gobinda Chandra Pal* v. *Dwarkanath Pal* (1). The sale has been confirmed and the question whether it was void or voidable does not arise, and does not affect the claim for the surplus sale proceeds.

We now come to the questions of amend-

(1) I. L. R. 33 Cal. 666 (1906).

ment of the plaint and limitation, but before doing so, we must notice a contention raised on behalf of the Plaintiff, *viz.*, that the Defendant No. 2 not having preferred an appeal is not entitled to raise any objection against the finding of the Subordinate Judge. The Subordinate Judge gave a decree for possession to the Plaintiff in respect of an 8 annas share of the property. The question of the surplus sale proceeds would arise only if that decree for possession was set aside. There was no decree against the Defendant No. 2, with respect to the surplus sale proceeds and an appeal does not lie merely against findings. In any case having regard to the provisions of Or. 41, r. 33, C. P. C., we can give such relief to Defendant No. 2, as he may be entitled to.

Then comes the question of amendment of the plaint. It arises in this way. The first sale, as already stated, took place on the 15th May 1916 and on the 29th May 1916, Suit No. 309 of 1916 was instituted by Defendants Nos. 6 to 9. The second sale took place on the 16th November 1916. On the 22nd November 1916 the Plaintiff put in an application praying that the payment of the surplus sale proceeds might be withheld for one month, but the Court held that no action could be taken without an injunction from the Civil Court. On the 24th January 1917 the Defendant No. 2 withdrew the sum of Rs. 8,999 odd, that being the surplus sale proceeds. The present suit was instituted on the 14th May 1917. There was originally no prayer in the plaint about the surplus sale proceeds, though it was open to the Plaintiff on the 14th May 1917 (when the suit was instituted) to claim a moiety of the surplus sale proceeds in the alternative. He was fully aware of the fact that the Defendant No. 2 had withdrawn the whole of the surplus sale proceeds as he had objected to the withdrawal. On the 7th May 1920, an application was made for amendment of the plaint praying for a refund of Rs. 2,000 in case the first sale was set aside; even then there was no prayer for amendment in respect of the one-half of the surplus sale proceeds. On the 31st May 1920, an application for amendment in respect of the surplus sale proceeds was made for the first time. The Defendant No. 2 objected to the application; but the Court on the 18th July 1920 allowed the plaint to be amended. The question however seems to have been left open, and was finally decided in the judgment.

The question is whether the application for amendment was properly allowed. It is contended on behalf of the Appellant that the claim in respect of the surplus sale proceeds was barred at the date of the application for amendment (31st May 1920) as the surplus sale proceeds were withdrawn by the Defendant No. 2 on the 24th January 1917, and that therefore the amendment ought not to have been allowed. We have to see therefore whether the claim in respect of the surplus sale proceeds was barred by limitation on the 31st May 1920. The claim for the surplus sale proceeds comes under Art. 62 of the Limitation Act, under which a suit has to be brought within three years from the date on which the money was received by the Defendant. There is no doubt that money was received by the Defendant on the 24th January 1917 and the date of the amendment was 31st May 1920 which was more than three years from the former date. It is contended on behalf of the Plaintiff that the period between the date on which the sale was set aside by the Court below is

NIRANKA CHANDRA BASU *v.* ATUL KRISHNA GHOSE.

Suit No. 309 of 1916 (21st February 1918) and the date on which the High Court reversed that decision and upheld the sale (23rd February 1920), should be deducted and that if that period is deducted, the claim for the surplus sale proceeds would be in time. The case does not come under sec. 14 of the Limitation Act as the Plaintiff was not prosecuting the previous suit, nor does it fall under any other section of the Act.

The Plaintiff evidently relies upon the principle of suspension of time which has been laid down in some cases. The question of suspension of the period of limitation is one upon which the authorities do not seem to be uniform. In the well-known case of *Ranee Surno Moyee* v. *Shoshee Mokhee Burmonia* (2) the Judicial Committee in determining whether the cause of action accrued with reference to sec. 32 of Act X of 1859, at the end of each Fusli year when the rent became due or at the date of the decree reversing the auction sale of the *putni* taluk belonging to the zamindar, decided in favour of the latter date. That therefore was a case in which the question was when did the cause of action arise for the suit, and it was not really a case of suspension of the period of limitation. The case of *Hukumchand Boid* v. *Prithichand Lal Chowdhury* (3) is also not a case of suspension of the period of limitation. Their Lordships held that the sale had not become final and conclusive: in other words, for the purpose of the question of limitation the sale had not become absolute. On the other hand, in the case of *Sani Rani* v. *Kanhaye Lal* (4) where there was a fusion of the interests of the mortgagor and the mortgagee for a certain period, and it was contended that limitation was suspended for that period, their Lordships observed :—"There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation has begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that by reason of the fusion of interests between 1883 and 1898 the period of limitation was suspended, they would—this not being a suit to which the proviso to sec. 9 of Act XV of 1887 applies—be deciding contrary to the express enactment of that section that when once time has begun to run no subsequent disability or inability to sue stops it." But in the case of *Lakhan Chandra Sen* v. *Madhusudan Sen* (5) this Court acting upon the principle of the cases *Ranee Surno Moyee* v. *Soshee Mokhee Burmonia* (2) and *Pran Nath Ray Choudhury* v. *Rokea Begum* (6) held that the Plaintiff's right to bring an action was suspended for a certain period: the decision of this Court was approved by the Judicial Committee in the case of *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (7). In that case two out of three brothers were dispossessed of their shares in certain properties by the third brother. One of the brothers who were dispossessed brought a suit for recovery of possession of his share as against the other two brothers as Defendants. One of the Defendants supported the Plaintiff, and set up his own right to one-third share in the property. It appears that an issue was raised as between the co-Defendants as to

(2) 12 M. I. A. 244 (1868)
(3) I. L. R. 46 Cal. 670: s. c. 23 C. W. N. 721 (P. C.) (1918)
(4) I. L. R. 35 All. 227: s. c. 17 C. W. N. 605 (P. C.) (1913).

(2) 12 M. I. A. 244 (1868).
(5) I. L. R. 35 Cal. 209: s. c. 12 C. W. N. 326 (1907).
(6) 7 M. I. A. 323, 357 (1859).
(7) I. L. R. 43 Cal. 660: s. c. 20 C. W. N. 522 (P. C.) (1916).

NIRANKA CHANDRA BASU *v.* ATUL KRISHNA GHOSE.

whether the Defendant who supported the Plaintiff was entitled to a certain share. The Court actually passed a decree not only in favour of the Plaintiff but also declared that the Defendant had one-third share. On appeal the decree of the trial Court in favour of the Plaintiff was upheld, but was set aside so far as the Defendant was concerned. It was in these circumstances that this Court and the Judicial Committee held that limitation was suspended from the date of the decree of the first Court to the date when that decree was set aside on appeal. The Judicial Committee observed as follows :—"Limitation would no doubt run against them from that time. But it would equally without doubt remain in suspense whilst the Plaintiffs were *boná fide* litigating for their rights in a Court of Justice. They had in the suit of 1896 before Mr. Justice Henderson associated themselves with the Plaintiffs in that action and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim to which no objection seems to have been made by the Appellant. It was an effective decree made by a competent Court and was capable of being enforced until set aside. Admittedly, if the period during which the Plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that plea of limitation was rightly overruled by the High Court."

Now, what are the facts of the present case? Here the Plaintiff himself did not institute any suit. The suit was instituted by the Defendants Nos. 6 to 9 for reversal of the first and subsequently by way of amendment they prayed for setting aside the second sale. The Plaintiff was interested in upholding the first sale because he had purchased the property at the first sale. Though he was interested in having the second sale set aside he does not appear to have taken any part in the suit. It is true that in the case of *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (7), also, the Plaintiff did not institute the previous suit and was a Defendant, but as pointed out by their Lordships, he had associated with the Plaintiff in the previous suit and had asked for an adjudication of his rights in that suit. A distinct issue was raised in respect of his claim to which no objection seems to have been made by the other Defendant. It was in these circumstances that the Plaintiff was held entitled to suspension of the time during the time the decree in the previous suit remained in force. The case of *Sani Rani* v. *Kanhaye Lal* (4) does not appear to have been brought to the notice of the Judicial Committee. A Full Bench of the Madras High Court in the case of *Muthia Korarki Chetti* v. *Madar Arumal* (8), considered the decisions of the Judicial Committee on the question of suspension of limitation and one of the learned Judges (Seshagiri Ayyar, J.) observed : "The true rule deducible from these decisions of the Judicial Committee is this : that subject to the exemptions, exclusion, mode of computation, and the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. This is a rule of construction and not a rule of law. I would answer the refer-

(4) I. L. R. 35 All. 227 : s. c. 17 C. W. N. 606 P. C.) (1913).

(7) I. L. R. 43 Cal. 660 s. c. 20 C. W. N. 522 (P. C.) (1916).

(8) I. L. R. 43 Mad. 185 (F. B.) (1919).

ence as above leaving each case to be dealt with in the light of these observations." However that may be, we do not think that the principle of *Nrityamoni* v. *Lakhan Chandra Sen* (7) should be extended to the facts of the present case and we are accordingly of opinion that the claim for the surplus sale proceeds was barred by limitation on the 31st May 1920 when the amendment was applied for.

It is contended on behalf of the Defendant No. 2 that even if the claim for the surplus would have been barred by limitation, it would be no ground for disallowing the application for amendment. Reliance is placed upon the case of *Zahur Ali Khan* v. *Rutta Koer* (9), where their Lordships allowed an amendment of the plaint on the ground that a new suit would be barred by limitation. But the reasons why the amendment was allowed is thus stated : "The fairer course is to do what the Judge of the Court of first instance might under the Code of Procedure have done at an earlier stage of the course, namely, allow the Appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of money due on a bond. Her liability on the bond may thus be tried on the issues already settled." It does not appear that the claim would have been barred had the amendment been allowed by the Court of first instance in that case. Then again the claim for recovery of the money allowed by way of amendment could be, as pointed out by their Lordships, tried on the issues already settled.

Here the claim for the surplus sale proceeds could not be tried on the issues in the case, and although the claim for possession of an 8 annas share and that for recovery of an 8 annas share of the surplus proceeds might be said to arise out of the same transaction, the cause of action was not identical [see *Payana Reena Saminathan* v. *Pana Sana Patamapoor* (10)].

In a series of cases it has been held that the power of the Court to amend the plaint should not be exercised where the effect is to take away from the Defendant a legal right which has accrued to him by lapse of time. See *Kalidas Choudhury* v. *Draupadi Dassi* (11), *Upendra Narayan Ray* v. *Janaki Nath Ray* (12), *Rebati Raman* v. *Harish Chandra* (13) and *Gyanendra Nath* v. *Paresh Nath* (14). The rule is recognised by the Judicial Committee in the case of *Charan Das* v. *Amir Khan* (15), where it was held that there are cases in which that consideration is outweighed by the special circumstances of the case. We do not think that there are any special circumstances in the present case to outweigh the rule.

The last question is whether the Plaintiff is entitled to recover the sum of Rs. 2,300 paid by him on account of the purchase money and other expenses. The application for amendment so far as this claim is concerned was made on the 7th May 1919 within three years of the date on which the money was paid (15th and 22nd May 1916). The application was ordered to be put up later, and was taken up along with the subsequent application, dated the 31st May which related to the

(7) I. L. R. 43 Cal. 660 : s. c. 20 C. W. N. 522 (P. C.) (1916).
(9) 11 M. I. A. 468 (1867).

(10) L. R. 41 I. A. 142 : s. c. 18 C. W. N. 617 (1914).
(11) 22 C. W. N. 104, 109 (1917).
(12) 22 C. W. N. 611, 617 (1917).
(13) 24 C. W. N. 749, 751 (1919).
(14) 26 C. W. N. 73, 77 (1921).
(15) L. R. 47 I. A. 255 : s. c. I. L. R. 48 Cal. 110 ; 25 C. W. N. 289 (1920).

NIRANKA CHANDRA BASU v. ATUL KRISHNA GHOSH.

claim for surplus sale proceeds and in the alternative for refund of the purchase money. It is stated in the order-sheet that the application, dated the 7th May, was not pressed. But the later application for amendment filed on the 31st May 1920 which as stated above related to the recovery of the surplus sale proceeds and in the alternative for the recovery of Rs. 2,300 was certainly pressed; it was therefore unnecessary to press the application, dated the 7th May, separately.

The result therefore is that the Plaintiff's claim so far as the surplus sale proceeds are concerned is disallowed, but the Plaintiff will get a decree for the sum which he had paid to the Defendant No. 2 for the purchase of the first sale, namely, the sum of Rs. 2,300.

The Plaintiff and Defendant No. 2 will bear their own costs in this Court as well as in the Court below. The Maharaja of Burdwan will get three gold mohurs from Defendant No. 3 and 2 gold mohurs from the Plaintiff as his costs in the cross-objection. Defendant No. 3 will get his costs from the Plaintiff in this appeal, the hearing fee being assessed at 5 gold mohurs.

The Plaintiff must pay the costs of the Maharaja in the lower Court and half the costs of Defendant No. 3 in the lower Court. Defendant No. 2 will not get costs of the additional papers printed out of Court.

J. N. R. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
1923,
Heard, 1, November.
Judgment,
26, November.

MALIREDDI AYYAREDDI, Appellant,
v.
ADUSUMILLI GOPALAKRISHNAYYA and anr., Respondents.

Mortgages, successive—Payment by owner, not bound by personal covenant to pay, of earlier mortgage—Subrogation—Earlier mortgage of land and crops and later of crops alone—Payment by owner to save crop from sale, if may be claimed in priority.

It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, that is to say, he may keep alive the incumbrance for his own benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt. It is further to be presumed, as provided by sec. 101 of the Transfer of Property Act, that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit.

GOKULDOSS GOPALDOSS v. RAMBUX SEOCHAND (1), DINOBUNDU SHAW CHOWDREY v. JOGMAYA DASI (2) *and* MAHOMAD IBRAHIM HOSSEIN KHAN v. AMBIKA PERSHAD SINGH (3) *followed.*

Where the prior mortgage covered both the land and crops whilst the later one was secured on the land alone the

(1) L. R. 11 I. A. 126 (1884).
(2) L. R. 29 I. A. 9: s. c. 6 C. W. N. 209 (1901).
(3) L. R. 39 I. A. 68: s. c. I. L. R. 39 Cal. 527; 16 C. W. N. 505 (1912).

payment by the owner to save the crops from sale by the prior mortgagee must be deemed to be purchase pro tanto *of the prior mortgage and not a redemption thereof, so that in respect of the sum paid he would be entitled to stand in the shoes of the prior mortgagee.*

This was an appeal from an order, dated the 26th January 1920, of the High Court of Madras, affirming an order, dated the 10th October 1918, of the temporary Subordinate Judge of Masulipatam.

The owners of certain property in Masulipatam created three mortgages upon it, dated respectively 21st August 1905, 5th March 1909, and 20th October 1909. The equity of redemption was purchased in execution of a money decree against the mortgagors, and the purchasers transferred their interest to the present Respondents. The first and third mortgages were upon the lands alone. The second mortgage included the annual crops as well.

In 1913 the second mortgagee filed a suit to enforce his mortgage and obtained a decree for sale of the mortgaged property. The Respondents and their assignors paid over considerable sums of money in discharge of that decree and satisfaction thereof was entered in 1918.

Meanwhile the Appellant instituted a suit (No. 12 of 1914) to enforce his third mortgage and obtained a decree for sale in execution of which a portion of the mortgaged properties was sold and purchased by the Appellant with the leave of the Court.

After payment of the amount due under the first mortgage a balance of Rs. 1,327-12-3 remained in Court to the credit of the cause.

The Respondents thereupon applied to the Subordinate Court for the payment to them of this balance claiming to be subrogated to the second mortgagee. The application was opposed by the Appellant who denied the Respondents' claim to subrogation and contended that the second mortgagee's decree had been satisfied in full and that such satisfaction inured to his benefit.

The Subordinate Judge decided in favour of the Respondents and his decision was upheld by the High Court (Oldfield and Seshagiri Ayyar, JJ.) on appeal.

Mr. Narasimham for the Appellant.

Mr. Dubé for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—Certain Indian landowners within the district of Masulipatam effected 1st, 2nd and 3rd mortgages on their property; the 1st and 3rd being on the lands alone, the 2nd on the crops also. They were afterwards sued to judgment by some creditors for ordinary debts, and their lands were sold in execution of the judgment but subject to the mortgages. The purchaser of the equity of redemption was one Pingala, who paid rupees 1,000, and thereout the judgment debt was satisfied.

The second mortgagee then instituted his suit to enforce his mortgage, making the original mortgagors the third mortgagee and Pingala Defendants; and having obtained judgment, he from time to time obtained orders for sale of the crops. In one case it would seem as if the crops were actually sold in execution; in others, Pingala, or the present Respondents who bought Pingala's interests during the course of the proceedings, paid the second mortgagee sums of money and saved the crops from seizure. While this was going on, the third mortgagee, who is the present Appellant, brought a suit, making the original mortgagors and Pingala

parties; and in this suit the lands were sold out and out, freed and discharged from the mortgages. After payment of the amount due to the first mortgagee and the expenses of the sale and so forth, there remained in Court to the credit of the cause a sum of rupees 1,327 with some annas and pies.

The Respondents, the purchasers from Pingala, who had been added as supplemental Defendants in the suit brought by the Appellant, thereupon claimed to be subrogated to the second mortgagee, and in right of the latter, to receive this sum out of Court. They made this claim on the 22nd July 1918, for the following reasons. At the time of the decree in favour of the third mortgagee which was made on appeal by the High Court on the 13th February 1917, there was still due to the second mortgagee the sum of rupees 1,990. Now the decree of the High Court provided that Pingala or his assignees should be at liberty to pay the amount due under the decree obtained by the second mortgagee, and that by doing so, they would be relegated to the rights of that mortgagee. Accordingly the Respondents paid rupees 1,990 to the second mortgagee, and on the 20th of December 1917, full satisfaction by payment through the Court was recorded.

The application of the Respondents for the payment out of the money in Court was resisted by the Appellant, who contended that when the owner of a property subject to several mortgages pays off a prior mortgage, he is not entitled to stand in the shoes of the prior mortgagee but is to be taken as clearing the property from prior incumbrances for the benefit of the later mortgagee.

Now quite apart from the general law on the subject, the decree of the High Court, from which there was no appeal, had provided that in respect of any payment made by the owner of the property to the second mortgagee he should acquire the right of the second mortgagee. This would be sufficient for the determination of the question immediately in dispute, because the sum in Court, rupees 1,327 odd, is less than the sum of rupees 1,990 which the Respondents paid to the second mortgagee when final satisfaction was entered. And accordingly the Subordinate Judge had no difficulty in deciding the immediate application in favour of the Respondents.

From this decision the present Appellant appealed to the High Court at Madras. This Court, in affirming the actual decision, went further and stated a principle in accordance with which the present Respondents will not only be entitled to stand in the shoes of the second mortgagee in respect of Rs. 1,990, paid at the time of the final satisfaction, but also in respect of several payments that they or Pingala had made from time to time to save the crops from being seized. This question, as the Judges in the High Court rightly pointed out, was not determined by the previous decree of the High Court, which only affected payments made subsequent to that decree.

It is therefore necessary to investigate matters a little more closely. It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case

MALIREDDI AYYAREDDI *v.* ADUSUMILLI GOPALAKRISHNAYYA.

there was no such personal covenant. It is further to be presumed, and indeed the statute so enacts (Transfer of Property Act, sec. 101), that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit.

So far therefore as Pingala or the Respondents can be supposed to have bought the rights of the second mortgagee at the various times when they paid sums to him, so far they are entitled to stand in his shoes and claim priority over the present Appellant, who is the third mortgagee. This could hardly be disputed by counsel for the Appellant, having regard to the decisions of this Board [*Gokuldoss Gopaldoss* v. *Rambux Seochand* (1), *Dinobundu Shaw Chowdrey* v. *Jogmaya Dasi* (2) and *Mahomad Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3)]. The point, however, on which he really relied arose under the peculiar conditions of the second mortgage, which was upon the crops as well as upon the land. He contended that sums paid to the second mortgagee to save the crops from seizure must be deemed to be sums paid in reduction of the second mortgage, and not purchases *pro tanto* of that mortgage.

Their Lordships fail to follow the contention. There was an incumbrance upon a composite security, land and crops. It became necessary for the owner subject to the incumbrance, to pay sums of money to the incumbrancer to prevent his enforcing his charge from time to time. The incumbrancer could sell his charge or portions of his charge to any one, and there is nothing in law or good sense to eliminate the owner of the property from the list of possible purchasers. It is to the benefit of the owner that the proceedings should be deemed to be a purchase and not a redemption, and no reason appears why it should not be assumed that he intended to act in the way most beneficial to himself.

If instead of the mortgage being on lands and crops it had been on three separate estates, and proceedings had been taken against one of them only, money paid to stave off such proceedings might certainly be considered to be purchase money and not redemption money. So in the case of these crops. Any sums paid by Pingala or the Respondents to save the sale of crops should be deemed to be *pro tanto* purchases of the second mortgage. It is suggested by the Appellant that the sum of rupees 2,058 odd received in April 1914, was not paid by Pingala but was the fruits of a sale in execution. If this should prove to be so, and there is nothing to qualify it, the present Respondents would not in respect of that sum be entitled to stand in the shoes of the second mortgagee. But in all cases where they have paid the money, they are entitled to the benefit. *A fortiori* they are entitled to keep the order made in their favour by the Judge of the Subordinate Court and confirmed by the High Court, and to have the money in Court paid out to them. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor: *Mr. E. Delgado* for the Appellant.

Solicitor: *Mr. H. S. L. Polak* for the Respondents.

G. D. M.

(1) L. R. 11 I. A. 126 (1884).

(2) L. R. 29 I. A. 9; s. c. 6 C. W. N. 209 (1901).

(3) L. R. 39 I. A. 68; s c. I. L. R. 39 Cal 527; 16 C. W. N. 505 (1912).

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER, UPPER BURMA.]

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
1923,
Heard, 30, October and 2, November.
Judgment, 22, November.

BAIJNATH SINGH and ors., Appellants, *v.* JAMAL BROTHERS & CO.; LD., and anr., Respondents.

Registration Regulation, II of 1897, of Upper Burma, rr. 4, 5, 7—Mortgage, if properly registered—Presumption—Official endorsement that presentation was by mortgagee—Omission to state reason of executant's inability or failure to appear and admit—Irregularity.

Where the law required that the document to be registered should be presented by some person executing or claiming under it or by the agent of such person duly authorised by power-of-attorney, and the document, in this case a mortgage, bore the official endorsement signed by the registering officer that it was presented for registration by the mortgagee and also a note purporting to be signed by some person as the agent of the mortgagee:

Held—*That in the absence of any provision of law requiring the signature of the person presenting the document for registration the correctness of the official endorsement should be presumed and the signature of the agent for which there was no legal sanction could not operate to contradict it.*

The omission by the registering officer to note the circumstances in which the executant of the document was unable or refused to appear and admit execution is at most a defect in procedure which does not vitiate the registration made on a proper presentation. The presumption in such a case is that the registering officer acted according to law when registered the document.

This was an appeal from a decree, dated the 10th January 1921, of the Court of the Judicial Commissioner of Upper Burma, whch reversed a decree, dated the 31st July 1916, of the Court of the Additional District Judge of Yenangyaung.

The Respondent Company sued to enforce a mortgage of oil-well sites, dated the 16th August 1904. The facts may be shortly stated as follows:—A. S. Jamal Brothers and Company lent the sum of Rs. 25,000 to the Defendants-Appellants, Baijnath Singh and Fateh Bahadur Singh, who executed a mortgage, dated the 16th August 1904, hypothecating certain oil-well sites specified therein. As the creditors desired that their name should not be made public in connection with the oil business, the deed of mortgage was executed *benami* in favour of Suna Ravana Mona Vengarachellum Chetty. The mortgagors covenanted as follows:—"We will pay the principal whenever it is required. If, when required, we fail to pay the principal and interest please act accordng to law and sell the wells."

The above deed of mortgage was duly presented for registration and the registering officer was satisfied that it was executed by the mortgagors, in accordance with the rules then in force in Upper Burma for registration of documents.

The Chettys, who were the *benamidars* for the said A. S. Jamal Brothers and Company, executed a deed of assignment or release on the 11th September 1914 in favour of the real mortgagees, who are now represented by the Respondent Company and they instituted the present suit on the 30th March 1915 against the Defendants to recover the amount of principal and interest due

MAHTH SINGH v. JAMAL BROTHERS & CO., LD.

under the mortgage, dated the 16th August 1904, by sale of the mortgaged property.

The mortgagors Baijnath Singh and Fateh Bahadur Singh are Defendants Nos. 1 and 2. The 4th Defendant is the Burma Oil Company, Limited, having purchased some of the mortgaged properties from Defendant No. 1 in 1908, and the 3rd Defendant the Nath Singh Oil Company is also a subsequent transferee of the mortgaged properties.

The Plaintiffs claimed the usual decree for sale of the mortgaged properties on default of payment.

The trial Judge held that the mortgage was fictitious, that the Rs. 25,000 paid by Jamal Brothers to Baijnath Singh was not paid as consideration therefor, and that the mortgage was accordingly without consideration, and he dismissed the suit.

On appeal the judgment of the lower Court was reversed and the suit was decreed.

Messrs. DeGruyther, K. C. and *Parikh* for the Appellants.—The mortgage is invalid. It was never presented for registration by a person duly authorized, and it was registered without admission of execution by the executant. There was no compliance with the provisions of sec. 32, Act III of 1877 and Reg. II of 1877, rr. 4, 6, 7.

Jambu Parshad v. *Muhammad Aftab Ali Khan* (1), *Chhotey Lal* v. *Collector of Moradabad* (2), *Ma Shwe Mya* v. *Maung Ho Hnaung* (3) and *Bharat Indu* v. *Hamid Ali Khan* (4).

(1) L. R. 42 I. A. 22: s. c. I. L. R. 37 All. 49; 19 C. W. N. 282 (1914).

(2) L. R. 49 I. A. 375: s. c. 27 C. W. N. 437 (1922).

(3) L. R. 49 I. A. 395: s. c. I. L. R. 50 Cal. 166; 27 C. W. N. 533 (1922).

(4) L. R. 47 I. A. 177: s. c. 25 C. W. N. 73 (1920).

The failure to admit execution is a fundamental defect and not merely a defect in procedure. There is no note by the Registrar of any enquiry as to execution and the inference is that no enquiry was made.

The assignment is also invalid for defects in registration. It is alleged to have been presented for registration under a power-of-attorney and no such power-of-attorney is in evidence.

Further, the document is not proved to have been executed by the Chettys and consequently their agent, even if duly authorised, was not entitled to present the document for registration.

[Reference was also made to sec. 114, Indian Evidence Act.]

Messrs. Micklem, K. C. and *Dubé* for the Respondents.—The mortgage was registered in accordance with the rules. There is a presumption in favour of the correctness of the indorsement which professes to have been made by the mortgagees. The omission by the registering officer to record non-appearance is merely an error of procedure on the part of that officer for which the Respondents cannot be penalised.

Mukhun Lall v. *Koondun Lall* (5) and *Bharat Indu* v. *Hamid Ali Khan* (4).

[They were stopped.]

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This is an appeal from a decree, dated the 10th January 1921, of the Court of the Judicial Commissioner of Upper Burma, which reversed a decree, dated the 31st July 1916, of the

(4) L. R. 47 I. A. 177: s. c. 25 C. W. N. 73 (1920).

(5) L. R. 2 I. A. 210, 215; 24 W. R. 25; 15 B. L. R. 228 (1875).

BAIJNATH SINGH v. JAMAL BROTHERS & CO., LD.

Court of the Additional District Judge of Yenangyaung.

The suit is to enforce a mortgage of the 16th August 1904, for Rs. 25,000 advanced by the firm of Abdul Shakoor Jamal Brothers and Company to the Defendants Baijnath Singh and Fateh Bahadur Singh. The mortgage was taken in the name of Suna Ravana Mona Vengarachellum Chetty, but as *benamidar* for the firm of Jamal Brothers and Company.

The present Plaintiffs are Jamal Brothers and Company, Limited, who claim to be transferees from the firm of Jamal Brothers and Company and their *benamidars* of the mortgage debt and the security.

The suit was dismissed in the 1st Court but was decreed on appeal. From the Appeal Court's decree the present appeal is preferred.

Though numerous pleas in defence were urged in the early stages of the suit which has been needlessly and lamentably prolonged, the only pleas that now survive are by way of objection to the execution and registration of the mortgage and the transfer.

The mortgage purports to be signed by both the mortgagors and its execution is admitted by them.

But then it is contended that there has been no valid registration of the document. The law applicable is at that date to be found in Reg. II of 1897, and the rules made in exercise of the powers conferred by it. By the 4th rule "every document to be registered under the rules must be presented by some person executing or claiming under the same . . . or by the agent of such person . . . duly authorized by power-of-attorney."

It is urged that the mortgage was presented for registration by an agent, and to comply with the terms of the rule it was incumbent on the Plaintiffs to produce a duly authenticated power-of-attorney authorizing the agent's presentation. In support of this contention realiance was placed on the decision of this Board in *Jambu Parshad* v. *Muhammad Aftab Ali Khan* (1).

But the whole structure of this argument has no real foundation.

It rests on the supposition that the writing at the foot of the document purporting to be the Tamil signature of Ramasawmy Chetty shows that it was he who presented the document and that he was only an agent. This theory owes its origin to the belated and unfortunate discovery of one of the Defendants' legal advisers, and is directly opposed to the official statement signed by the registering officer that the document was presented for registration by the mortgagee.

There is no provision in the regulation or the rules that requires the signature of the person presenting the document for registration. But under r. 7 registration shall be affected by the registering officer writing on it an endorsement in the terms of that appearing at the foot of the document.

The correctness of this official endorsement is to be presumed, and the Tamil signature, for which there was no legal sanction, cannot operate to contradict it.

The presentation, therefore, was by a person claiming under the document.

It is next objected that execution of the mortgage was not admitted before the registering officer by Fateh Bahadur Singh. It, however, admittedly bears his signature and it is a fair presumption in the circumstances that the officer acted under r. 5 when he registered the document. It is true that where any party to a docu-

(1) L. R. 42 I. A. 22 : s. c. I. L. R. 37 All. 49; 19 C. W. N. 282 (1914).

ment is unable or refuses to appear the rule requires a note of the circumstances to be made, and that has not been done. But the omission is one for which the person presenting the document cannot be held responsible : it is at most a defect in procedure which did not vitiate the registration made as it was on a proper presentation.

Then the transfer of the mortgage to the limited company, the Plaintiffs, is assailed.

It is dated the 11th September 1914 and the parties to it are S. R. M. Soobramaniyan Chetty, S. R. M. Mayappa Chetty, S. R. M. Chinnayu Chetty *alias* Ramasawmy Chetty, and S. R. M. Arunachellam, described as carrying on business in partnership under the style of S. R. M. of the 1st part, Jamal Brothers and Company of the 2nd part, and Jamal Brothers and Company, Limited, the present Plaintiffs, of the 3rd part.

The Chetty partners, by the direction of the Jamal Brothers assigned, and Jamal Brothers confirmed, the mortgage debt of Rs. 25,000 with interest and also the mortgaged property to the Plaintiff Company, and the deed if executed and duly registered would unquestionably vest the debt and the security in the Plaintiff Company.

It is contended, however, that there is no formal proof of execution by the Chettys. It is true that the evidence of M. A. S. Jamal, as recorded on the 11th July 1915, does not speak specifically to execution by them. But later affidavits were sworn by M. A. S. Jamal and his advocate Mr. Ormiston to the effect that the witness had deposed to execution by the attorney of the Chetty firm. A petition was accordingly presented praying that the witness might be examined further on the point of the execution by the assignors of the deed of assignment. Interrogatories directed to this point were prepared under an order of the Court, and though no answers are on the record it is apparent from what is said by the Judicial Commissioner that on further examination under the order of the Court the formal defect was remedied.

It is next urged that though Mayappa was expressed to be a party, he did not execute. But in the attestation clause it is stated that the parties (other than the Plaintiff Company) had set their hands thereto, and the document is expressed to be signed by all four of the Chetty partners. The signature was in fact by their attorney and in the circumstances their Lordships are satisfied that the attorney acted for all four partners. This view gains support from the endorsement of presentation from which it is apparent that the signatory held a power-of-attorney authorizing him to act for the four partners. The transfer was also signed by the Jamal Brothers, and execution by them was admitted by their duly authorized attorney. The result then is that the transfer has been sufficiently executed and its registration has been effected in accordance with the law that then applied.

The appeal therefore fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

The Appellants must pay the costs of the appeal.

Solicitor : *Mr. E. Delgado* for the Appellants.

Solicitors : *Messrs. Waterhouse & Co.* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 132 OF 1921.

MOOKERJEE, J. SUHRAWARDY, J. 1923, Heard, 10, 11, 12 and 13, December. Judgment, 31, December.	LAKSHAN CHANDRA MANDAL, Plaintiff, Appellant, *v.* TAKIM DHALI and ors., Defendants, Respondents.

Plaintiff succeeds on the strength of his own title —Amalnama, *if requires registration—Non-registration of documents compulsorily registrable, effect of—Registration Act (XVI of 1908), sec. 49—Plaint, statement in, admissible for what purpose—Transaction, evidence of, if may be relied on in proof of the allegation therein—Evidence Act (I of 1872), sec. 32—Representation in Mahomedan law—Evidence Act (I of 1872), sec. 90—Ancient document, loss of—Custody, proof of—Secondary evidence, admissibility of, after custody of original proved.*

The Plaintiff must succeed on the strength of his own title and is not assisted by any weakness, real or apparent, in the case for the Defendant.

An amalnama, *which in essence only authorises the grantee to take possession and is intended to be followed by a formal* kabuliyat, *is neither a lease nor an agreement to lease within the meaning of sec. 3 of the Indian Registration Act and is consequently admissible in evidence without registration.*

DWARKA NATH *v.* LEDU SIKDAR (2) *and* SYED SUFDAR REZA *v.* AMZAD ALI (3) *referred to.*

CHOONEE *v.* CHANDEE (4), MEHERUNNESSA *v.* ABDOOL GUNEE (5), LUCHMISWAR *v.* DAKHO (6), LALL JHA *v.* NEGROO (7), CHAMPAKLATIKA *v.* NAFAR (8) *and* ELAHI *v.* HUKUM (9) *explained.*

A document compulsorily registrable is inadmissible only for a limited purpose, viz., as evidence of a transaction "affecting" immoveable property comprised therein.

ULFATUNNESSA *v.* HOSSEIN KHAN (10), BAI GULABBAI *v.* DATAGARJI (11), HOPE MILL, LD. *v.* READYMONEY (12) *and* VYRAVAN *v.* SUBRAMANIAN (13) *referred to.*

A plaint in the suit for arrears of rent is admissible in proof of the fact that the landlord did sue on a certain allegation, but cannot be admitted in proof of the contents thereof, unless the conditions laid down in sec. 32 of the Indian Evidence Act are established.

The distinction between the admissibility of a document as evidence of a transaction and its admissibility in proof of a statement contained therein, though refined, is of a fundamental character.

KASHINATH *v.* JAGATKISHORE (17), RAM PERKASH *v.* ANAND DAS (18), SEETHAPATI *v.* VENKANNA (19), BAIDYA NATH *v.* ALEF JAN (20) *and* SARADA PRASANNA *v.* UMAKANTA (21) *referred to.*

The doctrine of representation of the family has no place in Mahomedan law.

(2) I. L. R. 33 Cal. 502 (1906).
(3) I. L. R. 7 Cal. 703 (F. B.) (1881).
(4) 14 W. R. 178 (1870).
(5) 17 W. R. 509 (1872).
(6) I. L. R. 7 Cal. 708 (1881).
(7) I. L. R. 7 Cal. 717 (1881).
(8) 15 C. W. N. 536: s. c. 13 C. L. J. 300 (1910).
(9) 18 C. W. N. 38: s. c. 19 C. L. J. 464 (1913).
(10) I. L. R. 9 Cal. 520 (F. B.) (1883).
(11) 9 Bom. L. R. 393 (1907).
(12) 13 Bom. L. R. 162 (1910).
(13) L. R. 47 I. A. 188: s. c. I. L. R. 43 Mad. 660; 24 C. W. N. 1058 (1920)
(17) 20 C. W. N. 643: s. c. 23 C. L. J 588 (1915).
(18) L. R. 43 I. A. 73: s. c. I. L. R. 43 Cal. 707; 20 C. W. N. 802 (1916).
(19) I. L. R. 43 Mad. 333: s. c. 42 Mad L. J. 324 (1922).
(20) 36 C. L. J. 9 (1922).
(21) 37 C. L. J. 288 (1923).

LAKSHAN CHANDRA MANDAL *v.* TAKIM DHALI.

SUKUR MAHOMED *v.* ASMOT MANDAL (22) *and* ABDUL MAJEETH *v.* KRISHNAMACHARIAR (25) *followed.*

ASSAMATHEN *v.* LACHMIPAT (23) *and* MUTTYJAN *v.* AHMED ALI, (24) *referred to.*

Semble—*The test to be applied in proof of the proper custody of an ancient document is laid down in* GUDADHAR *v.* BHOYRAB (14), TRAILAKHA NATH *v.* SHURNO CHONGIMA (15) *and* EHTISHAM ALI *v.* JAMNA PRASAD (16).

When the custody is satisfactorily proved according to the test and the original cannot be traced, secondary evidence of the document is admissible.

This was an appeal preferred on the 19th of July 1921 against the decree of the Subordinate Judge of Zillah Khulna (Babu Tej Chandra Mitra), dated the 31st of May 1921.

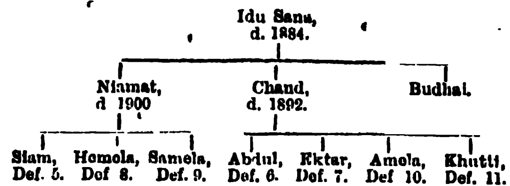
The facts of the case will appear from the judgment.

Dr. Jadunath Kanjilal for the Appellant.

Babus Brajalal Chakravarti and *Promodekumar Ghose* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The subject-matter of the litigation, which has culminated in this appeal, is a tenure created on the 25th February 1881 by the proprietor of Chuck Ula Kalijuga appertaining to Touzi No. 57 of the Collectorate of Khulna. The proprietary interest, which at that time was vested in Suryyakanta Rai Chaudhuri, has since been transferred to Jogendra Chandra Ghose and others. The case for the Plaintiff is that the tenure was granted to one Idu Sana; while the case for the Defendants is that the grant was made in favour of his son Budhai Sana. The relationship of the parties will appear from the annexed genealogical table:—



Idu Sana left three sons, Niamat, Chand and Budhai who inherited the properties left by him in equal shares. Niamat left a son (Defendant No. 5) and two daughters (Defendants, Nos. 8 and 9). Chand left two sons (Defendants Nos. 6 and 7) and two daughters (Defendants Nos. 10 and 11). The daughters are alleged to have relinquished their interest in favour of their respective brothers, and it may be taken for the purposes of this litigation that whatever estate was left by Idu Sana passed to his grandsons alone. On the 14th November 1906, Budhai sold the entire tenure to the first Defendant for a sum of Rs. 1,600, on the assumption that his nephews had no interest therein. On the 26th January 1917, the fifth, sixth and seventh Defendants conveyed a two-thirds share of the tenure to the Plaintiff for a sum of Rs. 3,000, on the assumption that it was the joint property of their respective fathers and of their uncle. On the 6th November 1918, the Plaintiff instituted the present suit for recovery of joint possession on declaration of title by purchase, for partition, and for incidental reliefs. The Plaintiff joined with the prayer for possession an alternative prayer for recovery of the

(14) I. L. R. 5 Cal 918 (1890).
(15) I. L. R. 11 Cal. 539 (1885).
(16) L. R. 43 I. A 365: s. c. 27 C. W. N (1921).
(22) I. L. R. 50 Cal. 978 (1923).
(23) I. L R. 4 Cal. 142 (1878).
(24) I. L. R. 8 Cal. 370 (1882).
(25) I. L. R. 40 Mad. 243 (1916).

LAKSHAN CHANDRA MANDAL *v.* TAKIM DHALI.

purchase money from his vendors, should the Court ultimately hold against him on the question of title. The brothers and sisters of the first Defendant were brought on the record as Defendants (Defendants Nos. 2-4 and 12-15) in order that they might have an opportunity to oppose the claim and might be bound by any decree in favour of the Plaintiff. The claim was, however, contested by the first Defendant alone, who disputed the title and possession of the Plaintiff as well as of his vendors. The principal issues framed on the pleadings were as follows :—

(1) Did Idu Sana or his son Budhai Sana take settlement of the land in suit?

(2) Is the claim barred by limitation?

(3) Is the conveyance of the Plaintiff a *bonâ fide* document for consideration?

The Subordinate Judge has dismissed the suit and has disallowed the claim for possession as well as the alternative claim for refund of the consideration money. On the present appeal, the conclusions of the Subordinate Judge have been assailed upon every point.

We have to consider in the first place the fundamental question in the suit, namely, whether the settlement of the disputed land was taken by Idu Sana or by his son Budhai Sana. The oral testimony of the persons said to have been present at the time of the actual settlement has been accurately analysed by the Subordinate Judge, and he has held that the evidence given by the principal witnesses for the Plaintiff, Abdul Sana and Esen Sardar, to establish that the settlement was made with Idu Sana is wholly unreliable. The oral evidence is full of contradictions, and we are not prepared to dissent from the estimate of its value formed by the trial Judge. The unsatisfactory evidence brought forward by the Plaintiff does not gain in strength by the fact that the Defendant has not been able to produce unimpeachable evidence in support of his affirmative case that Idu Sana had died long before 1881 when the settlement took place. The Plaintiff must succeed on the strength of his own title and is not assisted by any weakness, real or apparent, in the case for the Defendant. We may add that some of the witnesses appear to have very hazy notions of time which make it difficult for the Court to place implicit reliance on them; but we feel bound to add that the Subordinate Judge should not have relied upon the statements of ages of witnesses at the head of depositions, which, as pointed out by the Judicial Committee, do not furnish evidence on the subject, *Maqbuar* v. *Amad Hussain* (1). In this state of the oral evidence the Plaintiff is driven to rely upon documentary evidence. In this category, we have the plaint in a suit for arrears of rent instituted on the 13th April 1904, by the landlord Suryyakanta Rai Chaudhuri against Budhai Sana. The second paragraph of the plaint recites that Idu Sana obtained the settlement on the 25th February 1881, when an *amalnama* was granted to him. The terms of the *kabuliyat* which was executed by the tenant after he had received the *amalnama* are then set out in detail, and the area is stated to have been 299 bighas by guess. The *kabuliyat* has not been produced, but the *amalnama* has been received in evidence, subject to objection. This *amalnama*, it must be mentioned here, purports to be in favour of Budhai Sana and not Idu Sana. In these circumstances, it is not surprising that there has been some

(1) L. R. 31 I. A. 38: s. c. I. L. R. 26 All. 108; 8 C. W. N. 241 (1903).

LAKSHAN CHANDRA MANDAL *v.* TAKIM DHALI.

discussion at the Bar as to the admissibility of the *amalnama* and of the plaint.

As regards the *amalnama*, we are of opinion that it was neither a lease nor an agreement to lease within the meaning of sec. 3 of the Indian Registration Act and that it was consequently admissible in evidence without registration, as explained in *Dwarka Nath* v. *Ledu Sikdar* (2) which distinguished the decision of the Full Bench in *Syed Sufdar Reza* v. *Amzad Ali* (3). The document in essence authorised the grantee to take possession, and was intended to be followed by a formal *kabuliyat;* it does not consequently fall within the scope of such decisions as *Choonee* v. *Chandee* (4), *Meherunnessa* v. *Abdool Gunee* (5), *Luchmiswar* v. *Dakho* (6), *Lall Jha* v. *Negroo* (7), *Champaklatika* v. *Nafar* (8) and *Elahi* v. *Hukum* (9). We must further remember that apart from sec. 17 (2) (v) of the Indian Registration Act, the document, even if deemed compulsorily registerable, is inadmissible only for the limited purpose mentioned in sec. 49 (c), namely, as evidence of a transaction "affecting" immoveable property comprised therein. Here the transaction itself is admitted by both sides, the only dispute is, whether it was between A and B or A and C. We need not pause to consider whether the use of the document as an aid for the solution of this question may or may not be called "use for a collateral purpose" within the meaning of such cases of *Ulfatunnessa* v. *Hossein Khan* (10), *Bai Gulabbai* v. *Datagarji* (11), *Hope Mill, Ld.* v. *Readymoney* (12) and *Vyravan* v. *Subramanian* (13). If the document be admitted in evidence, there can be no doubt that it militates against the theory put forward by the Plaintiff. Consequently a strenuous endeavour has been made to cast doubt upon its genuineness. We are not impressed by this argument. The original was produced in a previous litigation; the certified copy now on the record was taken from it on the 18th February 1914. The original cannot now be traced, but its custody is satisfactorily proved according to the test formulated in *Gudadhar* v. *Bhoyrab* (14) and *Trailakha Nath* v. *Shurno Chongima* (15). In such circumstances secondary evidence was plainly admissible, *Ehtisham Ali* v. *Jamna Prasad* (16) and a presumption of genuineness may be made. There is no substance in the suggestion that the terms of the *amalnama* are not in all respects identical with the contents recited in the plaint dated 13th April 1904. The variations afford no ground for suspicion, as all the terms could not be expected to be enumerated in an *amalnama* when a more formal document in the shape of a *kabuliyat* was intended to be drawn up.

As regards the plaint in the suit for arrears of rent, it was plainly admissible in proof of the fact that the landlord did sue on the allegation that the settlement had been made with Idu Sana; but

(2) I. L. R. 33 Cal. 502 (1906).
(3) I. L. R 7 Cal. 703 (F. B.) (1881).
(4) 14 W. R. 178 (1870).
(5) 17 W. R. 509 (1872).
(6) I. L. R. 7 Cal. 708 (1881).
(7) I. L. R 7 Cal. 717 (1881).
(8) 15 C. W. N. 536: s. c. 13 C. L. J. 300 (1910).
(9) 18 C. W. N. 38: s. c. 19 C. L. J. 464 (1913).
(10) I. L. R. 9 Cal. 520 (F. B.) (1883).
(11) 9 Bom. L. R. 393 (1907).
(12) 13 Bom. L. R. 162 (1910).
(13) L. R. 47 I. A 188: s. c. I. L. R. 43 Mad. 660; 24 C. W. N. 1053 (1920).
(14) I. L. R. 5 Cal. 918 (1880).
(15) I. L. R. 11 Cal 539 (1885).
(16) L. R. 48 I. A. 365: s. c. 27 C. W. N. (1921).

the plaint is not admissible to prove the statement itself, as the conditions prescribed by sec. 32 of the Indian Evidence Act do not exist in this case. The landlord was alive, and no effective attempt was made to secure his attendance as a witness or to examine him on commission. The distinction between the admissibility of a document as evidence of a transaction and the admissibility of a document in proof of a statement contained therein is, if refined, but of a fundamental character and is yet frequently overlooked; see *Kashinath* v. *Jagatkishore* (17), *Ram Perkash* v. *Anand Das* (18), *Seethapati* v. *Venkanna* (19), *Baidya Nath* v. *Alef Jan* (20) and *Sarada Prasanna* v. *Umakanto* (21). In our opinion, the plaint cannot properly be used to prove the statement made by the superior landlord, and the same remark applies to the plaint, dated the 18th April 1911, filed by the Ghoses (the present landlords) in a suit for ejectment instituted by them. In this plaint, the Ghoses asserted that the settlement had been made with Budhai Sana. Between the dates of these two plaints, Suryyakanta Rai Chaudhuri, the former landlord, granted a lease on the 14th December 1905, to Dwarkanath Mandal and Dasarath Mandal, after he himself had purchased the tenure at the sale which followed the decree, dated 13th September 1904 in the suit for arrears of rent. This lease, which subsequently became infructuous by reason of reversal of the rent sale, recites that the original settlement had been made with Budhai Sana. The position, consequently, is that in 1904 the landlord came into Court on the allegation that the settlement had been made with Idu Sana, in 1905 the same landlord granted a lease on the assertion that the settlement had been made with Budhai Sana and in 1911 the new landlords maintained that the settlement had been made with Budhai Sana. The Subordinate Judge has correctly held that these conflicting assertions, even if they were regularly admitted in evidence, could not advance the case of the Plaintiff. We cannot further overlook that in 1908, when Suryyakanta Rai Chaudhuri sued Budhai Sana and others for arrears of rent, the present first Defendant, who was then the second Defendant, promptly repudiated the allegation of the landlord and maintained that Budhai Sana and not his father Idu Sana took the settlement. We must hold that the documentary evidence, like the oral evidence, does not prove the case for the Plaintiff. This view is materially confirmed when we examine the evidence of possession. The Subordinate Judge, on a detailed analysis of the oral evidence, has pronounced against the contention of the Plaintiff that Idu Sana took the settlement, raised the embankments, reclaimed the jungles, brought the lands under cultivation, and that, after his death, his three sons Niamat, Chand and Budhai were in joint possession till the death of Chand. We have closely examined the evidence, and notwithstanding the forcible criticisms of Counsel for the Plaintiff, we have come to the conclusion that the view taken by the trial Judge is correct. Consequently, in so far as possession may be deemed evidence of title, the case for the Plaintiff has completely broken down and we accept the view that since the settlement of 1881, Budhai Sana was in sole posses-

(17) 20 C. W. N. 643: s. c. 23 C. L. J. 583 (1915).

(18) L. R. 43 I. A. 73: s. c. I. L. R. 43 Cal. 707; 20 C. W. N. 802 (1916).

(19) I. L. R. 45 Mad. 332: s. c. 42 Mad. L. J. 324 (1922).

(20) 36 C. L. J. 9 (1922).

(21) 37 C. L. J. 238 (1922).

LAKSHAN CHANDRA MANDAL *v.* TAKIM DHALI.

sion up to the time of the sale to the first Defendant in 1906. There is, in our opinion, no escape from the conclusion that the Plaintiff has failed to establish his alleged title. We may add that no solid foundation has been laid in the evidence for a possible theory that the settlement was taken in the name of Budhai for the benefit of the entire family, either during the life-time of Idu or after his death. Such a case would contradict and effectively destroy the theory that the settlement was taken by Idu as the head of the family. But, apart from this, the hypothesis would have no chance of acceptance in view of the decision in *Sukur Mahomed* v. *Asmot Mandal* (22) which, notwithstanding the dicta in *Assamathen* v. *Lachmipat* (23) and *Muttyjan* v. *Ahmed Ali* (24), followed *Abdul Majeeth* v. *Krishnamachariar* (25) and affirmed the doctrine that in Mahomedan law there is no representation of the family as under the Hindu law.

In view of our decision upon the question of title, we need not investigate the interesting point of limitation raised in course of argument, namely, whether having regard to the character of the lands, which, for many years, formed in the main an unculturable waste, the principles recognised by the Judicial Committee in *Trustees and Executors Agency Co.* v. *Short* (26), *Radha Gobind* v. *Inglis* (27), *Rajkumar* v. *Gobinda Chandra* (28), *Secretary of State* v. *Krishnamani* (29) and *Basanta Kumar* v. *Secretary of State* (30), and other cases which will be found elaborately reviewed by Chatterjee, J., in *Rakhal Chandra* v. *Durgadas* (31) should not be applied. In our opinion, the claim for recovery of possession has been rightly dismissed, as the Plaintiff has failed to establish his alleged title.

We have finally to consider the alternative claim made by the Plaintiff for recovery of the purchase money from his vendors, who, as we have seen, had no title to the disputed property. The Subordinate Judge has directed that the matter be determined in a separate suit, if occasion should arise. He has held that the Plaintiff is a speculative purchaser, who took the conveyance with full knowledge that his vendors were not in possession. He has further held that the evidence does not afford convincing proof of the precise amount, if any, paid by the Plaintiff, to his vendors. It is plain that though the alternative claim was put forward in the seventeenth paragraph of the plaint, no issue was raised on the point, and the evidence was not directed to the elucidation of the question, whether there is a covenant for title under sec. 55 of the Transfer of Property Act and whether in the events that have happened the Plaintiff can claim restitution. According to the opinion expressed by Wilson, J., in *Hanuman* v. *Hanuman* (32), which was affirmed by the Judicial Committee on a different ground, *Hanuman* v. *Hanuman* (33), sec. 43 of the Code of 1882, now superseded by Or. 2, r. 2 of the Code of 1908, would

(22) I. L. R. 50 Cal. 978 (1923).
(23) I. L. R. 4 Cal. 142 (1878).
(24) I. L. R. 8 Cal. 370 (1882).
(25) I. L. R. 40 Mad. 243 (1916).
(26) L. R. 13 A. C. 793 (1888).
(27) 7 C. L. R. 364 (1880).
(28) L. R. 19 I. A. 140: s. c. I. L. R. 19 Cal. 660 (1892).
(29) L. R. 29 I. A. 104: s. c. I. L. R. 29 Cal. 518; 6 C. W. N. 617 (1902).
(30) L. R. 45 I. A. 104: s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 642 (1917).
(31) 26 C. W. N. 724 (1922).
(32) I. L. R. 15 Cal. 51 (1888).
(33) L. R. 18 I. A. 158: s. c. I. L. R. 19 Cal. 123 (1892).

LAKSHAN CHANDRA MANDAL *v.* TAKIM DHALI.

not bar a separate suit; in any event, the claim can, with the leave of the Court, be reserved for investigation in another suit. In view of the course the trial took in the Court below and the state of the evidence on the record, the Subordinate Judge has, we think, properly reserved liberty to the Plaintiff to institute a separate suit for restitution against his vendors; and we see no reason to vary that order.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal is dismissed with costs in favour of the first Defendant.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 863, 1218 AND 1219 OF 1922.

GREAVES, J. CHAKRAVARTI, J. 1924, 22, May.	SATYA BHUPAL BANERJEE, Defendant, Appellant, *v.* RAJNANDINI DEBI, Plaintiff, Respondent.

Apportionment of putni *rent on determination of proprietor's interest, effect of—*Putnidar *acquiring proprietary interest before end of agricultural year —Rent, accrual of—Transfer of Property Act (IV of 1882), sec. 36, applicability of.*

In a case where putni *rent was payable in ten monthly instalments, the last* kist *being payable in Magh and before the end of the agricultural year,* i.e., *on the 22nd Falgoon 1326 B. S., there was a partition between the co-sharers whereby the whole proprietary interest passed to the* putnidar :

Held—*That rent does not accrue from day to day but is payable in accordance with the contract. Unless there is any contract between the parties for apportionment of the rent, the* putnidar *is bound to pay the whole rent for the year, though he became the proprietor before the end of the year. The only statute dealing with apportionment is sec. 36 of the Transfer of Property Act, but that does not apply to agricultural lands.*

SATYENDRANATH THAKUR *v.* NILKANTH SINGH (1) *and* MATHEWSON *v.* SHYAM SUNDAR SINGH (2) *followed.*

These were appeals preferred on the 31st March 1922 from the decree of the District Judge of Zillah Hughly (Mr. S. C. Mallik), dated the 30th January 1922, modifying the decree of the Subordinate Judge, 2nd Court of Hughly (Babu Srish Chandra Choudhuri), dated the 29th April 1921.

The material facts will appear from the following extract from the judgments of the lower Appellate Court in one of the appeals :—

"This appeal arises out of a suit for recovery of arrears of rent for the years 1325 and 1326 and also for Baisack of 1327 B. S. The defence, *inter alia*, was that the Plaintiff's proprietary interest had passed to the Defendant under a partition decree. The Subordinate Judge who tried the suit found that the proprietary right of the Plaintiff had passed to the Defendant about the end of Falgoon 1326 B. S.; but finding that the rent had been made payable in ten monthly *kists* the last one of which was payable in Magh he (the Subordinate Judge) gave a decree to the Plaintiff for arrears for the years 1325 and 1326 together with interest at the rate claimed up to the date of the institution of the suit and dismissed the rest of the Plaintiff's claim. He gave to the parties costs in proportion of their respective success and he directed that the decretal amount shall carry interest at the rate of 6 per cent. per annum from the

(1) I. L. R. 21 Cal. 383 (1893).
(2) I. L. R. 33 Cal. 783 (1906).

SATYA BHUPAL BANERJEE v. RAJNANDINI DEBI.

date of the decree till realisation. The Defendant has appealed. The Plaintiff has filed a cross-appeal.

In appeal it was contended before me that inasmuch as the relationship of landlord and tenant had come to an end in Falgoon 1326, the Plaintiff was not entitled to any rent for the last two months of the year, namely, Falgoon and Chaitra. But the documentary evidence that was adduced before the lower Court clearly showed that the rent of the holding was payable in ten *kists* and that the last *kist* was payable in the month of Magh. That being the case and remembering that rent is ordinarily regarded not as accruing from day to day but as falling due at stated intervals according to the contract of tenancy [*Satyendranath Thakur* v. *Nilkanth Singh* (1)], I am of opinion that the learned Subordinate Judge was right when he allowed to the Plaintiff a full decree for the whole of the year 1326 B. S."

Babu Bejoy Kumar Bhattacharjea for the Appellant.

Babus Narendra Kumar Bose and *Profulla Chandra Chakravarty* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—These are three appeals by the Defendant against a decision of the District Judge of Hughly, modifying a decision of the 2nd Subordinate Judge. The suits were for rent in respect of two *putnis* held by the Defendant in two separate moujas. Appeal No. 863 relates to a *putni* in mouja Ramnarainpur and Appeals Nos. 1218 and 1219 relate to a *putni* in the other mouja. The suits were brought to recover an 8 annas share of the rent. Under the *putni* the rent was payable in ten monthly *kists*, the last *kist* being payable in the month of Magh. On the 22nd Falgun 1326 there was a partition between the co-sharers as a result of which the whole proprietary interest passed to the Defendant and the Plaintiff's claim for rent is resisted with regard to a period of one month and seven days of the year 1326 because the Defendant contends that it is not right that he should not receive rent for seven days of Falgoon and for the month of Chait inasmuch as he was the proprietor during this period by virtue of the partition. There is no doubt that there is a good deal to be said on general grounds in support of the contention put forward on behalf of the Defendant but in our opinion the matter is covered by the two cases, to which we have been referred, namely, *Satyendranath Thakur* v. *Nilkanth Singh* (1) and *Mathewson* v. *Shyam Sundar Singh* (2). In effect these cases decide that rent does not accrue from day to day but is payable in accordance with the contract. In the present case the contract for the payment of rent was that the tenth *kist* should be paid at the end of the month of Magh. Consequently, in our opinion, unless there is any statute whereby the rent is apportionable or unless there is any contract between the parties as to the rent for 1 month and 7 days the contention of the Defendant cannot succeed. The only statute in this country dealing with apportionment is sec. 36 of the Transfer of Property Act, and that does not apply to agricultural lands and consequently has no application. When the partition took place there was no stipulation made by the Defendant that he should be entitled to the

(1) I. L. R. 21 Cal. 383 (1893).

(1) I. L. R. 21 Cal. 383 (1893).
(2) I. L. R. 33 Cal. 786 (1906).

SATYA BHUPAL BANERJEE *v.* RAJNANDINI DEBI.

rent for this one month and seven days. This being so, it seems to us that the appeal fails as the point is covered by the two decisions to which we have been referred.

The result is that the appeals fail and are dismissed with costs.

CHAKRAVARTI, J.—I agree.

J. N. R. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 164 OF 1922.

MOOKERJEE, J. SUHRAWARDY, J. 1923, Heard, 19 and 20, December. Judgment, 21, December.	KUSH KANTA BARKAKATI, Plaintiff, Appellant, *v.* CHANDRA KANTA KAKATI and ors., Defendants, Respondents.

Indian Contract Act (IX of 1872), secs. 160 and 161—Bailment—Trover, action of—Bailee, liability of—Onus of proof—Sole agent.

The bailee is responsible to the bailor for loss, destruction or deterioration of the bailed property upon his failure to return the same according to contract upon the expiry of the term of bailment; an action of trover is maintainable against a bailee where he fails to re-deliver the bailed property or to deliver it over in accordance with the terms of the contract.

LOESCHMAN *v.* MACHIN (2), BRYANT *v.* WARDELL (3), FENN *v.* BITTLESTON (4) *and* COOPER *v.* WILLOMATT (5) *referred to and followed.*

Where goods are delivered to the bailee in a sound condition and are lost or are not returned or are returned in a damaged state, the law presumes negligence to be the cause and casts upon the bailee the burden to shew that loss is due to causes consistent with due care on his part.

MACKENZIE *v.* COX (18), REEVE *v.* PALMER (19), PHIPPS *v.* NEW CLARIDGE HOTEL (20), BULLEN *v.* SWAN E. E. Co. (21) *and* COLDMAN *v.* HILL (22).

This was an appeal against the decree of R. N. Phukan, Esq., Subordinate Judge of Assam Valley Districts, dated the 18th of January 1922.

The Respondent No. 1 hired Plaintiff's (Appellant's) elephant at the request and on behalf of his brother, the Respondent (Defendant) No. 3, who was the agent of the Respondent (Defendant) No. 2, for the use and benefit of the latter for a term of ten months which expired on 14th May 1920. The (Defendants) Respondents having failed to re-deliver the animal as agreed upon, the (Plaintiff) Appellant brought an action against all the Respondents for the price of the animal and that of chains, etc. The animal died seven days after the expiry of the term for re-delivery while in the Respondents' possession. The Court below having dismissed the suit, the Plaintiff preferred this appeal.

Babu Amarendra Nath Bose (with *Moulvi Syed M. Saadulla* and *Babus Prakas Chandra Pakrasi* and *Rama Prosad Mookerjee*) for the Appellant.—The learned Subordinate Judge ought to have decreed the suit against all the Defendants. There was an implied authority to the Defendant No. 3, the forest officer of the Defendant No. 2, a Limited Company, to employ elephant

(2) 2 Stark. 311; 20 R. R. 687 (1818).
(3) 2 Exch. 479 (1848).
(4) 7 Exch. 152; 86 R. R. 598 (1851).
(5) 1 C. B. 672; 68 R. R. 798 (1845).
(18) 9 C. & P. 632; 62 R. R. 763 (1840).
(19) 5 C. B. N. S. 91; 116 R. R. 577 (1859).
(20) 22 T. L. R. 49 (1905).
(21) 22 T. L. R. 275; 23 T. L. R. 258 (1906).
(22) [1919] 1 K. B. 443.

KUSH KANTA BARKAKATI *v.* CHANDRA KANTA KAKATI.

for the benefit of the latter. The Defendant No. 1 was the Company's sub-agent, being employed in their business by their agent the Defendant No. 3. Sec. 191, Indian Contract Act (IX of 1872).

The Company, Defendant No. 2, was thus bound by the acts of Defendant No. 1 as if he were their agent. Every agent has implied authority to do whatever is necessary for and incidental to the effective execution of the express authority. Bowsted on Agency, pp. 77, 79, 85; secs. 189 and 194, Indian Contract Act (IX of 1872).

The Company Defendant is liable on the contract entered into by the sub-agent, Defendant No. 1. Sec. 192, Indian Contract Act, *Peacock* v. *Baijnath* (23). Even if there was no express or implied authority the Defendant No. 2 having by its conduct ratified the agreement between the Plaintiff and the Defendant No. 1 the Company Defendant was liable. Secs. 196, 197 and 199, Indian Contract Act; Bowsted on Agency, pp. 62 and 64. Ills. Nos. 2, 5 and 8.

After the expiration of the contract, the Defendants were bailees and were unconditionally liable. Secs. 160 and 161, Indian Contract Act (IX of 1872). It was their duty to return the animal immediately upon expiry of the term for which it was bailed.

Dr. Jadunath Kanjilal and *Babu Amiya Chandra Sen* for the Company Respondents were not heard as it was represented that they had no instructions.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a suit for recovery of the price and hire of an elephant as also the cost of an iron chain. The case for the Plaintiff is that the first Defendant on behalf of the third Defendant who is an officer of the second Defendant (the Surma Valley Saw Mills Company, Limited) hired his elephant for a period of ten months from the 15th July 1919 to the 14th May 1920. There was a written agreement between the Plaintiff and the first Defendant executed on the 8th July 1919. The Plaintiff alleges that although the period of the hire expired on the 14th May 1920, the first Defendant did not re-deliver the elephant to him, and, as he was subsequently apprised, the elephant died on the 22nd May 1920. The Plaintiff accordingly seeks to recover from the three Defendants, jointly and severally, Rs. 5,000 as price of the elephant; Rs. 45 as price of the iron chain supplied by him when the elephant was delivered to the first Defendant, and Rs. 16-5-4 as hire for seven days from the 15th to the 22nd May 1920. The Subordinate Judge has dismissed the suit. On the present appeal, the Plaintiff has contended that he is entitled to a decree for the entire sum against all the three Defendants. The first and third Defendants have argued that neither of them is responsible to the Plaintiff and that the liability, if any, rests upon the second Defendant. The second Defendant has formally entered appearance, but we have been informed by Mr. Amiya Chandra Sen that he has received no instructions.

The facts material for the determination of the question in controversy lie in a narrow compass. On the 8th July 1919, the first Defendant executed an agreement in favour of the Plaintiff in the following terms :—

"I, Chandra Kanta Kakati, son of late Sonaram Kakati, contractor by profession and Kayastha by caste, inhabitant of

(23) L. R. 18 I. A. 78: s. c. I. L. R. 18 Cal. 573 (581) (1891).

Baliaghata, Mauza Konarpur, Thana Sub-Division, District Sub-Registry office Sibsagar, do execute this *ekrarnamah* (deed of agreement) and declare that this day I engage your elephant named Mohan valued at Rs. 5,000 under registered contract for ten months, promising to pay hire at Rs. 70 per month for timber business at Naojan Camp of the Surma Valley Timber Company, that for feeding the said elephant I will supply grain at the rate of ten seers per diem and I will also bear myself the costs of the same as also of ropes and other necessaries required for it, that I will also myself engage a mahut (driver) and a grass-cutter, etc., that will be required for the elephant, that from this day in case the elephant disappears, broken (in health and dies) or in any way injured (crippled or rendered defective), that is, made unfit for work (Harounbhagan lit. means loss or breakage—Hemkosh Dic., p. 966), I will pay Rs. 5,000 for its price, that on the expiry of the term I will bring back the elephant to your house and make the same over to your charge, that on account of hire of the said elephant I am paying you to-day Rs. 200 in advance for which Rs. 20 will be deducted every month and the balance Rs. 50 shall be paid to you month by month. I shall take charge of the elephant on 10th July next and pay you hire from the 15th July. If I fail to pay hire and thereby commit breach of this contract and do not make over the elephant to your charge within the term, then you shall be competent to recover from me both the hire and the price of the elephant through Courts. You will return me this document when I bring another from the Company. To the above effect I get this *ekrarnamah* executed of my own accord and in sound state of body and mind."

The elephant was delivered by the Plaintiff to the first Defendant on the 10th July 1919. Subsequently a memorandum of agreement was prepared, dated the 15th July 1919, to be executed between the Company and the Plaintiff. This document, however, was never executed as the Company declined to accept some of the terms of the proposed contract. The elephant, which had been made over by the first Defendant to the third Defendant continued, however, to be employed to carry timber for the benefit of the Company. The animal was not re-delivered to the Plaintiff on the expiration of the term of hire on the 14th May 1920, and there is evidence to show that it was employed as usual on the 15th, 16th and 17th May 1920; it was taken ill on the 18th May 1920 and died on the 22nd May 1920. In these circumstances, the question arises, whether the Plaintiff is entitled to the sum claimed from the Defendants or from any of them. The Plaintiff imputed negligence to the Defendants in the use of the animal. But that allegation is not borne out by the evidence and we are not prepared to decree the suit on the ground that the animal had been underfed and overworked during the term of hire. The real question is, what are the rights of the Plaintiff on proof of the fact that the animal taken on hire was not re-delivered to him on the expiration of the term on the 14th May 1920.

Sec. 160 of the Indian Contract Act provides that it is the duty of the bailee to return or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished. Sec. 161 provides that if, by the default of the bailee,

KUSH KANTA BARKAKATI *v.* CHANDRA KANTA KAKATI.

the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. The rule thus enunciated is in agreement with the principle formulated by Sir James Mansfield, C. J., *Mills* v. *Graham* (1). The substance of the matter is, in the phraseology familiar to students of archaic English law, that trespass lies where the bailee has destroyed the bailed property or lost it, while where the bailee has been guilty of a conversion of the bailed property either by a user of it in a different manner or for a different purpose from that agreed upon or by failure to re-deliver it or to deliver it over in accordance with the terms of the contract, the bailor may sue him in trover, *Loeschman* v. *Machin* (2), *Bryant* v. *Wardell* (3), *Fenn* v. *Bittleston* (4) and *Cooper* v. *Willomat* (5). We are not now concerned with the question, whether the bailee would be liable if his failure to re-deliver the goods were due to an act of State or an act of God or an act of the King's enemies; *Williams* v. *Llyod* (6), *Menetone* v. *Athawes* (7), *Taylor* v. *Caldwell* (8), *Cunningham* v. *Dunn* (9) and *U. S.* v. *Thomas* (10). It is plain that in the case before us, the bailee was in default. In the Court below, the reason assigned for non-delivery was that the driver was taken ill on the 15th May 1920. The Subordinate Judge also mentions that as there was a festival at the time, it was not easy to secure the services of a driver. There is no evidence on the record to show that there was in fact a festival or that by reason of the festival performance of the contract became impossible. We need not consequently examine how far impossibility which arises subsequently to the formation of a contract excuses performance; *Grant Smith* v. *Seattle* (11). In any event, this is not a case where the Court will imply a term whereby the contract was intended to be discharged through impossibility of performance; *Tamplin Steamship Co.* v. *Anglo Mexican Petroleum Co.* (12), *Redmond* v. *Dainton* (13), *Matthey* v. *Curling* (14), *Bank Line, Ld.* v. *Capel & Co.* (15), *Metropolitan Water Board* v. *Dick* (16) and *Horlock* v. *Beal* (17). It cannot be maintained that here performance became impossible through supervening circumstances within the time or in the manner contemplated by the parties. The Defendant should have, in advance, completed arrangements to fulfil the agreement to re-deliver the elephant to the Plaintiff on the expiry of the term of hire on the 14th May 1920, but there is no evidence to show that he even made an attempt in that behalf. In our opinion, the case is covered by sec. 161 of the Indian Contract Act and the Plaintiff is entitled to recover the price of the elephant as also the hire from the 16th May to the 22nd May 1920, as he appears to have been paid the hire up to the 15th May 1920.

(1) 1 Bos. & P. N. R. 140 (145); 8 R. R. 767 (1804).
(2) 2 Stark. 311; 20 R. 687 (1818).
(3) 2 Exch. 479 (1848).
(4) 7 Exch. 152; 86 R. R. 593 (1851).
(5) 1 C. B. 672; 68 R. R. 796 (1845).
(6) W. Jones 179.
(7) 3 Burr. 1592 (1764).
(8) 3 B. & S. 826; 129 R. R. 573 (1863).
(9) 3 C. P. D. 443 (1878).
(10) 15 Wallace 337.
(11) [1920] App. Cas. 162.
(12) [1916] 2 App. Cas. 397.
(13) [1920] 2 K. B. 256.
(14) [1922] 2 App. Cas. 180.
(15) [1919] App. Cas. 435 (1918).
(16) [1918] App. Cas. 119 (1917).
(17) [1916] 1 App. Cas. 486.

We may add that the rule adopted in modern decisions is that proof of loss or injury establishes a sufficient *primâ facie* case against the bailee to put him upon his defence; where chattels are delivered to a bailee in good condition and are lost or are not returned or are returned in a damaged state, the law presumes negligence to be the cause, and casts upon the bailee the burden to show that the loss is due to causes consistent with due care on his part; *Mackenzie* v. *Cox* (18), *Reeve* v. *Palmer* (19), *Phipps* v. *New Claridge Hotel* (20), *Bullen* v. *Swan E. E. Co.* (21) and *Coldman* v. *Hill* (22). There remains the question of the liability of the Defendants individually. It is beyond controversy that the first and third Defendants are both liable. The contract was made between the first Defendant and the Plaintiff. The third Defendant has admitted that he employed the first Defendant to enter into the transaction on his behalf. The principle applicable in these circumstances is concisely formulated in Bacon's Abridgement, tit Bailment: "If a bailee deliver the goods to another, then he shall have an action of detinue against him, because he hath his possession and undertakes for the custody, and the original bailor may have his action against either of them, because in him is the property which both are bound to answer to him."

The question of the liability of the second Defendant stands on a different footing. We have been pressed to hold that as the animal was employed for the benefit of the Company Defendant, that Defendant is equally liable to the Plaintiff. This contention is based on the fallacious assumption that there was in fact and in law a contract between the Plaintiff and the Company. We cannot overlook the circumstance that the Company refused to execute the document to the knowledge of the Plaintiff. The view cannot be maintained that the Plaintiff looked forward to the Company for the price or the hire. We are not now concerned with the question of the liability, if any, of the second Defendant to the third Defendant; that is a question which can be decided only in a suit properly framed for the purpose, if occasion should arise, between the two Defendants. In the present litigation, we feel bound to hold that the Plaintiff is entitled to no relief as against the second Defendant. We may add that the allegation that an iron chain was delivered by the Plaintiff to the first Defendant has not been satisfactorily established and that portion of the claim must be disallowed.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside, except as against the second Defendant. There will be a decree for Rs. 5,016-5-4 in favour of the Plaintiff against the first and third Defendants jointly. This sum will carry interest at 6 per cent. per annum from the date of suit to the date of realization. The Plaintiff will have his costs in both the Courts as against the first and third Defendants. The decree of dismissal of the claim as against the second Defendant will stand confirmed, but there will be no order for costs in his favour in this Court.

H. D. C.

(18) 9 C. & P. 632; 62 R. R. 762 (1840).
(19) 5 C. B. N. S. 91; 116 R. R. 577 (1859).
(20) 22 T. L. R. 49 (1905).
(21) 22 T. L. R. 275; 23 T. L. R. 258 (1906).
(22) [1919] 1 K. B. 443.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 170 OF 1924.

NEWBOULD, J.
B. B. GHOSE, J.
1924,
Heard, 13 and 16, June.
Judgment, 26, June.

UMADASI DASI, Appellant,
v.
THE KING-EMPEROR.

Conviction of abettor where principal is acquitted, legality of—Acquittal on the ground of repugnancy or contradiction on the face of the record, how far allowable—Misdirection to jury—Indian Penal Code (Act XLV of 1860), sec. 94, plea of compulsion by threat of instant death, if can be a good defence to a charge of abetment of murder—"Murder," meaning of.

N. was charged with murder and U. with murder and abetment of murder. U. made a statement of the nature of a confession implicating herself and N., in which she said that N. murdered her husband while she held his legs, but that she protested against the murder and only assisted N. because he threatened to murder her also. She retracted the incriminating statement afterwards. N. was acquitted of the charge of murder and U. was convicted of abetment of murder, but acquitted of murder:

Held—*That it cannot be held as a general rule that an abettor if charged with having abetted the principal in the commission of an offence must be acquitted if the principal is acquitted.*

RAJA KHAN *v.* KING-EMPEROR (1) *distinguished.*

In the absence of any provision in the Indian Statute Law the Court is not bound to follow the rule of English law that repugnancy or contradiction on the face of the record is a ground for quashing a conviction.

R. *v.* PLUMMER (2), ROMESH CHANDRA *v.* THE EMPEROR (3) *and* R. *v.* MANNING (4) *referred to and discussed.*

Held further—*That under sec. 94 of the Indian Penal Code, a plea of compulsion by threats of instant death is a good defence by a person charged with any offence except murder and offences against the State punishable with death. The statement of U., if believed, though not a bar to her conviction on the charge of murder, could not support the charge of abetment of murder, for the word "murder" in sec. 94 cannot be held to include abetment of murder punishable under sec. 109, I. P. C. If the statement of U. was true she was entitled to acquittal on the charge of abetment on the ground that she acted under the apprehension of instant death and the fact that the jury did not convict her of murder but of abetment showed that they accepted her explanation and believed her confession as a whole.*

This was an appeal preferred on the 17th March 1924 against the conviction under sec. 302/109, I. P. C. and sentence to transportation for life passed by the Sessions Judge of Birbhum (Mr. K. C. Nag), on the 17th January 1924.

The facts were briefly as follows:—One Nabanidhar Mandal was charged with the murder and the Appellant Uma Dasi was charged with the murder and of abetment of murder of her husband Radha Raman Mandal. Uma Dasi made a statement before the Sub-Divisional Magistrate implicating herself and Nabani, but she subsequently retracted this incriminating statement. In this statement Uma Dasi said that Nabani murdered her husband by striking him over the head with an axe while she

(1) 32 C. L. J. 478 (1920)

(2) [1902] 2 K. B. 339.

(3) 18 C. W. N. 498 (1913).

(4) 12 Q. B. D. 241 (1883).

UMADASI DASI *v.* THE KING-EMPEROR.

held his legs. But she also said that she protested against the murder and only assisted Nabani because he threatened to murder her also. The jury found Uma Dasi guilty under sec. 302/109, I. P. C. and found Nabani not guilty of murder, and unanimously recommended Uma Dasi for mercy on the ground of her youth. The Sessions Judge agreed with the verdict and convicted her under sec. 302/109, I. P. C. and accepting the recommendation of the jury sentenced her to transportation for life and acquitted her of the charge of murder. Against this conviction Uma Dasi preferred the present appeal to the High Court.

Babu Probodh Chandra Chatterjee (for *Babu Bankim Chandra Mukerjee*) for the Accused, Appellant.

Mr. Khundkar, Officiating Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Appellant Uma Dasi and one Nabanidhar Mandal were committed for trial to the Court of the Sessions Judge of Birbhum on a charge that they committed murder by causing the death of Radha Raman Mandal. In the Sessions Court a charge was added against the Appellant which was as follows :—"I, K. C. Nag, Sessions Judge of Birbhum, hereby charge you Uma Dasi as follows :—That you, on or about the 30th day of August 1923 at Dechandra, P. S. Shapur, being present abetted the commission of the offence of murder of Radha Raman Mandal by Nabanidhar Mandal which was committed in consequence of your abetment and thereby committed an offence punishable under sec. 302/109 of the Indian Penal Code." The first trial of the accused persons commenced on the 26th November 1923 and continued till the 5th December 1923 when the jury were discharged and a fresh trial ordered as one of them was unable to attend owing to illness. The second trial commenced on the 7th January and ended on the 17th January 1924. Seven of the jurors found Uma Dasi guilty under sec. 302/109 and two of them found her not guilty. Four were of the opinion that Nabanidhar Mandal was guilty under sec. 302 and five were of opinion that he was not guilty. The jury unanimously recommended Uma Dasi for mercy on the ground of her youth. The Sessions Judge agreed with the verdict of the majority of the jurors and convicted her under sec. 302/109, I. P. C. Accepting the recommendation of the jury he sentenced her to transportation for life. He recorded an order of acquittal of the charge under sec. 302, I. P. C. He did not accept the verdict of the majority of the jury acquitting Nabanidhar Mandal and referred his case to this Court under the provisions of sec. 307, Cr. P. C. This reference (No. 6 of 1924) was heard by another Divisional Bench of this Court on the 20th March. The reference was not accepted and the accused Nabanidhar Mandal was acquitted.

The first point urged on behalf of the Appellant is that Nabanidhar having been acquitted, her conviction cannot stand. It is urged that the only charge on which she was convicted was that of having abetted the commission of the offence of murder by Nabanidhar and that as it has been judicially and finally decided that Nabanidhar did not commit the murder it would be anomalous to hold that the Appellant abetted the commission of an offence that had not been committed. It is further urged as a supplementary argument that there was misdirection by the learned Sessions Judge since he omitted

UMADASI DASI *v.* THE KING-EMPEROR.

to tell the jury the points they would have to consider with reference to the charge of abetment if they acquitted Nabanidhar of the charge of murder. In support of this contention reliance is placed on the decision in *Raja Khan* v. *King-Emperor* (1). In that case one Torap Ali was charged with cheating by personation and the two Appellants were charged with abetment of that offence. Torap Ali was acquitted and the two Appellants were convicted. It was held on appeal that the jury should have been told that the first thing that must be decided was whether the alleged offence had been committed by Torap Ali and unless Torap Ali was guilty the Appellants could not be found guilty of abetting that offence. The report of the case gives no facts except those stated in the Appellate judgment and it does not in our opinion support the general proposition that in every case where an abettor and principal are tried together the abettor if charged with having abetted the principal in the commission of an offence must be acquitted if the principal is acquitted. In the majority of cases this would necessarily follow but we hold that a case like the present might be an exception to the general rule. The general rule is stated in the head-note to the case above cited in the following terms: "An offence of abetment falls through if the principal offence is not substantiated." There is nothing to suggest that in that case there was any evidence to prove the commission of the offence by the principal as against the abettors which was not equally good evidence against the principal Torap Ali. If the jury disbelieved that evidence it would necessarily follow that those charged with abetment should also have been acquitted. The present case is distinguishable firstly on the ground that there can be no doubt that the offence of murder was committed; secondly on the ground that there was the evidence of a retracted confession by Uma Dasi on the basis of which the jury might have found, as against her, that the murder was committed by Nabanidhar though as against him it would be of practically no value and insufficient to support a conviction. The strongest support to this contention on behalf of the Appellant is to be found in the English law, the leading case on this point being *R.* v. *Plummer* (2). Under English law the present Appellant would be entitled to an acquittal on the ground of repugnancy or contradiction on the face of the record. But we are in agreement with the opinion expressed by Beachcroft, J., in his judgment in *Romesh Chandra* v. *The Emperor* (3). He held at page 516 that mere repugnancy in the verdict of a jury is not by itself sufficient to ensure the quashing of a conviction. In addition to the weighty reasons given by Beachcroft, J., we may add that the English decisions on this point appear to have been based on a regard for long established practice rather than on principle. In one of the earlier cases *R.* v. *Manning* (4) two of the learned Judges Mathew and Stephen, JJ., expressly stated that they affirmed this principle with great reluctance. Lord Coleridge C. J., who originally tried the case had directed the jury that where two persons were indicted for conspiring together and were tried together they might find one prisoner guilty and acquit the other. He also was one of the Bench that heard the rule for a new trial. In his judgment on that rule he explained that his opinion

(1) 32 C. L. J. 478 (1920).

(2) [1902] 2 K. B. 339.

(3) 18 C. W. N. 496 (1913).

(4) 12 Q. B. D. 241 (1883).

UMADASI DASI v. THE KING-EMPEROR.

at the time of the trial was that where there is a joint offence which has to be proved against each person separately the evidence which is sufficient to convict one person of the offence may not by any means be sufficient to convict the other. He further stated that he might have adhered to this view if the matter had been *res integra*. In *R.* v. *Plummer* (2) also two of the learned Judges Lord Alverstone, C. J., and Jelf, J., felt considerable difficulty on this point. In the absence of any provision in the Indian Statute Law we do not feel bound to follow this rule of English law that repugnancy on the record is a ground for quashing a conviction.

The learned vakil for the Appellant ably argued several other points of law on his client's behalf. As we hold that this appeal must be allowed on one of these grounds we do not think it necessary to discuss the other grounds of minor importance which we held not to have been established. The case for the prosecution is that Radha Raman Mandal was murdered by Nabanidhar Mandal, the paramour of Uma Dasi, who was the wife of the murdered man. On the night of the murder Uma Dasi and her husband were left alone in their house, the other inmate Radha Raman's mother having gone to another village at Uma Dasi's request. The next morning Radha Raman's corpse was discovered on the bank of a tank 30 cubits away. The wounds on the body, the blood-stains found in the house and marks of dragging from the house to the tank afford very strong circumstantial evidence that the murder was committed in the house by some one who struck the deceased three severe blows on the head with some hard substance. Uma Dasi's conduct was suspicious and she made contradictory statements when questioned about the manner in which her husband was killed. To the investigating Sub-Inspector Uma Dasi made incriminating statements when she produced a number of blood-stained articles. The following afternoon Uma Dasi was taken before the Sub-Divisional Magistrate where she made a statement of the nature of a confession implicating herself and Nabani. This incriminating statement she subsequently retracted. It is with reference to this statement that there has been serious misdirection. In this statement Uma Dasi said that Nabani murdered her husband by striking him over the head with an axe while she held his legs. But she also said that she protested against the murder and only assisted Nabani because he threatened to murder her also. The learned Sessions Judge in his charge to the jury has overlooked the provisions of sec. 94 of the Indian Penal Code. Under this section a plea of compulsion by threats which reasonably cause the apprehension of instant death is a good defence by a person charged with any offence except murder and offences against the State punishable with death. This statement of Uma Dasi, if believed, though not a bar to her conviction on the charge of murder, could not support the charge of abetment of murder. The word murder in sec. 94, I. P. C. cannot be held to include abetment of murder punishable under sec. 109, I. P. C. The prosecution is therefore placed in a dilemma. If the statement of Uma Dasi is true she is entitled to acquittal on the charge of abetment on the ground that she acted under the apprehension of instant death. If this statement is false the evidence against her is insufficient to prove that Nabani committed the murder and she cannot be convicted on the charge as framed that she

(2) [1902] 2 K. B. 339.

abetted the commission of murder by him. The learned Deputy Legal Remembrancer asked us to disbelieve this part of the confession and to hold that the circumstantial evidence was sufficient to support the verdict of the jury. This we cannot do as it cannot be said that the jury would have convicted the Appellant if they had been properly directed as to the application of sec. 94, I. P. C. If, as we must presume, the jury obeyed the directions of law given to them by the learned Judge, it seems evident that they did believe the confession. They were told that if they held on a consideration of the whole of the evidence that Uma Dasi was actuated by the common intention of murdering her husband when she held his legs, Uma Dasi and Nabani were both guilty under sec. 302, I. P. C. As they did not find her guilty under this section but of abetment as charged it appears that they believed that she held her husband's legs while Nabani murdered him but that she was not actuated by the common intention of murdering him. They could only have come to this conclusion if they accepted her explanation and believed her confession as a whole. On this finding the Appellant is entitled to an acquittal and it would not be just to order her retrial.

There are also other reasons why we do not think a retrial should be ordered. At a retrial the case for the prosecution would necessarily be that the statement of Uma Dasi was not a true account of what happened but that her guilt was established by the circumstantial evidence. This circumstantial evidence is such that the inference might be drawn that she was guilty of murder but she cannot be again tried on that charge after her acquittal. Further the circumstantial evidence appears consistent with her having been an accessory after the fact and if the jury took this view she could not be convicted of abetment.

For the above reasons we set aside the conviction and sentence of the Appellant on the charge of having abetted the commission of murder by Nabanidhar Mandal and direct that she be released at once.

J. N. R. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD DUNEDIN. LORD PHILLIMORE. SIR JOHN EDGE. MR. AMEER ALI. SIR LAWRENCE JENKINS. 1923, Heard, 19 and 22, October. Judgment, 13, November.	OBALA KONDAMA NAICKER AYYAN and anr., Appellants, v. KANDASAMY GOUNDAR, Respondent.

Hindu law—Madras Presidency—Compromise by daughter with separated agnate dividing inheritance, if binds former, she acting **bona fide** *whilst the latter knew he had no rights*—**Purdanashin** *lady, compromise by, without independent advice, not binding on reversioners—Mortgage by agnate—Mortgagee if purchaser for value without notice—Onus of proof, nature and extent of, on mortgagee—Hindu daughter's power of alienation—Court's power to declare alienation invalid beyond her life-time at the suit of expectant reversioners*

A, the daughter and sole heiress of a Mitakshara Hindu and a purdanashin *lady, recently widowed, and a mother of infant sons, was induced by M, an agnate of her father whose branch of the family had previously separated, to enter into a compromise dividing her father's estate with M, who subsequently mortgaged the share he got under the compromise. In a suit by A's son, brought in A's life-time challenging the validity of the compromise and the mortgage, it was found that M was fully aware that he was not joint with A's*

OBALA KONDAMA NAICKER AYYAN *v.* KANDASAMY GOUNDAR.

father but that there was no sufficient evidence to show that in assenting to the terms of the compromise A was not acting bonâ fide *in the light of the circumstances brought to her notice:*

Held—*That the compromise was invalid as against M who, though A's sole adviser, took to the detriment of A and her infant sons benefits, to which, to his own knowledge, he had no honest claim.*

That even as a compromise and an acknowledgment of an existing title, it was improperly induced and inoperative.

That the mortgagee's plea of purchase for value without notice was not sustainable in the absence of proof either of necessity or of inquiry validating the compromise, the mortgagee having had notice that his mortgagor took from one who only had a limited and conditional power of disposal.

It is now settled beyond dispute that in the Madras Presidency a daughter as heiress of her father takes a restricted interest similar to that taken by a widow with a similar power of disposal; she can dispose of the inheritance for legal necessity, but it lies on the alienee to prove the existence of this necessity and this is so even though the absence of necessity be not pleaded by the reversioner.

SHAM SUNDER LAL *v.* ACHHAN KUNWAR (1) *followed.*

The fact that the reversion was still in expectancy was no bar to the Court declaring that the mortgage was inoperative beyond A's life-time.

This was an appeal from a decree, dated the 2nd May 1919, of the High Court at Madras which varied a decree, dated the 23rd December 1916, of the Court of the Subordinate Judge at Madura.

(1) L. R. 25 I. A. 183 at p 191: s. c. I. L. R. 21 All. 71; 2 C. W. N. 729 (1898).

The suit was brought by the Appellants for a declaration that certain transfers of property made by their mother Aparanji were void as against them. They claimed to be reversionary heirs to the property of their grandfather Mayilchami. Mayilchami was a Hindu resident in Madras and his daughter, on his death, succeeded to his property for a woman's estate. On the death of Mayilchami in May 1901 disputes arose between his daughter Aparanji and his daughter-in-law Sennammam. The latter claimed the estate as being the widow of the deceased's son, and on the rejection of her claim, brought a suit against Aparanji and Mandalathipathy, a cousin of the deceased, seeking to establish an alleged Will of the deceased under which she claimed one-third of the estate.

Mandalathipathy defended the suit on the footing that he was an undivided member of the family of the deceased and Aparanji supported his claim. In the following year the litigation terminated in a compromise in accordance with which a decree was passed on the 29th September 1903. The estate was divided and in 1907 a partition deed was executed in terms of the compromise.

Subsequently alienations of the shares which they took thereby were made by each party to the compromise, among them being a mortgage executed by Mandalathipathy in favour of the Respondent on the 10th July 1910 to secure a sum of Rs. 10,000 which is in question in the present appeal.

On the 7th January 1915 the mortgagee obtained thereon a decree for Rs. 17,257 which he was proceeding to execute at the date of the suit which gave rise to the present appeal.

The Appellants in their plaint asked for a declaration that the compromise and

OBALA KONDAMA NAICKER AYYAN *v.* KANDASAMY GOUNDAR.

partition of 1907 and the alienations were invalid as against them and void after the life-time of their mother Aparanji.

The Subordinate Judge found that the compromise and partition were valid and binding on the Plaintiffs; and that the rights of the present Respondent, which had been acquired for full consideration and without notice of any defect in the compromise or the partition, could not be affected even if the compromise were not binding on the Appellants. In the result he passed a decree dismissing the suit. On appeal the High Court was dissatisfied with the manner in which the suit had been tried and called for further findings as to whether Mayilchami and Mandalathipathy were undivided and whether the compromise was *bonâ fide*.

On remand the suit came before a different Subordinate Judge who without taking further evidence found that Mayilchami and Mandalathipathy were divided in status and estate, that the compromise and partition were not *bonâ fide*.

The appeal having come on for final hearing, the learned Judges of the High Court (Wallis, C. J. and Seshagiri Ayyar, J.) held that Aparanji in entering into the compromise must be taken to have done so as representing the estate, that she had done so *bonâ fide*, but that the compromise was not valid as against the Plaintiffs. As regards the present Respondent they found that he was not a party but the alienee of a party to the compromise and as such was entitled under sec. 96 of the Indian Trust Act, 1888 as against the Plaintiffs to the rights which his mortgage purported to give him, as he had paid consideration and was not shown to have had notice of the defect in his mortgagor's title.

They accordingly allowed the appeal as against the Defendants other than the present Respondent but dismissed it as against him.

The Plaintiffs appealed against the decree of dismissal.

Messrs. DeGruyther, *K. C.* and *Kenworthy Brown*, for the Appellants.—The High Court were in error in applying the provisions of the Trust Act.

There are concurrent findings that the compromise and the subsequent deed of partition were brought about by undue influence and fraud on the part of Mandalathipathy and they are not binding on the Appellants.

Gunjeshwar Kunwar v. *Durga Prasad Singh* (3) and *Sham Sunder Lal* v. *Achhan Kunwar* (1).

Sec. 38 of the Transfer of Property Act, 1882 is not applicable. The principle by which an innocent purchaser is protected cannot be applied to a person who takes at second hand from one with a limited interest. The Respondent could only have got a good title from Mandalathipathy if the latter had taken *bonâ fide* and for value. The Appellants never adopted the transaction as in *Madhu Sudan Singh* v. *Rooke* (4).

In any event the Respondent has failed to establish that he was a *bonâ fide* purchaser without notice. On the face of the title the Respondent had notice that his transferor took from one who had only a limited power of disposal and he has offered no proof that there was legal necessity for the borrowing; or that he had taken any pains to discover whether such necessity existed.

He must therefore be taken to have been cognisant of the defect in his mortgagor's title.

(1) L. R. 25 I. A. 183 at p. 191; s. c. I. L. R. 21 All. 71; 2 C. W. N. 729 (1898).

(3) L. R. 44 I. A. 229 (1917).

(4) L. R. 24 I. A. 164; s. c. I. L. R. 25 Cal. 1; 1 C. W. N. 433 (1897).

OBALA KONDAMA NAICKER AYYAN *v.* KANDASAMY GOUNDAR.

Sec. 3, Transfer of Property Act.

Hon. Sir Wm. Finlay, K. C. and *Mr. K. V. L. Narasimham* for the Respondent.—The appeal is incompetent being under Rs. 10,000. Leave was asked for under sec. 110 and was granted under sec. 109.

Mr. DeGruyther, K. C.—The High Court have granted a certificate and the Board will not look into the circumstances under which it was granted when the High Court have certified that in their opinion there is an important question of law to be decided.

Hon. Sir Wm. Finlay, K. C. and *Narasimham.*—The High Court acted *ultra vires* in remitting the case for further findings. The trial Judge had already given his findings on the material facts in favour of the Respondents and the further findings on remand were made on the evidence already on the record.

Venkata Varuthi v. *Anantha Chariar* (5), Civil Procedure Code, Or. 41, r. 25.

In any event there are concurrent findings that the Respondent had no notice of any defect in the compromise.

Aparanji was acting *bonâ fide* on behalf of her children and of the estate and could pass a good title to the present Respondent.

[SIR L. JENKINS.—The position is different from that of an English *bonâ fide* purchaser for value.

Here the title is derived from a person who could only part with a limited interest unless certain specific conditions were satisfied.]

Mandalathipathy was not claiming under the compromise but as being undivided and therefore entitled to the whole property.

Aparanji compromised the claims against the estate and a compromise made by a Hindu woman can bind the reversioners.

Ramsumran Prasad v. *Shyam Kumari* (6).

The transfer under the compromise was not in fact an alienation but a recognition of a pre-existing right in Mandalathipathy.

Khunni Lal v. *Govind Krishna Narain* (7).

On the facts the original trial Judge's findings are correct that there was a genuine dispute ending in a compromise.

Mr. DeGruyther, K. C. in reply.—The High Court have in fact set aside the compromise as bad, so that it would have no binding effect as between Mandalathipathy and Aparanji. It is invalid as against the reversioner and an alienee cannot be in a better position. *Rangasami Gounden* v. *Nachiappa Gounden* (8).

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 2nd May 1919, which varied a decree of the Subordinate Judge of Madura, dated the 23rd December 1916. The Plaintiffs are the reversionary heirs of their maternal grandfather Mayilchami, who died in May 1901, and was succeeded by his daughter, Aparanji Amman, the mother of the Plaintiffs. The Defendants are (among others) Aparanji Amman, Kumaravigaya, the son of the late Mandalathipathy, Sennamman Avergal, and Kandasamy Goundar.

(5) I. L. R. 16 Mad. 299 (P. C.) (1893).

(6) L. R. 49 I. A. 342, 345: s. c. 27 C. W. N 269 (1922).

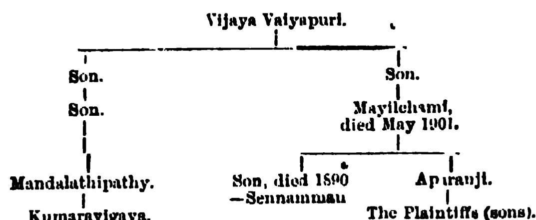
(7) L. R. 38 I. A. 87: s. c. 15 C. W. N. 545 (1911).

(8) L. R. 46 I. A 72: s. c. I. L. R 42 Mad. 523; 23 C. W. N. 777 (1918).

OBALA KONDAMA NAICKER AYYAN v. KANDASAMY GOUNDAR.

The purpose of the suit is to establish the Plaintiffs' title as reversioners.

To explain this title it will be convenient to set out the following pedigree :—



On Mayilchami's death Sennamman commenced proceedings under the Criminal Procedure Code for possession of the estate of her father-in-law. Her application substantially failed. She then instituted a suit on the 14th February 1902 against Aparanji and Mandalathipathy seeking to establish a Will alleged by her to have been executed by Mayilchami and praying that possession should be given to her of one-third share of the property left by him.

Both Defendants to that suit filed written statements and the litigation closed with a compromise in 1903.

It provided that 10 kulies of the property therein described and a house should be delivered by the Defendants to Sennamman. To this extent it was within the scope of the suit and ultimately a decree was passed in accordance with this stipulation.

But the compromise also purported to define the rights of the Defendants to that suit as between themselves. By cl. 8 it provided that the properties described in the plaint (other than what was given to Sennamman) should be divided into moieties and that each of those Defendants should take one. On the 23rd February 1907, a partition deed was executed in accordance with the terms of the compromise. On the 2nd July 1910, Mandalathipathy executed a mortgage on property taken by him under the compromise to secure Rs. 10,000 advanced to him by the Respondent Kandasamy Goundar, and on the 7th January 1915, a decree for Rs. 17,257 was passed on it in the mortgagee's favour.

The Plaintiffs, as reversioners under their maternal grandfather, have instituted this suit on the 2nd March 1915, seeking to establish the invalidity as against them of the respective titles claimed by Kumaravigaya, the son of Mandalathipathy, deceased, and by the mortgagee.

It has been held by the High Court, and their Lordships adopt the finding, that Mayilchami and Mandalathipathy were separate and not joint, and there can be no doubt that this was known to Mandalathipathy at the time of the compromise.

But the compromise was based on the supposition that there was a question as to whether there had been a separation between the two lines of the family.

The High Court has further found that there is no evidence that Aparanji, with full knowledge that there was no truth in the claim put forward by Mandalathipathy, agreed to the compromise from ulterior motives and that there is no sufficient evidence to show that in assenting to the terms of the compromise she was not acting *bonâ fide* in the light of the circumstances then brought to her notice. Their Lordships do not dissent from this appreciation of the evidence. Aparanji at the time of the compromise stood in need of especial protection. She was a *purdanashin* lady, recently widowed, the mother of infant sons, and, so far as the evidence discloses, without any adult male relation except Mandalathipathy to advise her.

But it was under his advice and influence that she acted in the litigation with

OBALA KONDAMA NAICKER AYYAN v. KANDASAMY GOUNDAR.

Sennamman and in the compromise by which Mandalathipathy took to the detriment of herself and her infant sons the benefits to which, as he well knew, he had no honest claim.

In these circumstances the High Court rightly came to the conclusion that as against Defendant No. 2, Mandalathipathy's son and heir, the Plaintiffs established the invalidity of the compromise after their mother's death. From this part of their adjudication no appeal has been preferred, and the only contest now is with the mortgagee in whose favour the High Court decided.

The ground of this decision is that the mortgagee is a *bonâ fide* transferee for value, and so stands in a better position than his transferor, whose title was held to be bad.

The High Court appears to have thought that justification for this view was to be found in the provisions of the Trust Act. In their Lordships' opinion this was erroneous: the Act has no direct relevance to the circumstances of this case, and it was properly realized in the argument here that if the High Court's conclusion can be supported it must be on other grounds.

It has thus been contended that the High Court acted without jurisdiction in remanding the case as it did, and that the true view of the facts is that taken by the first trial Judge. But though the High Court's procedure may invite criticism, this is of no importance in view of that Court's ultimate findings of fact which, as already indicated, their Lordships accept.

They therefore do not think it necessary to discuss further the propriety of the remand.

It is then contended that the plea of purchaser for value without notice assists the Respondent.

But an initial difficulty in applying this doctrine is that on the face of the title the mortgagee had notice that his mortgagor took from one who only had a limited and conditional power of disposal. And so the enquiry comes back to this: What was the daughter's interest and power, bearing in mind that the case comes from the Madras Presidency? It is now settled beyond dispute that a daughter as heiress of her father takes a restricted interest similar to that taken by a widow with a similar power of disposal. This power is conditional; she can dispose of the inheritance for legal necessity, but it lies on the alienee to prove the existence of this necessity, and this is so even though the absence of necessity be not pleaded by the reversioner. Thus it was laid down in *Sham Sunder Lal* v. *Achhan Kunwar* (1): "In a suit like the present, on a bond made by a person with restricted power of alienation, the Defendants are not required to plead the absence of legal necessity for the borrowing. It is for the Plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage." And later it was said the "touchstone of the authority is necessity." It may be conceded that even though there may not be legal necessity in fact, the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed.

But here there is no proof either of necessity or of enquiry validating the compromise.

The inheritance therefore was not transferred so as to bind the reversioners. On the contrary, the reversioners on the mother's death can treat it as a nullity without the intervention of any Court.

(1) L. R. 25 I. A. 183 at p. 191: s. c. I. L. R. 21 All. 71; 2 C. W. N. 729 (1898).

OBALA KONDAMA NAICKER AYYAN *v.* KANDASAMY GOUNDAR.

[*Bejoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2)].

Nor in their Lordships' opinion does it alter the position that the dealing with Mandalathipathy purported to be a compromise and an acknowledgment of an existing title. Even so it was improperly induced and equally vitiated.

As against the reversioners in this case, it was not within the power of Mandalathipathy to transfer a larger legal title than he himself had, nor have the reversioners by any act or omission debarred themselves from insisting on this contention. It is true that the reversion is still an expectancy, but an expectant reversioner's right to sue for a declaration has statutory recognition, and for the purpose in hand it is legitimate to consider what their position would be on their mother's death in their life-time. They would in that event have the immediate title without the intervention of any Court, and there would in their Lordships' view be no principle of justice, equity or good conscience that would empower the Court to deprive them of that legal title or to impose any restriction in derogation of it.

Their Lordships therefore are unable to agree with the High Court's decision in the mortgagee's favour, and they will accordingly humbly advise His Majesty that the appeal be allowed and that the decree of the High Court be varied so far as it dismissed the appeal as against the 4th Defendant and ordered that the Plaintiff should pay to the 4th Defendant Rs. 621-2-6 for his costs, by directing in lieu thereof (*a*) that it be declared that the mortgage of the 2nd July 1910, and the decree thereon are inoperative against the Plaintiffs beyond their mother's life-time, and (*b*) that the 4th Defendant pay to the Plaintiffs their costs in the lower Courts so far as attributable to his claim against them, the amount of such costs to be assessed by the High Court. The 4th Defendant must pay to the Plaintiffs their costs of this appeal.

Solicitor: *Mr. Douglas Grant* for the Appellants.

Solicitor: *Mr. Edward Delgado* for the Respondent.

G. D. M.

(2) L. R. 34 I. A. 87: s. c. 11 C. W. N. 424 (1907).

[CIVIL APPELLATE JURISDICTION.]

Full Bench Reference

No. 1 OF 1924.

SANDERSON, C. J. WALMSLEY, J. NEWBOULD, J. MUKERJI, J. CHOTZNER, J. 1924, Heard, 25, July. Judgment, 8, August	BARADA KANTA RAY, Plaintiff, *v.* SHAIKH MAIJUDDI, Defendant.

Provincial Small Cause Court, if can order attachment of immoveable property before judgment—Provincial Small Cause Courts Act (IX of 1887), sec. 17—Civil Procedure Code (Act V of 1908), secs. 7, 94, 95 and Ors. 38, 39 and 50—Procedure for such attachment—"Attachment" and "order for attachment," difference between—Construction of statute—Sec 7, "so far as they relate to injunctions and interlocutory orders," meaning of.

Per CURIAM (WALMSLEY AND CHOTZNER, JJ., dissentiente).—*A Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment under Or. 38 of the Civil Procedure Code. There is a difference between ordering the attachment of property and attaching property. If a Small Cause Court passes such an order, it would have to send the order to an ordinary Civil Court for executing it.*

Per WALMSLEY AND CHOTZNER, JJ.—*A Provincial Small Cause Court has*

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

no power to attach immoveable property before judgment under Or. 38 of the Civil Procedure Code.

Per SANDERSON, C. J. AND NEWBOULD, J.—KEDAR NATH *v.* HEM NATH (1) *was wrongly decided and* SADEK ALI *v.* SAMED ALI (2) *was rightly decided.*

Per MUKERJI, J.—*The case of* KEDAR NATH *v.* HEM NATH (1), *if it purported to lay down that a Provincial Small Cause Court can attach immoveable property and not merely make an order of attachment thereof, was not correctly decided, nor was the case of* SADEK ALI *v.* SAMED ALI (2) *correctly decided if it meant to lay down that no such order can be passed by a Provincial Small Cause Court.*

This was a Reference to a Full Bench made by Newbould and B. B. Ghose, JJ., for decision owing to a conflict of decisions on the point which was made the subject of a Reference to the High Court by the Munsif of Madaripur.

The facts material to this report will appear from the following Reference by the Munsif of Madaripur, dated the 10th January 1924.

"Plaintiff in the present case has applied for attachment of Defendant's immoveable property before judgment, but as I entertain reasonable doubt as to whether such attachment can be legally made, I would refer the question to the Hon'ble High Court for its decision under r. 1, Or. 46, Civil Procedure Code.

The matter was twice before referred to the Hon'ble High Court within recent years. Vide *Kumud Behari* v. *Hari Charan* (3) and *Kedar Nath* v. *Hem Nath* (1), and in these cases it was held that the Provincial Small Cause Court is competent to attach moveable and immoveable property before judgment. In the latest case on the subject, *Sadek Ali* v. *Samed Ali* (2), however, it has been held that a Provincial Small Cause Court has no power to attach immoveable property before judgment. All that can be usefully said on both sides of the question has been said in the reported cases referred to above, and I have nothing more to add beyond saying that *Kedar Nath* v. *Hem Nath* (1), where it has been held that the Provincial Small Cause Courts can attach immoveable property, does not appear to have been considered in *Sadek Ali* v. *Samed Ali* (2) which in effect overrules that decision. In view of this conflict of judicial authority a clear finding of the Hon'ble Court seems to be necessary for the guidance of subordinate Courts. So far as moveable property is concerned, there is no such conflict. I accordingly refer the following point for the decision of High Court:—Whether a Provincial Small Cause Court is competent to attach immoveable property before judgment?"

When the Reference came before the Divisional Bench (Newbould and B. B. Ghose, JJ.), the Court referred it to the Full Bench with the following observations:—

"This is a Reference by the Judge of the Court of Small Causes at Madaripur under Or. 46, r. 1, Civil Procedure Code for the decision by this Court of the question whether the Provincial Small Cause Court is competent to attach immoveable property before judgment. The reason for the Reference is given to be the existence of conflicting decisions in this Court and apparently for this the referring Judge has not recorded his own opinion

(1) I. L. R. 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).
(3) I. L. R. 46 Cal. 717 (1918).

(1) I. L. R. 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

on the question. In the case of *Kedar Nath* v. *Hem Nath* (1), it was held that the Provincial Small Cause Court can attach immoveable property before judgment while the contrary view was taken in *Sadek Ali* v. *Samed Ali* (2). The earlier case was not evidently brought to the notice of the Division Bench which decided the latter case. Each of us was a party to one of the two cases cited, one of which must be overruled. Under this circumstance, we are unable to decide the question finally and we find it necessary to refer the matter to a Full Bench. We therefore refer the following questions for decision by a Full Bench :—

(1) Whether a Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment?

(2) Whether the case of *Kedar Nath* v. *Hem Nath* (1) or the case of *Sadek Ali* v. *Samed Ali* (2) was correctly decided?"

Babus Santosh Kumar Bose and *Sitaram Banerjee* appeared *amicus curiæ* for and against the Reference at the request of the Court.

The arguments will appear from the following summary and from the judgment of Mukerji, J.

Babu Santosh Kumar Bose for the Reference.—Sec. 17 of the Small Cause Courts Act makes the provisions of the Civil Procedure Code of 1882 mentioned in Sch. II applicable to Small Cause Courts whereas sec. 5 of the Code of Civil Procedure of 1882 expressly extended to Small Cause Courts certain provisions of the Code enumerated in the Second Schedule, other chapters and sections did not apply. Sec. 226, relating to attachment and sale, applied except with regard to immoveable property and secs. 273, 284, 285, 286, 287, 288, 289, 290, 328 to 332 and 333 applied so far as they related only to moveable property. Chap. XXXIV, relating to arrest and attachment before judgment, applied except as regards immoveables. Chap. XXXV, *re* injunctions and interlocutory orders, not being mentioned did not apply. By the Code of 1908 the whole scheme was altered. There is no express application of some of its provisions but it consolidates and amends the law of procedure applicable to Courts of civil judicature. Small Cause Courts are such Courts. Sec. 7, sub-sec. (*a*), cl. (*iii*) excludes provisions in the body of the Code relating to execution of decrees against immoveables, and sub-sec. (*b*) excludes secs. 94 and 95 so far as they relate to injunctions and interlocutory orders. Sec. 94, cl. (*c*) refers to injunctions and cl. (*e*) to interlocutory orders; other clauses do not contemplate interlocutory orders, although the word "such" appears in cl. (*e*). Otherwise sec. 7 will be rendered meaningless, and further because temporary injunctions and interlocutory orders are mentioned in Or. 39 and other orders mentioned in cls. (*a*), (*b*) and (*d*) are provided for in Ors. 38 and 40. Besides, by Or. 50, Or. 38 is not excluded. Sec. 7, sub-sec. (*a*), cl. (*iii*), excludes provisions in the body of the Code *re* execution of decrees against immoveables, and creates no bar against attachment before judgment. Or. 50, r. 1, sub-r. (*a*) (*ii*) also excludes so much of the schedule as relates to execution of decrees against immoveable property, but this attachment is not in execution, but before judgment. There is exception in Or. 16, r. 10 as regards attachment in cases of defaulting witnesses. Attachment before judgment is entirely for a different purpose from execution. The distinction between an attachment and an order of attachment is

(1) I. L. R. 49 Cal. 991 (1922).
(2) 28 C. W. N. 16 (1923).

very thin. Refers to *Kumud Behari Pal* v. *Hari Charan Sardar* (3), *Basiram* v. *Kattyayani* (5), *Arunachellam* v. *Haji Shaikh Rowther* (6) and *Sriram* v. *Tincowrie* (7).

Babu Sitaram Banerjee against the Reference.—The Second Schedule of the Small Cause Courts Act excludes from the cognizance of the Small Cause Court all suits in respect of immoveable property, whether for declaration, partition or possession or otherwise and rights to or interests in immoveable properties are specifically and elaborately excluded. Sec. 17, Small Cause Courts Act relates to the procedure to be applied to Small Cause Court suits, the Code of 1882 specifically excluded the power of attachment of immoveable properties before judgment from the jurisdiction of Small Cause Court. In the present Code, sec. 7 and Or. 50 relate to the matters excluded. By sec. 7 (*a*) (*iii*) the execution of decrees against immoveable property is specifically excluded. Sec. 7 relates to the body of the Code and not to the orders and rules.

Refers to sec. 94 (*c*) and (*e*). Interlocutory orders are excluded from the jurisdiction of Small Gause Courts. Or. 38 has been prescribed to enable the Court to make an order for the attachment of any property for preventing ends of justice from being defeated, and therefore it is covered by sec. 94 (*b*). An attachment before judgment is an interlocutory order according to the usual acceptance of the term. Sec. 94 clearly refers to interlocutory orders in all its clauses, which is clear from the wording of cl. (*e*), viz., "such other interlocutory orders," and hence by the operation of sec. 7 of the Code, this must be excluded from the jurisdiction of the Small Cause Court and therefore a Provincial Small Cause Court is no longer competent to make any order for attachment of property before judgment. To hold that the Small Cause Court can attach immoveable property before judgment will lead to claims to immoveable property being decided by it with no right of appeal. To hold that it is competent to attach moveables before judgment, when Or. 39, r. 6 which gives this power, being an interlocutory order specified as such in the Code, is expressly excluded by sec. 7 read with sec. 94 (*e*), would lead to an anomaly. Reads Or. 50 (*a*) (*ii*). Several interlocutory matters, *viz.*, relating to injunctions, appointments of receivers, etc., are not included in Or. 50. Hence neither sec. 7 nor Or. 50 is exhaustive. The argument in *Kumud Behari Pal* v. *Hari Charan Sardar* (3) is logically fallacious. An order under Or. 38, r. 6 is appealable under Or. 43, r. 1, but if the Small Cause Court makes an order under Or. 38, r. 6, would it be appealable? Under Or. 38, r. 11, there is no necessity for fresh attachment at the time of execution, which would be an anomaly. Similarly Or. 38, rr. 7 and 8 would lead to anomalies. The distinction between attachment in execution and before judgment is really technical and not fundamental. Distinguishes *Basiram* v. *Kattyayani* (5). The object is the same in both, *viz.*, preservation of the judgment-debtor's property as security for the decree-holder's money. A Court which cannot attach primarily in execution of its decree cannot attach in anti-

(1) I. L. R. 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).
(3) I. L. R. 46 Cal. 717 (1918).
(5) I. L. R. 38 Cal. 448; s. c. 15 C. W. N. 795 (1911).
(6) I. L. R. 34 Mad. 25 (1910).
(7) 13 W. R. 9; 4 B. L. R. 68 (F. B.) (1869).

(3) I. L. R. 46 Cal. 717 (720) (1918).
(5) I. L. R. 38 Cal. 448; s. c. 15 C. W. N. 795 (1911).

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

cipation of it. Refers to *Marthamma* v. *Kittu Sheregara* (4). If Or. 38, r. 7 applies to Small Cause Courts, then Or. 21, r. 63 will also apply, and then the anomalous position will follow that the order of a Small Cause Court will become final as regards immoveable property which is certainly contrary to the intention of the legislature. Under sec. 36, C. P. C., execution of order against immoveable property is same as execution of decrees, hence there is another anomaly. Arguments from previous Codes are apt to be misleading [*Bank of England* v. *Vagliano* (8)] and *Kedar Nath* v. *Hem Nath* (1) was decided on a wrong analogy of Small Cause Court's power over moveable properties, based on *Kumud Behari Pal* v. *Hari Charan Sardar* (3). Refers to sec. 158, C. P. C.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—The questions referred to the Full Bench are as follows :—

(1) Whether a Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment?

(2) Whether the case of *Kedar Nath* v. *Hem Nath* (1) or the case of *Sadek Ali* v. *Samed Ali* (2) was correctly decided?

The reference arises by reason of conflicting decision of this Court in two cases. *viz.*, *Kedar Nath Pramanik* v. *Hem Nath Karmokar* (1) and *Sadek Ali* v. *Samed Ali* (2).

In the former case it was decided that a Provincial Small Cause Court can attach before judgment immoveable property under the Code of Civil Procedure of 1908. In the latter case it was decided that a Provincial Court of Small Causes has no power to attach immoveable property before judgment under Or. 38 of the Civil Procedure Code of 1908 and that an order of such a Court adjudicating a claim to property so attached is *ultra vires*.

The decision in the case of *Kedar Nath Pramanik* v. *Hem Nath Karmokar* (1) was not brought to the attention of the learned Judges who decided the latter case.

I am not surprised that there has been and is a difference of judicial opinion in respect of this question, for in my opinion it is by no means easy upon an examination of the various provisions relating to it to ascertain what was the intention of the legislature with regard to this matter when the Civil Procedure Code of 1908 was passed. This presents an unsatisfactory situation, for the Provincial Small Cause Courts are obviously intended for the expeditious disposal of small causes, and it is desirable that those who preside over such Courts and those who practise in them should be able to ascertain without any difficulty what are the jurisdiction and procedure applicable thereto. So far from that being the case in respect of the matter now under discussion, it has become necessary, in order to ascertain the powers of the Provincial Small Cause Courts, to refer the question to a Full Bench and during the argument it was necessary to examine minutely sections of the Provincial Small Cause Courts Act of 1887, the Civil Procedure Code of 1882 and the Civil Procedure Code of 1908 and the result is a difference of opinion.

This therefore appears to be a matter which should engage the attention of the legislature so that the jurisdiction of the Provincial Small Cause Courts may be made clear beyond all question.

(1) I. L. R. 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).
(3) I. L. R. 46 Cal. 717 (721) (1918).
(4) 6 Mad. H. C. R. 90 (1871).
(8) [1891] A. C. 107.

(1) I. L. R. 49 Cal. 994 (1922).

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

Sec. 15 of the Provincial Small Cause Courts Act, 1887, provides that a Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits excepted from the cognizance of a Court of Small Causes and amongst the suits excepted by that Schedule from the cognizance of a Court of Small Causes are. a suit for the possession of immoveable property or for the recovery of any interest in such property, a suit for partition of immoveable property, a suit for purchase or sale or redemption of mortgaged property, a suit for assessment, etc., of rent of immoveable property.

Sec. 17 of the Provincial Small Cause Courts Act, 1887, provides that the procedure prescribed in the chapters and, sections of the Code of Civil Procedure (*viz.*. Act XIV of 1882) specified in the Second Schedule to that Code shall, so far as these chapters and sections are applicable, be the procedure followed by a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits.

Sec. 5 of the Code of Civil Procedure, 1882 provided that the chapters and sections specified in the Second Schedule thereto should extend to the Provincial Small Cause Courts and that the other chapters and sections of the Code should not extend to such Courts.

The Second Schedule included Chap. LIX (which dealt with the execution of decrees), sec. 266, but there was added the exception as follows :—" Except so far as relates to immoveable property."

The schedule also included Chap. LXXIV " Of arrest and attachment before judgment except as regards immoveable property."

It is therefore clear that at the time of the passing of the Provincial Small Cause Courts Act in 1887 the intention of the legislature was that a Provincial Small Cause Court should not have power to attach immoveable property before judgment.

The Code of Civil Procedure, 1882, was repealed by the Code of Civil Procedure, 1908 and sec. 158 provided as follows :— " In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding part, order, section or rule."

There is, however, no part of the Code of 1908 which corresponds to the Second Schedule of the Code of 1882 and whereas the scheme of the 1882 Code was to specify the provisions of the Code which should apply to a Provincial Small Cause Court, the scheme of the 1908 Code is to make all the provisions of the Code of 1908 applicable except those which are expressly excepted. The result is that sec. 17 of the Provincial Small Cause Courts Act is entirely inapposite although it remains unrepealed. This is one reason for the difficulty which has arisen.

On examination of the Code of 1908 and the orders contained in the first Schedule thereto, it seems to me that the most material sections and orders are as follows :—

Secs. 7, 36, 94 and 95; Or. 16 (r. 10), Or. 21 (r. 82); Or. 38, Or. 39, Or. 50.

Sec. 7 of the 1908 Code provides as follows :—" The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,

BARADA KANTA RAY v. SHAIKH MAIJUDDI.

(*a*) so much of the body of the Code as relates to

(*i*) suits excepted from the cognizance of a Court of Small Causes; (*ii*) the execution of decrees in such suits; (*iii*) the execution of decrees against immoveable property; and

(*b*) the following sections, that is to say . . . . . secs. 94 and 95 so far as they relate to injunctions and interlocutory orders."

On reference to sec. 94 it will be found that all the orders therein mentioned are "interlocutory orders" in the ordinary meaning of the phrase and cl. (*e*) runs as follows:—"Make such other interlocutory orders as may appear to the Court to be just and convenient." This clause therefore would go to show that all the orders specifically mentioned in sec. 94 are "interlocutory orders."

It was therefore argued on the one hand that the intention of the legislature was to exclude all the matters mentioned in sec. 94 from the jurisdiction of a Provincial Small Cause Court. On the other hand it was argued that, if this contention were adopted, no effect would be given to the words, "so far as they relate to injunctions and interlocutory orders" in sec. 7. It was argued that some effect must be given to these words, and that they cannot be regarded as a surplusage, and further that if it had been intended to except all the matters mentioned in sec. 94, there would have been no necessity to refer to "injunctions" in sec. 7, for the only injunctions mentioned in sec. 94 are "temporary injunctions" which would be included in the phrase "interlocutory orders" which are the subject-matter of cl. (*e*) of sec. 94.

It is a well-known rule that in construing an Act, words found therein should not be regarded as surplusage, and full effect should be given to them, if a reasonable interpretation can be found.

In sec. 94 "temporary injunctions" and "interlocutory orders" are specifically mentioned in separate clauses, *viz.*, (*c*) and (*e*) and in my judgment the only reasonable interpretation to be placed upon the words in sec. 7, *viz.*, "so far as they relate to injunctions and interlocutory orders" is, that it was intended to exclude from the jurisdiction of a Provincial Small Cause Court the matters particularly specified in cls. (*c*) and (*e*).

I am confirmed in this opinion by the words which are to be found at the beginning of sec. 94, *viz.*, "if it is so prescribed."

Having regard to the definitions in the second section of the Code the meaning of these words is, if it is prescribed by the rules and orders contained in the First Schedule of the Code.

On reference to the First Schedule, it will be observed that Or. 38 deals with "arrest and attachment before judgment" and Or. 39 deals with "temporary injunctions and interlocutory orders."

Therefore, although "orders for attachment before judgment" are in the ordinary meaning of the words "interlocutory orders" they are placed in a different category to "temporary injunctions" and "interlocutory orders."

Again although "temporary injunctions" are really "interlocutory orders" they are specifically mentioned in the schedule as being something special and distinct from "interlocutory orders."

The result of my examination of these sections therefore is the conclusion that the framers of this legislation were dealing with "temporary injunctions" and "other interlocutory orders" as matters distinct from the matters specifically mentioned in cls. (*a*), (*b*) and (*d*) of sec. 94 and that it

BARADA KANTA RAY v. SHAIKH MAIJUDDI.

was intended that the provisions of sec. 94, which were not to extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, were the provisions contained in cls. (c) and (e) of sec. 94.

Cl. (b) of sec. 94 empowers the Court to "order the attachment of any property."

Sec. 7 of the Code therefore does not prevent a Provincial Small Cause Court from making such an order.

But such order must be of an interlocutory nature, for sec. 7 of the Code and Or. 50 in the 1st Schedule expressly provide that the provisions of the Code relating to the execution of decrees against immoveable property shall not extend to a Provincial Small Cause Court.

Therefore the order for attachment contemplated by sec. 94, cl. (b) must be such an order as is specified in Or. 38, r. 6, *viz.*, an order for attachment before judgment.

As I am of opinion that the provisions of cl. (b) of sec. 94 are not excluded by reason of sec. 7 and that the order for attachment there referred to must mean an order for attachment before judgment, it follows that, in my opinion, a Provincial Small Cause Court has jurisdiction to make an order for attachment before judgment of any property, which would include immoveable property.

I agree that at first sight it may appear strange that a Provincial Small Cause Court, which cannot entertain suits relating to immoveable property, and which cannot execute a decree by attachment of immoveable property or entertain a claim, which an attachment may produce, should have been given power to make "an order for attachment of immoveable property before judgment." There is, however, a distinction between making an order for attachment and making an attachment.

It may be that if a Provincial Small Cause Court were to make an order for attachment of immoveable property before judgment, it would be necessary for that Court to transmit the order to a Court of Ordinary Civil Jurisdiction for the purpose of the order being carried out and the property attached.

In this connection I desire to refer to a passage in the judgment of Rankin, J., in *Sadek Ali* v. *Samed Ali* (2) which is as follows:—

"It is by no means absurd to suppose that the Code of 1908 may have meant, subject to the right of the High Courts to amend the rules, to extend the power of attachment before judgment to immoveable property in the case of Provincial Small Cause Courts while refusing to such Courts the right to attach such property in execution of decrees."

I agree with that passage if the words "power to order attachment before judgment" are substituted for the words "power of attachment before judgment."

The question, however, is whether the legislature has extended such a power to the Provincial Small Cause Courts.

It is to be noted that Or. 50, cl. (a) excludes from the jurisdiction of the Provincial Small Cause Courts, the matters mentioned in cl. (a) of sec. 7 of the Code and two other matters, *viz.*, the execution of a decree against the interest of a partner in partnership property and the settlement of issues, and in cl. (b) specifies certain rules and orders which are not to extend to Provincial Small Cause Courts.

This order, however, does not mention Or. 38 which deals with attachment before judgment, and it does not mention Or. 16, r. 10 or Or. 21, r. 82.

Or. 16, r. 10 deals with the procedure

(2) 28 C. W. N. 16 at p. 19 (1923).

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

where a witness fails to comply with a summons to give evidence or produce a document.

One of the powers given to the Court under that rule, is to attach his property.

But it is expressly provided that no Court of Small Causes shall make an order for attachment of immoveable property in respect of the matters referred to in that rule.

Similarly in dealing with the question of what Courts may order sales in execution of decrees or orders, Or. 21, r. 82 expressly provides that sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

These two rules therefore show that in respect of matters, which are not dealt with in Or. 50, when the legislature desired to exclude them from the jurisdiction of the Provincial Small Cause Courts, it expressly said so.

In my opinion, therefore, it is not unreasonable to assume that if the legislature had intended to exclude the powers conferred upon the Court by Or. 38, rr. 5 and 6 from the jurisdiction of the Provincial Small Cause Courts, it would have expressly so provided, as in the case of Or. 16, r. 10 and Or. 21, r. 82.

On the whole, therefore, though I think the matter is by no means free from difficulty as I have already indicated, I am of opinion that the first question referred to the Full Bench, *viz.*, whether a Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment, should be answered in the affirmative.

The subject of the decisions in the two cases referred to in the second question was the power of a Provincial Small Cause Court to attach immoveable property before judgment and in *Sadek Ali* v. *Samed Ali* (2) the question whether the Small Cause Court could adjudicate upon a claim to immoveable property arising by reason of the attachment was also involved. The decisions were not confined to the mere question whether a Provincial Small Cause Court has power to order attachment of immoveable property before judgment. In my judgment therefore the answer to the second question should be that *Kedar Nath Pramanik* v. *Hem Nath Karmokar* (1) was wrongly decided, and *Sadek Ali* v. *Samed Ali* (2) was rightly decided.

WALMSLEY, J.—The questions referred are whether a Provincial Small Cause Court can attach immoveable property before judgment, and which of two decisions, opposed to one another, is correct.

There was no doubt upon the main question before the present Code of Civil Procedure came into force: a Court exercising the powers of a Provincial Small Cause Court could not order such an attachment. The manner in which this restriction was enacted was as follows: The Provincial Small Cause Courts Act, sec. 17, runs as follows:—"The procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the Second Schedule to that Code, shall, so far as those chapters and sections are applicable, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits." The Second Schedule to the Code then in force (that of 1882) enumerated the chapters and sections of that Code extended to Provincial Courts of Small Causes and among them was Chap. XXXIV "Of arrest and attachment before judgment," with the addition "except as regards immoveable property."

(1) I. L. R. 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

The Code now in force proceeds on entirely different lines: there is no Schedule corresponding to the Second Schedule of the Code of 1882, and although the sections of Chap. XXXIV are reproduced with slight modifications in the rules of Or. XXXVIII and in sec. 95 of the present Code there is nothing to be found which corresponds to the clear words "except as regards immoveable property." The method has in fact been changed: in place of a detailed list of provisions which do apply to Provincial Small Cause Courts, there is first in the body of the Code in sec. 7 a description of the classes of provisions which do not apply, and in the first Schedule, in Or. 50, there is both an exclusion by class, and a list of particular provisions which do not apply. Inspite of this radical change the language of the Provincial Small Cause Courts Act remains unaltered.

The position is therefore very obscure, and it is difficult to say whether the legislature intended to lay down any rule on the subject or not. The learned Vakils who have been good enough to lend us their help, have not in my opinion been able to advance any convincing argument in either direction.

It appears to me that we must approach the matter from the standpoint that by the Act of 1887 Provincial Courts of Small Causes are generally forbidden to have any dealings with immoveable property, both in suits and in execution proceedings. No change has been made in that principle by the new Code of Civil Procedure, and in one instance, that is, in the matter of compelling the attendance of a witness, there is a specific direction that no Court of Small Causes shall make an order for the attachment of immoveable property.

It would be surprising if a Court that could not execute a decree by attachment of immoveable property should be able to attach the same immoveable property before a decree came into being, and I am disposed to think that the provisions of sec. 7 may fairly be construed to give effect to this natural inference. That section says—The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act of 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, *viz.*,

(*a*) so much of the body of the Code as relates to—

(*i*) . . .

(*ii*) . . .

(*iii*) the execution of decrees against immoveable property.

(*b*) . . . Secs. 94 and 95, so far as they relate to injunctions and interlocutory orders. Of these two sections, the latter is practically the same as sec. 491 of the old Code, the last section of Chap. XXXIV, which as I have mentioned was one of the chapters enumerated in the Second Schedule. The former authorises the Court to take certain measures to prevent the ends of justice being defeated. The measures are not new but the section is. The measures mentioned are the power to demand security from a Defendant to call upon a Defendant to produce property, to attach property, to issue an injunction, to appoint a Receiver. This list is followed by a fifth clause in these words "make such other interlocutory orders as may appear to the Court to be just and convenient."

The term "interlocutory orders" is not defined in any statute but the orders mentioned in the first four clauses are generally regarded as interlocutory orders, and I do not think that the heading to Or. XXXIX, can be taken to mean that only

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

the orders mentioned in rr. 6 to 10 of that order are interlocutory orders. Moreover the reference in the fifth clause of sec. 94 to "other interlocutory orders" seems to mean that the preceding orders are also interlocutory orders.

On this view of the section, I must hold that the Small Cause Court cannot attach property whether moveable or immoveable. That view is contrary to the view taken in the case of *Kedar Nath Pramanik* v. *Hem Nath Karmokar* (1) except in so far as I hold that the present Code makes no distinction between the power to attach moveable property and the power to attach immoveable property. The earlier case of *Kumud Behari Pal* v. *Hari Charan Sardar* (3) to which the learned Judges referred for their reasons, was a reference as to the power to attach moveable property and the learned Judges were considering whether the present Code had taken away that power, and they held that an attachment of moveable property before judgment was not an "interlocutory order" for the purpose of sec. 7 (*b*), because that construction would render the words "so far as they relate to injunctions and interlocutory orders" superfluous. With all deference, I venture to differ, although I confess I can find no use for the phrase just mentioned in the view that I take.

The conclusion to which I come is that of Rankin, J., that the power to attach immoveable property before judgment is sufficiently, if not too clearly, negatived.

I would therefore answer the first question in the negative and the second question by saying that the case of *Sadek Ali* v. *Samed Ali* (2) was correctly decided.

NEWBOULD, J.—The questions which we have to decide in this Reference depend primarily on the proper interpretation of cl. (*b*) of sec. 7 of the Code of Civil Procedure, 1908, which enumerates certain sections in the Code which shall not extend to Provincial Small Cause Courts. Among these sections are included "secs. 94 and 95 so far as they relate to injunctions and interlocutory orders." As pointed out by Rankin, J., in his judgment in *Sadek Ali* v. *Samed Ali* (2) "this provision is badly drafted." The difficulty arises from the fact that sec. 94 apparently refers entirely to interlocutory orders if the expression interlocutory order be given its ordinary meaning, as for example its definition in Wharton's Law Lexicon. But if this is done this qualification of sec. 94 in cl. (*b*) of sec. 7 becomes meaningless. It is a general rule of construction that full effect must be given to every word and the words of a statute must be construed so as to give a sensible meaning to them, if possible. It is possible to give a sensible meaning to the words "so far as they relate to injunctions and interlocutory orders" by interpreting them as used in a technical sense and as referring to orders expressly described in the Code itself as injunctions or interlocutory orders. That these words were used in this technical sense by the framers of the Code would appear from the inclusion of the word "injunctions" in the sentence. The only injunctions referred to in secs. 94 and 95 are temporary injunctions and these would be included in interlocutory orders if these words were used in the ordinary sense. This was the view I held in 1918 when I was one of the Judges who decided the case of *Kumud Behari Pal* v. *Hari Charan Sardar* (3) and I see no reason to change my view as to the principle to

(1) I. L. R. 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).
(3) I. L. R. 46 Cal. 717 (1918).

(2) 28 C. W. N. 16 (1923).
(3) I. L. R. 46 Cal. 717 (1918).

BARADA KANTA RAY v. SHAIKH MAIJUDDI.

be followed in interpreting cl. (*b*) of sec. 7 of the Code. But now that I have had the advantage of hearing the point more fully argued I think that in applying this principle some modification should be made. My attention has now been drawn to the fact that the words "if it is so prescribed" at the end of the first sentence in sec. 94 render this section inoperative apart from the rules which are contained in the first Schedule to the Code. A reference to the first Schedule makes it easier to give a technical meaning to the words "injunctions and interlocutory orders." We there find that Or. 39 is headed "temporary injunctions and interlocutory orders" and the order is divided into two parts with separate headings, rr. 1 to 5 being described "temporary injunctions" and rr. 1 to 10 "interlocutory orders." It therefore appears to me that the meaning to be given to cl. (*b*) of sec. 7 so far as it relates to sec. 94, is that the provisions in Or. 39 of the first Schedule of the Code, shall not extend to Provincial Small Cause Courts but that it does not exclude the extension of the provisions in Or. 38 to such Courts. The present Code of Civil Procedure has the effect of making applicable to Small Cause Courts all the provisions of the Code that are not expressly excluded. I can find nothing in the Code apart from sec. 7, which could be interpreted to exclude the application of Or. 38 to such Courts. Under rr. 6 and 7 of that order a Court has power to order attachment of immoveable property. I would therefore answer the first question referred to the Full Bench, "Whether a Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment?" in the affirmative.

At the hearing of this Reference my attention was drawn to a point that escaped my notice when delivering judgment in the cases of *Kumud Behari Pal* v. *Hari Charan Sardar* (3) and *Kedar Nath Pramanik* v. *Hem Nath Karmokar* (1), that is, that there is a difference between ordering the attachment of property and attaching property. It does not follow that because, as I hold, a Small Cause Court has the power to order the attachment of immoveable property, it has also the power to attach it. From the provisions of sec. 36 and Or. 38, r. 7 of the Code it appears that when it is sought to give effect to an order of attachment before judgment this must be done in accordance with the provisions of the Code for attaching property in execution of a decree. Since a Small Cause Court is prevented by the provision of sec. 7 (*a*) (*iii*) and Or. 50 of the Code from executing decrees against immoveable property it would appear that it is equally debarred from executing an order of attachment of immoveable property passed by it. In order to give effect to such an order the assistance of the Civil Court of ordinary jurisdiction would have to be invoked and claims to immoveable property attached under the order of a Small Cause Court would be heard and decided by the attaching Court and not by the Small Cause Court.

I would therefore answer the second question in this Reference "whether the case of *Kedar Nath* v. *Hem Nath* (1), or the case of *Sadek Ali* v. *Samed Ali* (2) was correctly decided?" as follows :—

Having regard to the fact that the power to attach and not the power to order attachment is the subject of these decisions, *Kedar Nath* v. *Hem Nath* (1) was wrongly

(1) I. L. R. 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).
(3) I. L. R. 45 Cal. 717 (1918).

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

and *Sadek Ali* v. *Samed Ali* (2) was correctly decided.

MUKERJI, J.—The two questions referred to us for decision are simple enough. They resolve themselves into the question as to whether Or. 38 of the Code of Civil Procedure applies to a Provincial Court of Small Causes. The solution is not quite so simple.

The two views that may be taken of the matter and the arguments in support of them may shortly be summarised thus.

Sec. 17 of the Provincial Small Cause Courts Act (IX of 1887) lays down that the procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the second schedule to that Code shall, so far as those chapters and sections are applicable, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits. Then follows a proviso which need not be considered for our present purpose. Sec. 5 of the Code of Civil Procedure (Act XIV of 1882) provided that only certain chapters and sections of the Code (all specified in the second schedule thereof) were to extend to the Provincial Courts of Small Causes. From that schedule it would appear that the provisions regarding arrest and attachment before judgment (Chap. XXXIV) though made applicable to Provincial Small Cause Courts did not apply to such suits when they related to immoveable property. It is therefore quite clear that so long as the Code of 1882 was in force a Provincial Court of Small Causes could not make an order of attachment in respect of any immoveable property before judgment. The scheme of the Civil Procedure Code (Act V of 1908) now in force is entirely different. It does not profess to lay down which particular provisions of the new Code are to apply to the Provincial Small Cause Courts but simply lays down that certain provisions are not applicable to such Courts. These provisions are to be found in sec. 7 and Or. 50 of the Code and also in Or. 16, r. 10 and Or. 21, r. 82. The two rules last mentioned do not refer to the present question beyond suggesting that the scheme of the Code is to exclude by express mention. Sec. 7 is divided into two parts. Part (*a*) is confined to the provisions contained in the body of the Code relating to suits excepted from the cognizance of a Court of Small Causes, to the execution of decrees in such suits and to the execution of decrees against immoveable property. Part (*b*) mentions some of the sections, of which secs. 9, 91 and 92 have obviously no application to a Court of Small Causes, secs. 96 to 112 relate to appeals and sec. 115 relates to revision. Part (*b*) also excludes secs. 94 and 95 "so far as they relate to injunctions and interlocutory orders." Although all the orders mentioned in sec. 94 may in one sense be said to be interlocutory orders, the legislature intended by the use of the words "so far as they relate to injunctions and interlocutory orders" in sec. 7 to mean only such of them as are specified as such in the Code, that is to say, injunctions and such orders as are said to be interlocutory orders in Or. 39 of the Code. The precise effect, therefore, of providing for exclusion of the operation of secs. 94 and 95 "so far as they relate to injunctions and interlocutory orders" is to exclude in reality orders which come under cls. (*c*) and (*e*) of sec. 94 and not orders passed under the other clauses of the section. Cl. (*b*) of sec. 94 under which a Court can order the attachment of any property is therefore not affected by sec. 7. Or. 50 which

(2) 28 C. W. N. 16 (1923).

BARADA KANTA RAY v. SHAIKH MAIJUDDI.

specifies the portions of the first schedule and the rules and orders which shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887. or to Courts exercising the jurisdiction of a Court of Small Causes under that Act does not refer to Or. 38 at all. Consequently a Provincial Court of Small Causes is competent to make an order of attachment before judgment, in respect of moveable as well as immoveable property.

In support of this view it may be urged that the main object of an attachment before judgment is to enable the Plaintiff to realise the amount of the decree, supposing a decree is eventually passed, from the Defendants' property. It is a step taken merely for the purpose of preventing the debtor from delaying or defeating the enforcement of a decree and thereby obstructing or preventing the creditor from reaping its fruits. Unquestionably that is a much valued right; and so far as moveable property is concerned the Plaintiff enjoyed that right so long as the Code of 1882 was in force. The scheme of the Code of 1908 is radically different from that of the Code of 1882. Unlike the latter it by implication makes the whole Code applicable to Provincial Courts of Small Causes subject to certain express restrictions.

For the contrary view the reasoning in substance is this. The rules under Or. 38 have been prescribed to enable the Court to make an order for the attachment of any property for preventing the ends of justice from being defeated. Therefore the order is one which comes expressly within the last part of cl. (b) of sec. 94 of the Code. An attachment before judgment cannot but be an interlocutory order. The Code does not define what orders are interlocutory and what are not. Or. 39 only specifies certain classes of interlocutory orders. Something which is done between the commencement and the end of a suit or action, which decides some point or matter which, however, is not a final decision of the matter in issue, is known as an interlocutory order. An attachment before judgment is undoubtedly an interlocutory order according to the general acceptance of the expression. Sec. 94 refers entirely to interlocutory orders in all its clauses, and this is clear also from the wording of cl. (e) which speaks of "such other interlocutory orders." Therefore by sec. 7 of the Code they are all excluded, and a Provincial Court of Small Causes is no longer competent to make any order for attachment of property, either moveable or immoveable, before judgment.

The considerations that favour this view are that a Provincial Court of Small Causes is prohibited by its constitution from entertaining questions of rights in immoveables, and rights to or interests in immoveable property are elaborately excluded from its consideration. It can only go into such questions incidentally, and there is in sec. 23 of the Provincial Small Cause Courts Act (IX of 1887) a provision enabling but not making it obligatory for the Court to send the matter for decision to the ordinary Civil Court. A Provincial Court of Small Causes cannot deal with immoveables in execution of its decree, it cannot levy on immoveables, nor can it order the attachment of immoveable property to make a witness to appear. To hold that it is competent to attach immoveable property before judgment will be to open the gates for claims to such property being put in and allow the Court to investigate and decide on them with no right of appeal to the party aggrieved by its decision therein, and to countenance the eventuality of its decision

being final if no suit is instituted to establish the right within the time allowed by law. To hold that it is competent to attach moveables before judgment, when undoubtedly Or. 39, r. 6 which gives the power to order interim sale of moveables which are subject to speedy and natural decay or which for any other just and sufficient cause it may be desirable to have sold at once, does not extend to the Court - an order under Or. 39, r. 6 being an interlocutory order specified as such in the Code and therefore expressly excluded by sec. 7 read with sec. 94, cl. (e)—would lead to an anomaly.

A close examination of these rival contentions leads us to a position which can scarcely be ignored. To accept the former view would be to hold that the legislature intended to extend in respect of immoveable property the powers which the Provincial Courts of Small Causes enjoyed with regard to moveables ever since the said Courts came into existence by Act XLII of 1860: to adopt the latter view would be to hold that the object was to take away those powers. There is no escape from this position. It is difficult to imagine that such a salutary power which affords protection to Plaintiffs without causing any appreciable inconvenience to Defendants—for the proceedings in a Court of Small Causes are meant to be summary, and if the Plaintiff fails, the attachment fails under Or. 38, r. 9, and when there are ample provisions made under Or. 38, rr. 6, 9 and 12 protecting the Defendant and also the rights of strangers, and the Code lays down stringent safeguards in the shape of conditions which must be shown to exist before an order can be made under Or. 38, r. 5—was intended to be taken away without some express words indicating such intention. On the other hand the scheme adopted by repealing Sch. II of Act XIV of 1882 which expressly extended only some of the powers under the Code to Provincial Courts of Small Causes and adopting in the Code of 1908 the other mode of expression, namely, of restricting only the application of some of the provisions specifically mentioned therein, favours the view that the object was to enlarge the powers rather than to limit them.

Now, it is to be regretted that sec. 17 of the Provincial Small Cause Courts Act has not yet been amended as was absolutely necessary on the amendment of the Civil Procedure Code in 1908. The language of the section, as it is, is wholly inapposite. With the repeal of the Code of 1882 and of its second schedule the words of sec. 17 of the Provincial Court of Small Causes can no longer have any meaning: for though by sec. 8 of the General Clauses Act and sec. 158 of the Code of Civil Procedure (Act IX of 1908) we have, as far as practicable, to look to the part, order, section or rule which corresponds to the chapter or section of the earlier Codes, it will be seen that the Code of 1882 excluded the same by express mention whereas the Code of 1908 has restricted them by express mention.

There is little doubt that the amendments made by the Code of 1908 in this respect are anything but satisfactory. An examination of the provisions discloses a want of care and precision which is regrettable in an enactment dealing with procedure so largely in use. It is difficult to reconcile the expression "so far as they relate to injunctions and interlocutory orders" appearing in sec. 7 with the provisions of sec. 94 all of which deal with interlocutory orders of one kind or other. There is a clear ambiguity to dispel which it is permissible to look to

BARADA KANTA RAY v. SHAIKH MAIJUDDI.

the earlier enactments; but the earlier enactments afford us no real assistance, because in view of the fact upon either view it being admitted that a change has been effected—an extension of the powers to immoveables on the one view and a curtailment of the powers in the case of moveables on the other—it would be impossible to proceed on the assumption of a supposed policy on the part of the legislature not to depart from the law as it stood before. A change was intended and has been effected: and judging from the express words of the governing clauses of sec. 7 and Or. 50 there is no doubt in my mind that it was intended to extend the whole of the Code to Provincial Courts of Small Causes unless expressly provided for. The provisions of sec. 7 have to be reconciled with those of sec. 94, and that can only be done by treating interlocutory orders as meaning only such orders as are expressly said to be interlocutory orders in the Code, that is to say, those that are mentioned in Or. 39. That the legislature had this in view is apparent also from the fact that in sec. 7 as also in Or. 39 injunctions are treated as something other than interlocutory orders while in reality they are not so. I am of opinion that effect must also be given to the words "so far as they relate to injunctions and interlocutory orders" appearing in sec. 7 even at the risk of restricting the meaning of the expression "interlocutory orders" in sec. 94 to such orders as are mentioned as such in the Code and attributing to the legislature a redundancy in the use of the word "other" in cl. (e) thereof. In my opinion sec. 7 only excludes orders passed under cl. (c) and cl. (e) of sec. 94 and not under any of the other clauses thereof. I find it difficult to imagine that if the legislature intended to deprive the Provincial Courts of Small Causes of the power to order attachment of moveables they could not think of a better way of expressing themselves. I am therefore of opinion that Or. 38 has not been excluded either by sec. 7 read with sec. 94 or by Or. 50 and that it is applicable to a Provincial Court of Small Causes.

It remains now to consider some of the difficulties that are said to follow from the acceptance of this interpretation. The principle that a Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it which was applied in the case of *Marthamma* v. *Kittu Sheregara* (4) to the Code of 1859 in a case decided under Act XI of 1865 which provided by sec. 47 for the application of the provisions of that Code to Provincial Courts of Small Causes "so far as the same are or may be applicable," cannot have any appreciable force under the present enactments, the more especially as the immediate objects of the two kinds of attachment are widely different. No doubt a Provincial Court of Small Causes cannot deal with immoveables in execution of its decree, or order a sale of immoveables; nor can it be doubted that it cannot make an order of attachment of immoveable property to compel a witness to appear and that is so because it cannot order the sale thereof. The occasion for the exercise of these powers and the circumstances connected therewith, however, are so different from those relating to the power to order attachment of immoveables before judgment for protecting the Plaintiffs' interest, that no analogy can be drawn from the exclusion of those powers. The objection as to the investigation and adjudication of claims, which an attachment may produce, is more substantial, but is there a real difficulty on that ground?

(4) 6 Mad. H. C. R. 90 (1871).

BARADA KANTA RAY v. SHAIKH MAIJUDDI

Or. 38, r. 6 says that "where the Defendant fails to show cause why he should not furnish security or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit be attached." The Court therefore under this rule makes an order that the property be attached. In order to make the attachment or to attach the property this order has got to be executed. R. 7 says that save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree. If a Provincial Court of Small Causes makes an order of attachment before judgment in respect of immoveable property the order has to be executed under sec. 36 which lays down that "the provisions of this Code relating to the execution of decree shall so far as they are applicable be deemed to apply to the execution of orders." Under the provisions of sec. 38 and sec. 39, cl. (d) the order should be sent to an ordinary Civil Court within the local limits of whose jurisdiction the immoveable property is situate, and that Court should, under the provisions of Or. 21 which deals with execution of decrees and orders, proceed to execute it. That Court would then attach the immoveable property in accordance with r. 54 and investigate the claims, if any, under the provisions of r. 58 and the subsequent rules.

If the above procedure is followed, as I think it must under the Code, the objections as to investigations or adjudications of claims will lose all their force. As to the argument based on the absence of the right of appeal, orders of far greater importance passed by a Provincial Court of Small Causes are also not open to appeal; and in any event the suit itself being expected to be disposed of summarily no appreciable hardship is likely to be caused. As to the non-applicability of Or. 39, r. 6 it seems to be due to an omission on the part of the legislature. In the Code of 1882 the provision was confined to moveable property which was the subject of a suit; in the Code of 1908 the words "or attached before judgment in such suit" were added, but no provision was made extending the application of the rule to Provincial Courts of Small Causes. The matter is not of any great consequence, for I take it that even a Provincial Court of Small Causes can always act under sec. 151, C. P. C. and pass such orders as may be necessary.

On the whole, I am of opinion, that Or. 38, rr. 5 and 6 apply to the Provincial Courts of Small Causes and I would therefore answer the first question in the affirmative. The answer to the second question follows from the answer given to the first one and I would answer it by saying that the case of *Kedar Nath* v. *Hem Nath* (1) if it purported to lay down that a Provincial Small Cause Court can attach immoveable propetty and not merely make an order of attachment thereof, was not correctly decided, nor was the case of *Sadek Ali* v. *Samed Ali* (2) correctly decided if it meant to lay down that no such order can be passed by a Provincial Court of Small Causes. In conclusion I should like to add that this is a matter to which the attention of the legislature should be directed as early as possible in order that the defects pointed out above may be remedied.

CHOTZNER, J.—The question referred for the decision of the Full Bench is whether the Provincial Small Cause Court is

(1) I. L. R. 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).

BARADA KANTA RAY v. SHAIKH MAIJUDDI.

competent to attach immoveable property before judgment.

That question was decided in the affirmative in the case of *Kedar Nath* v. *Hem Nath* (1) and in the negative in the case of *Sadek Ali* v. *Samed Ali* (2). It may be conceded that while the former Code of Civil Procedure (Act LIV of 1882) was in force, such attachments were beyond the jurisdiction of the Small Cause Court. The procedure prescribed in sec. 17 of the Provincial Small Cause Court Act (IX of 1887) was regulated by the Second Schedule of the Code, which was also in conformity with the provisions of sec. 15 of the Act and the Second Schedule appended thereto, whereby all suits relating to immoveable property were comprehensively excluded from the cognizance of the Small Cause Court. Chap. XXXIV of the Code dealt with arrest and attachment before judgment except as regards immoveable property.

It has now to be considered what changes have been introduced into the procedure laid down in sec. 17 of the Small Cause Court Act by the Code of Civil Procedure (Act V of 1908).

It should be premised that no alteration has been made in the wording of the Small Cause Court Act so far as the second schedule and secs. 15 and 17 are concerned, though in the case of the latter section it is plainly inapposite. In view, however, of sec. 158 of the Code, it must be taken to refer to sec. 7 and Or. 50 of the Code the schedule to which declares that certain of its provisions do not apply to Small Cause Courts. It will be noticed that in the Code of 1908 the Second Schedule of the Code of 1882 has disappeared, and that no new schedule has been provided in its place. On the other hand secs. 477 to 490 of the former Code are now with slight modification reproduced in Or. 38, rr. 1-11, while sec. 491 re-appears (again with slight modification) in sec. 95 of the new.

(1) I. L. R 49 Cal. 994 (1922).
(2) 28 C. W. N. 16 (1923).

Or. 38 deals with "arrest and attachment before judgment." R. 1 says: "Where at any stage of a suit other than a suit referred to in sec. 16, cls. (*a*) to (*d*) the Court is satisfied" (to put it broadly) as to any dishonest intention of the Defendant in regard to the disposal of his property or person, it may issue a warrant for his arrest.

Sec. 16 lays down the Courts in which suits relating to immoveable property are to be instituted and *ex-hypothesi* excludes suits which are not cognizable by the Small Cause Court. It would follow therefore that a Small Cause Court is not competent to arrest a Defendant in any suit other than one where the subject-matter is moveable property.

R. 5 says: "Where at any stage of a suit, the Court is satisfied that the Defendant is about to dispose of his property or remove it from the local limits of the Court, it may direct him to furnish security to produce and place it at the disposal of the Court," failing which it may, under r. 6, order it to be attached.

Now if it be correct that Or. 38 substantially represents Chap. XXXIV of the Code of 1882, there seems to be no good reason for importing into r. 5 a meaning which was specifically negatived in sec. 483 of that Code by extending the jurisdiction of the Small Cause Court to attach immoveable property before judgment.

The difficulty in the way of this interpretation lies in the wording of sec. 94 (*b*) where the Court may order the attachment of any property and the Small Cause Court seems under sec. 7 (*b*) to be given the power of attaching such property

BARADA KANTA RAY *v.* SHAIKH MAIJUDDI.

before judgment. Sec. 7 moreover makes certain sections inapplicable and these include secs. 94 and 95 so far as they relate to injunctions and interlocutory orders, but as Rankin, J., points out sec. 94 appears to refer entirely to interlocutory orders and even to call them so but the parts of this section intended to be excluded are apparently cls. (*c*) and (*e*).

On the other hand powers under sec. 94 are only conferred "if it is so prescribed" and if it is said that they are so prescribed under sec. 7 (*b*), it would seem to be inconsistent with cl. (*a*) immediately preceding it, which excludes from the jurisdiction of the Small Cause Court so much of the body of the Code as relates to suits excepted from the cognizance of a Court of Small Causes, the execution of decrees in such suits and the execution of decrees against immoveable property.

Again Or. 16, r. 10 prohibits the attachment of immoveable property by a Small Cause Court to enforce the attendance of a witness and Or. 21, r. 82 forbids the sale of such property by a Court of that description. It would therefore be anomalous that a Court, which has not the power of executing a decree by attachment of immoveable property after judgment, should have the power of attaching such property before judgment.

The conclusion, therefore, at which I arrive is that under the Code of 1908 there has been no departure from the principles underlying Chap. XXXIV of the Code of 1882, and that consequently the question referred should be decided in the negative.

Per CURIAM.—The result is that the Reference will be answered in accordance with the opinion of the majority of the Judges constituting the Full Bench, and will therefore be answered in the manner stated in the judgment of the learned Chief Justice.

No order is made as to the costs of the Reference.

We direct that a printed copy of the judgments of the Full Bench be forwarded to the Government of India as early as possible.

J. N. R.

[CIVIL REVISIONAL JURISDICTION.]

REFERENCE UNDER THE INCOME TAX ACT.

CHATTERJEA, J.
MUKERJI, J.
CHOTZNER, J.
1924,
28, May.

Re: ROGERS PYATT SHELLAC CO.
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Income Tax Act (VII of 1918), secs. 3, 5, 33 (1)—Income Tax Act (XI of 1922), secs. 4, 6, 42 (1)—Liability to assessment—Non-resident Company, profits accruing to, from sale outside, of goods purchased in, British India—Profits to be assessable, if must accrue from trading within territorial limits—Difference between Indian and English Acts—Meanings of the words "business," "income," "accrue," "arise" in the Acts.

In the case of a company incorporated in the United States of America, having its head office in New York and a branch office in Calcutta, and whose transactions in India were only limited to purchases of articles and not sales:

Held—*That the company was liable to pay income tax on the profits arising out of those transactions under sec. 33* (1), *read with secs. 3 and 5 of the Act VII of 1918, and sec. 42* (1) *read with secs. 4, 6 of the Act XI of 1922, though the profits were actually made outside British India.*

SULLEY *v.* ATTORNEY-GENERAL (2) *and* GRAINGER & SON *v.* GOUGH (3) *explained.*

(2) 5 H. & N. 711 (1860).
(3) [1896] App. Cas. 325.

Re : ROGERS PYATT SHELLAC CO. *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

BOARD OF REVENUE *v.* THE MADRAS EXPORT CO. (1) *dissented from.*

BOARD OF REVENUE *v.* RAMANADHAN CHETTY (15), IN RE AURANGABAD MILLS LD. (16) *and* IN RE JOHN & CO (17) *referred to.*

There is an essential distinction between the Indian Acts and the English Acts on this point, viz., *the English Acts provide, which the Indian Acts do not, that the profits or gains liable to assessment should arise from the exercise of trade within territorial limits.*

SMIDTH & CO. *v.* GREENWOOD (4) *and* COLQUHOUN *v.* BROOKS (11) *referred to.*

This was a Reference by the Commissioner of Income Tax, Bengal, under sec. 66 of Act XI of 1922 and sec. 51 of Act VII of 1918.

The matter referred for decision will appear from the judgment.

Mr. Langford James in support of the Reference.

The Advocate-General (Mr. S. R. Das) for the Secretary of State.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEA, J.—This is a case stated by the Commissioner of Income Tax, Bengal under the provisions of sec. 66 of Act XI of 1922 and sec. 51 of Act VII of 1918.

The Rogers Pyatt Shellac Company is incorporated in the United States of America with its head-quarters in the City of New York. The company have a branch office in Calcutta to buy gum shellac and other Indian products, and a factory at Wyndhamgunj in the United Provinces. No sales are conducted in India by the company: their transactions are limited to the purchase of shellac and other goods, some of which are purchased on account of a certain Gramophone Company which pay the company a fixed percentage on the purchase plus expense, while the balance is sold in the open market.

Income tax was assessed for the year 1921-22 as also super tax, and the tax was paid under protest on the 6th May 1923.

They were similarly assessed for the year 1922-23 and the tax was paid on the 29th March 1923, with a notice that "they shall in all probability appeal against the assessment." On the 27th June 1923, they made an appeal to the Assistant Commissioner of Income Tax against the assessment, and for refund of the amounts paid for income tax and super tax respectively for the year 1921-22. A similar petition was made with regard to the assessment for the next year. The Commissioner of Income Tax on the 13th October 1923, however, confirmed the assessments. Thereafter the Commissioner of Income Tax at the instance of the company made a Reference under sec. 66 of Act XI of 1922 and sec. 51 of Act VII of 1918 as stated above.

The Reference was made under Act VII of 1918 as well as under Act XI of 1922, the reason being that the income tax for 1921-22 was assessed and levied under Act VII of 1918, and that for 1922-23 under the new Act XI of 1922. The provisions of the two Acts are, generally speaking, similar with certain exceptions.

Sec. 3 (*1*) of Act VII of 1918 lays

(1) I. L. R. 46 Mad. 360 (1922).

(4) [1920] 3 K. B. 275; [1921] 3 K. B 583; [1922] 1 A. C. (H L.) 417

(11) 21 Q. B. D. 52 at p. 59 (1888); 14 A. C. 493 (1889).

(15) I. L. R. 43 Mad 75 at p 86 (1919).

(16) I. L. R. 45 Bom 1280 (1921).

(17) I. L. R. 43 All. 139 (F. B.) (1920).

down: "Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India or is under the provisions of this Act deemed to accrue or arise or to be received in British India." By sec. 5, certain classes of income are chargeable to income tax, and they include "(IV) income derived from business."

Sec. 4 of Act XI of 1922 is similar to sec. 3 of Act VII of 1918 except that it says that the Act shall apply to all income, profits, or gains as described or comprised in sec. 6. There is a sub-sec. (2) added to sec. 4 of the Act of 1922 which was not in the Act of 1918, which will be referred to later. Sec 6 of Act XI of 1922 is also similar to sec. 5 of Act VII of 1918, only that the word "heads" is used in the former instead of "classes" in the latter, and the item *(iv)* is described as "business" instead of "income derived from business" as in Act VII of 1918. Reading secs. 4 and 6 of Act XI of 1922 (secs. 3 and 5 of Act VII of 1918) together, all income derived from "business" (1) accruing, arising or received in British India or (2) deemed under the provisions of the Act to accrue or arise or to be received in British India is taxable income.

Now it is admitted that no part of the company's income accrued, arose or was received in British India. Sec. 33 (1) of the Act, however, provides that "in the case of any person residing out of British India all profits or gains accruing or arising to such person, whether directly or indirectly through or from any business connection in British India, shall be deemed to be income accruing or arising within British India and shall be chargeable to income tax in the name of the agent of any such person, and such agent shall be deemed, for all the purposes of this Act the assessee in respect of such income tax." The contention of the Government is that although the income neither actually accrued, arose nor was recieved in British India, such income, as laid down in sec. 33 (*1*), shall be deemed to be income accruing or arising within British India as it accrued or arose whether directly or indirectly through or from business connection in British India. In other words, the charging section (sec. 5) was enlarged by the provisions of sec. 33 (1). On the other hand, it is contended on behalf of the company that sec. 33 (1) is merely what is called a "machinery" section enacted for the purpose of laying down the mode in which the tax is to be levied in the case of a non-resident person, and providing that in such a case his agent is to be deemed to be the assessee in respect of the income tax.

Now, secs. 3 and 5 of the Act appear in Chap. I, which is headed "Taxable income." Sec. 5 as stated above enumerates the classes of income chargeable to income tax, the "(IV)" class being "income derived from business." Chap. IV of the Act headed "Liability in special cases" contains a group of sections which provide that in the case of minors, lunatics, etc., or persons whose properties are managed by others, such as the Court of Wards, Administrator-General, etc., the income tax would be levied and recoverable from the guardian, trustee, the Court of Wards, etc., as the case may be. There is no doubt that secs. 31 and 32 are "machinery" sections. Then comes sec. 33 (*1*), the latter part of which lays down that a non-resident person shall be chargeable to income tax in the name of the agent of any such person, and such agent shall be deemed to be for the purposes of the Act, the assessee in respect of such income

tax. This part of sec. 33 (1) therefore also is a "machinery" section. The question is whether the first part of the section is also a machinery section or a charging section. As already pointed out sec. 3 provides that income not only accruing, arising or received in British India, but also income which under the provisions of the Act is "deemed to accrue or arise or to be received in British India" is taxable income. The first part of sec. 33 (*1*) lays down that income arising or accruing to a person residing out of British India, whether directly or indirectly through or from any business connection in British India, shall be deemed to be income accruing or arising within British India. Taking the language literally, it seems that income accruing or arising to a non-resident person in certain cases though not actually accruing or arising within British India shall be deemed to be income accruing or arising within British India, and reading sec. 33 (*1*) together with secs. 3 and 5, such income is liable to tax. This no doubt would extend far beyond what is recognised in England or had been recognised in British India previous to Act VII of 1918, as the territorial limit of taxation of income derived from business.

On behalf of the company, we have been referred to certain English cases, and a case in the Madras High Court, *The Board of Revenue* v. *The Madras Export Company* (1).

In *Sulley* v. *Attorney-General* (2), an American firm carried on a business in New York which consisted in the resale there of goods purchased on their account in England. One of the partners who resided in Nottingham transacted the business of the firm in England which consisted of purchasing and shipping goods for exportation, but no money was received in England except from New York for purchasing the goods. The profits arose on the sale of the goods at an increased price in America. It was held that the firm did not exercise its trade in the United Kingdom so as to subject it to income tax. Cockburn, C. J., observed : "Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, *viz.*, where his profits come home to him. That is, where he exercises his trade. It would be very inconvenient if this was otherwise. If a man were liable to income tax in every country in which his agents are established, it would lead to great injustice. The argument for the Crown must be carried to this extent, that merely buying goods in this country is a trade exercised here so as to subject the purchaser of the goods to income tax. . . . . . It would be most impolitic thus to tax those who come here as customers. The subjects of a foreign state, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Simply by the provision that whosoever carries on the business and receives the profits here shall be assessed. But in the present case, no profits are received by the firm, or exist in this country."

A similar view was taken by the House of Lords in *Grainger & Son* v. *Gough* (3) where it was held that a foreign merchant who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a

(1) I. L. R. 46 Mad 360 (1922).
(2) 5 H. & N. 711 (1860).
(3) [1896] App. Cas. 325.

trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. Lord Watson observed (at pp. 340-341) : "There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade within the meaning of Sch. D. In illustration of that view I may refer to *Sulley* v. *Attorney-General* (2) which was decided in the Exchequer Chamber by no less than six very eminent Judges."

The statutes under which the above cases were decided are the Income Tax Act, 1853 and the Income Tax Act, 1842. Chap. 34, sec. 2, Sch. D of Act, 1853, imposes a duty "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom from any trade exercised within the United Kingdom," and Chap. 35, sec. 41 of the Income Tax Act of 1842, provides : "Any person not resident in the United Kingdom whether a subject of His Majesty or not, shall be chargeable in the name of . . . . any factor, agent or receiver, having the receipt of any profits or gains arising as herein mentioned. . . . . ."

It will be seen that under the English Acts, it is essential that the profits should arise from the exercise of the trade within the United Kingdom. In the Indian Acts (VII of 1918 and XI of 1922), however, in the case of any person residing out of British India all profits or gains accruing or arising to such person, whether directly or indirectly through or from any business connection in British India, shall be deemed to be income accruing or arising within British India. There is no such provision in the English Acts, and that distinguishes the English Acts and the cases decided thereunder from the Indian Acts.

In the case of *Smidth & Co.* v. *Greenwood* (4) the Appellants were a Danish firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery which they exported all over the world. They had an office in London in charge of a qualified Engineer who was their whole time servant. He received enquiries for machinery such as the firm could supply, sent to Denmark particulars of the work which the machinery was required to do, including samples of materials to be dealt with, and when the machinery was supplied he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the firm and their customers were made in Copenhagen and the goods were shipped *f. o. b.* Copenhagen. It was held by Rowlatt, J., that the place where a trade was exercised was the place where the transactions forming the alleged business were closed, in the case of a selling business by the sale of the commodity, and the profit thereby realised, and that therefore the firm exercised their trade in Denmark, and that they could not in respect of the same profits and gains exercise their trade elsewhere.

The question therefore, *viz.*, whether the profits arose from the exercise of trade within the United Kingdom was the same as that decided in the other two

(2) 5 H. & N. 711 (1860).

(4) [1920] 3 K. B. 275; [1921] 3 K. B 583; [1922] 1 A. C. (H. L.) 417.

cases cited above. But the provisions of sec. 31, sub-sec. 2 of the Finance Act (No. 2 of 1915) (5 and 6 Geo., C. 89) were also considered in *Smidth & Co.* v. *Greenwood* (4). That section runs as follows :—" A non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly through or from any branch, factorship, agency, receivership or management, and shall be so chargeable under sec. 41 of the Income Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver or manager."

Rowlatt, J., observed: " The scope of this section is not very clear, but I am not prepared to hold that its effect is to bring into taxation profits made by non-residents from a trade not exercised in the United Kingdom. To make an extension in the scheme of taxation of that magnitude and importance the Court is entitled to look for words of clear and direct enactment." In the Court of Appeal, *Smidth & Co.* v. *Greenwood* (4), Lord Sterndale, M. R., observed : " Sec. 31 is only for the purpose of extending the operations of sec. 41 of the Income Tax Act, 1842. That section is not a charging section and only relates to the method of charging persons who are made chargeable under Sch. D. The duties mentioned in that section are the duties charged by Sch. D. It has been called only a machinery section, *i.e.*, a section which provides a method of carrying out the charge imposed by Sch. D. I think this is its effect, and the expression 'machinery' has no doubt often been used, as it is convenient, but I think it has also often been used in a wider sense than was intended by those who first used it, and may be fallacious, and I prefer not to use it. Sec. 31, sub-sec. 1, I think clearly does nothing more than extend the method provided by sec. 41 of carrying out the charge imposed by Sch. D, and it would be very strange if another sub-section of the same section imposed an entirely new charge not within the Schedule at all. I agree with Rowlatt, J., that such a thing, if intended, should be carried out with the greatest clearness and that if a reasonable meaning can be given to the sub-section without producing that effect, such a meaning should be given. I think this meaning can be given to it by adopting the construction suggested by the Respondents, namely, that it merely points out or, so to speak, sums up the effect of sec. 41 of the Act of 1842 as extended by sec. 31 of the Act of 1915, still keeping within the limits of the charge of Sch. D." In the House of Lords in *Smidth & Co.* v. *Greenwood* (4) Lord Buckmaster referring to sec. 31 (2) of the Finance Act 2 of 1915, observed :—" The Appellant argued that the effect of that sub-section is to extend the operation of Sch. D of the Act of 1853, and to render the Respondents liable to be assessed for income tax, even though upon the facts they did not exercise trade within the United Kingdom. I am unable to accept the argument that the sub-section has that effect. It is I think important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not for-

(4) [1920] 3 K. B. 275; [1921] 3 K. B. 583; [1922] 1 A. C. (H. L.) 417.

(4) [1920] 3 K. B. 275; [1921] 3 K. B. 583; [1922] 1 A. C. (H. L.) 417.

merly cast upon the tax-payer. Sub-sec. 2 here is at the best a sub-section of an extremely doubtful character, and I think there is very great weight in the argument that has been placed before your Lordships by Sir William Finlay and Mr. Bremner that, as the original charging power of the earlier statutes was derived from their Schedules, if it were desired to affect and alter the operation of those Schedules some clearer and better reference should have been made to their terms than the obscure and indirect reference that must be found in the section under consideration."

The charging provisions of the English Income Tax Acts are to be found in the Schedules, and Sch. D of the English Act of 1842 (5 & 6 Vict., C. 35 which is similar to that of the English Act of 1918) provides that tax under that Schedule shall be charged in respect of—

(*a*) the annual profits or gains arising or accruing,

(*i*) to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere; and

(*ii*) to any person residing in Great Britain from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in Great Britain or elsewhere; and

(*iii*) to any person whatever whether a subject of Her Majesty or not, although not resident within Great Britain from any property whatever in Great Britain, or from any profession, trade, employment or vocation exercised within Great Britain.

Sec. 41 of the same Act provided as follows :—" And be it enacted that the trustee, guardian, tutor, curator or committee of any person, being an infant, or married woman, lunatic, idiot or insane, and having the direction, control or management of the property or concern of such infant, married woman, lunatic, idiot or insane person, whether such infant, married woman, lunatic, idiot or insane person, shall reside in Great Britain or not, shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot, or insane person were capable of acting for himself; and any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of such trustee, guardian, tutor, curator or committee, or of any factor, agent or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof; and every such trustee, guardian, tutor, curator, committee, agent or receiver shall be answerable for the doing of all such acts, matters and things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same."

The Finance (No. 2) Act, 1915, 5 & 6 Geo. V., C. 89, sec. 31 lays down—

" (1) Section forty-one of the Income Tax Act, 1842 (which relates to the charge of income tax in special cases) shall, so far as it relates to the taxation of non-residents, be extended—

(*a*) So as to make non-resident persons chargeable to income tax in the name of any branch or manager as well as in the name of any factor, agent or receiver :

(*b*) so as to make non-resident persons so chargeable although the branch, factor, agent, receiver or manager may not have

the receipt of the profits or gains of the non-resident.

(2) A non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly through or from any branch, factorship, agency, receivership or management and shall be so chargeable under sec. 41 of the Income Tax Act, 1842, as amended by this section in the name of the branch, factor, agent, receiver or manager."

As pointed out by Lord Sterndale, M. R., in *Smidth & Co*., v. *Greenwood* (4) the duties mentioned in sec. 31 (of the English Finance Act, 1915) are the duties charged under Sch. D (of the Income Tax Act of 1842), and sub-sec. (*1*) of sec. 31 does nothing more than extend the method provided by sec. 41 of carrying out the charge imposed by Sch. D, and " it would be very strange if another subsection of the same section (sub-sec. 2) imposed an entirely new charge not within the Schedule at all . . . . such a thing if intended should be carried out with the greatest clearness and that if a reasonable meaning can be given to the subsection without producing that effect, such a meaning should be given." It appears from the last part of Sch. D of the Income Tax Act of 1842 that the profits or gains of a non-resident must arise from trade, etc., exercised within the United Kingdom, and as Lord Sterndale, M. R., says it merely points out or, so to speak, sums up the effect of sec. 41 of the Act of 1842 as extended by sec. 31 of the Act of 1915 still keeping within the limits of the charge of Sch. D. In other words, the liability to tax is controlled by Sch. D under which it is essential that the profits should accrue or arise from trade, etc., exercised within the United Kingdom, and that the territorial limits imposed by Sch. D cannot be taken to have been widened unless by clear words to that effect. It is contended by the learned Advocate-General that the Indian Income Tax Act, VII of 1918, does not recognise the territorial limit. Under sec. 3 of that Act income in certain cases for purposes of the Act, shall be deemed to be profits accruing or arising or to be received in British India, which indicates that income in certain cases though not actually accruing, arising nor received in British India, shall, for the purposes of the Act, be deemed to have accrued, arisen or been received in British India. The Indian Act therefore differs from the English Act in this respect. Although therefore sec. 31 (*1*) of the Indian Act, VII of 1918, is similar to sec. 31 of the English Finance Act, 1915, there is the distinction that in the former there are no such words as appear in the latter, *viz*., "shall be deemed to be income accruing or arising within British India."

The Madras High Court in the case of *The Board of Revenue* v. *The Madras Export Company* (1), which in its facts is similar to the present case, has followed the English case of *Smidth & Co.* v. *Greenwood* (4). It has held that sec. 33 (*1*) of the Indian Income Tax Act did not create a new category of income which could be charged under the Act in addition to incomes mentioned under sec. 5 as chargeable under the Act, but that sec. 33 (*1*) merely provided a machinery by which non-resident foreigners (amongst others) trading in British India or having business connection in British India could be taxed on income derived by them

(4) [1920] 3 K. B. 275; [1921] 3 K. B. 583; [1922] 1 A. C. (H. L.) 417.

(1) I. L. R. 46 Mad. 360 (1922).

(4) [1920] 3 K. B. 275; [1921] 3 K. B. 583, [1922] 1 A. C. (H. L.) 417.

in British India. But the learned Judges do not appear to have noticed the difference between the Indian Act and the English Act in so far as the former lays down that certain profits though not arising or accruing in British India shall be deemed to arise or accrue in British India.

There are several matters, however, which have to be considered and which have been urged on behalf of the company. The first is the position of sec. 33 in the Act. As stated above it comes under Chap. IV headed "Liability in special cases." It is to be observed that secs. 31 and 32 dealing with certain special cases (such as guardians of persons under disability, trustees, agents, or Court of Wards, etc.), merely lay down that the tax is to be levied upon and recoverable from certain persons while sec. 33 (*1*) provides that with regard to non-resident persons, income in certain cases shall be deemed to be income accruing or arising within British India. The provision would perhaps more appropriately come in after sec. 4 (*2*) of the Act XI of 1922, which deals with the converse case: "Profits and gains of a business accruing or arising without British India to a person resident in British India shall be deemed to be profits and gains of the year in which they are received or brought into British India notwithstanding the fact that they did not so accrue or arise in that year provided that they are so received or brought in within three years of the end of the year in which they accrued or arose."

Sec. 3 of the Act VII of 1918 which comes under Chap. I headed "Taxable income" expressly lays down that the Act shall apply not only to income accruing, arising or received in British India, but also to such income which under the provisions of this Act is "deemed to accrue, arise or to be received in British India." That section contemplates some provisions in the Act according to which income though not actually accruing or arising in British India shall be deemed to have so accrued or arisen, and if a section in the subsequent part of the Act clearly lays down in what cases it shall be so deemed, such provisions must be taken as incorporated in sec. 3 which deals with "taxable income" and the mere fact that such provision could have been more appropriately placed in some other part of the Act, cannot take away its effect, if the meaning of the provision is clear.

Secs. 7 and 11 of Act XI of 1922 show that income arising out of British India, may in some cases be deemed chargeable with tax. The first head of taxable income under sec. 6 is "salaries," and sec. 7 (*2*) lays down:—"Any income which would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India by Government or by a local authority established by the Governor-General in Council." The 5th head is "professional earnings" and sec. 11 (*3*) provides that "professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be profits or gains chargeable under this head." It may be said that secs. 7 and 11 appear under Chap. III headed "Taxable income," and secs. 7 and 11 along with others lay down in detail what would come under the "heads" of income (*i*) to (*vi*) in sec. 6. That is so, and we refer to those sections merely as illustrations of cases in which the income though not arising in British India shall be deemed to be chargeable with tax.

The next point for consideration is that sec. 33 (*1*) speaks of profits or gains through or from any business connection

Re : ROGERS PYATT SHELLAC CO. *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

in British India whereas sec. 5 merely mentions "income from business." If by the expression "business connection" in sec. 33 (*1*) was meant something different from "business" in sec. 5, then it would be going beyond the "classes of income" which alone according to sec. 5 are chargeable to income tax. Sec. 6 of Act XI of 1922 uses the word "heads" instead of "classes." The former expression seems to have been substituted to make it more comprehensive; we think the same thing was meant by the two expressions "business" and "business connection" and for this reason. Even if sec. 33 (*1*) be taken as a "machinery" section, as contended on behalf of the company, the agent cannot be charged with income tax, nor can the agent be deemed the assessee in respect of the income tax, unless the principal is chargeable. The principal is chargeable with tax upon income from "business," and unless the expression "business connection" in sec. 33 (*1*) was used in the same sense as "business" in sec. 5, the principal cannot be charged, and *a fortiori* the agent cannot be charged with the tax. The section accordingly, even as a machinery section, would be useless. The English Finance Act No. 2 of 1915, sec. 31 (*2*) uses the words "through or from any branch, factorship, agency, receivership or management," and the comprehensive expression "business connection" was probably used in the Indian Act to cover all those words. Then it is pointed out that the word "property" in sec. 42 (*1*) (which was not in the previous Act VII of 1918) indicates that the section could not but be a "machinery" section. It is contended that the profits of "property" in British India must accrue or arise in British India, and the fact that the profits of "property" also shall in some cases be deemed to be profits accruing or arising in British India indicates that the section was merely intended to provide for the method in which the tax was to be realised.

The word "property" seems to have been taken from the English Act, though the expression does not appear to have been considered in the English cases cited above. It is possible to conceive of cases where a property may be situate in British India and the profits thereof may accrue or arise out of British India.

The English Income Tax Acts lay down a territorial limit. The Indian Act, II of 1816, followed the English law, but in Act VII of 1918 and Act XI of 1922, the Indian legislature appears to have gone beyond that limit. Whether that is politic and whether it contravenes the comity of nations, it is not for us to consider. We have to construe the Act, and having regard to the essential difference in language between the English and the Indian Acts upon the point under consideration, we are unable to follow the English authorities decided with reference to the English statutes, or the Madras case referred to above. We accordingly hold that the company are liable to pay income tax having regard to the provisions of sec. 33 (*1*) read with secs. 3 and 5 of Act VII of 1918, and sec. 42 (*1*) read with secs. 4 and 6 of Act XI of 1922.

So far as the factory at Wyndhamgunj is concerned, it clearly comes within the Act. Admittedly there is a manufacturing branch of the company at that place, and under sec. 2, cl. (*3*) of Act VII of 1918 "business" includes among other things any "manufacture." The income therefore from such manufacture would be income from "business" and as such taxable under secs. 3 and 5 of the Act.

We make no order as to costs.

Re : ROGERS PYATT SHELLAC CO. *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

CHOTZNER, J.—I agree.

MUKERJI, J.—I have read the judgment just now delivered by my learned brother Chatterjea, J., and I entirely agree in the conclusions he has arrived at. In view, however, of the importance of the questions involved I desire to make some further observations.

Before dealing with the cases decided under the English statutes to which our attention has been drawn, I propose first of all to deal with the relevant provisions of the Indian Acts. For this purpose, it is not very material to advert to the provisions of Act II of 1886, or the enactments which preceded the same or the subsequent amendments incorporated into the said Act by Act V of 1916 and Act XI of 1903. A perusal of the several enactments makes it clear that the Income Tax Act of 1918 (Act VII of 1918) effected a radical change in the scheme and scope of operation of this branch of law. The Act of 1918 professes to be a consolidating and amending statute; on any point specifically dealt with in the Act the law is to be ascertained by interpreting the language used in the statute in its natural meaning, uninfluenced by considerations derived from the previous state of the law. [*Administrator-General* v. *Premlal* (5), *Narendra* v. *Kamal Basini* (6) and *Ramdas* v. *Amer Chand & Co.* (7)]. Reference to the previous state of the law would be permissible for the purpose of aiding in the construction of a new statute if any provision therein is of doubtful import [*Bank of England* v. *Vagliano Bros.* (8), *Robinson* v. *Canadian Pacific Ry.* (9) and *Mersey Docks* v. *Cameron* (10)]. I propose therefore to deal with the questions which arise on this reference primarily in the light of the provisions of Act VII of 1918. The question as to what change, if any, was effected by Act XI of 1922 will be considered later.

Reading sec. 3 (*1*) and sec. 5 of that Act it would appear quite clearly that the legislature expressly enacted that save as otherwise provided by the Act, all income, that is to say, salaries, interest on securities, income derived from house property, income derived from business, professional earnings, and income derived from other sources—is chargeable to income tax, provided it accrues or arises or is received in British India, or is under the provisions of the Act, deemed to accrue or arise or to be received in British India.

The section is divided into two parts; the first part deals with a reality, *i.e.*, where the income accrues or arises or is received in British India; the second part deals with a legal fiction, *i.e.*, where the income is deemed to accrue or arise or be received in British India. A close examination of the provisions of the Act discloses that the fiction does not purport to transform something unreal into real; the income is there, it has accrued or arisen or been received, the fiction only fixes the place where it is to be deemed as having accrued, arisen or been received, and the fiction is resorted to in order to make some person other than the beneficiary liable.

There is no provision in the Act under which income is deemed to be received in British India. There is only one provision, and that is contained in sec. 33 (*1*) under which income is deemed to accrue or arise in British India. Reading secs. 3 (*1*) and 33 (*1*) together it would appear that it is income which really accrues or

(5) L. R. 22 I. A. 107: s. c. I. L. R. 22 Cal. 788 (1895).
(6) L. R. 23 I. A. 18: s. c. I. L. R. 23 Cal 563 at pp. 571-572 (1896).
(7) I. L. R. 40 Bom. 630 at p. 636 (1916).
(8) [1891] A. C. 107 at p. 145.
(9) [1892] A. C. 481 at p. 487.
(10) 11 H. L. C. 443 at p. 480 (1864).

arises or is received in British India that is liable to tax; by a fiction some kinds of income which accrues or arises to a person not resident of British India is deemed to accrue or arise in British India (ignoring the aspect that it accrues or arises to a person outside British India) for the purpose of realising the same from an agent resident in British India. All these kinds of income, however, are such as may be said to have accrued or arisen at different places in British India by reason of its having been the direct or indirect result of some business connection there or outside British India where the ultimate transactions producing the profits or gains took place, but under the Act they are deemed to have accrued or arisen in British India so as to be taxable under the Act and recoverable by making some person in British India responsible for its payment. To appreciate correctly the exact significance of these sections a detailed examination of some of the provisions of the Act is necessary.

First of all, turning to sec. 3 (*I*) of the Act, we find the word "income" used there. Now, what is income? The term is nowhere defined in the Act. The definitions of "agricultural income" and "total income" as contained in sec. 2, afford very little assistance in determining what is meant by income. In the absence of a statutory definition we must take its oridnary Dictionary meaning, "that which comes in as the periodical produce of one's work, business, lands or investments, considered in reference to its amount and commonly expressed in terms of money; annual or periodical receipts accruing to a person or corporation (Oxford Dictionary). The word clearly implies the idea of receipt, actual or constructive. The policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. "Accrues" "arises" and "is received" are three distinct terms. So far as receiving of income is concerned there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word receiving itself. The words "accrue" and "arise" also are not defined in the Act. The ordinary Dictionary meanings of these words have got to be taken as the meanings attaching to them. "Accruing" is synonymous with "arising" in the sense of springing as a natural growth or result. The three expressions "accrues" "arises" and "is received" having been used in the section, strictly speaking, "accrues" should not be taken as synonymous with "arises," but in the distinct sense of growing or growing up by way of addition or increase or as an accession or advantage; while the word "arises" means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out by Fry, L. J., in *Colquhoun* v. *Brooks* (11) (this part of the decision not having been affected by the reversal of the decision by the House of Lords), that both the words are used in contradistinction to the word "receive" and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes

(11) 21 Q. B. D. 52 at p. 59 (1888); 14 A. C. 493 (1889).

receivable and connote a character of the income which is more or less inchoate.

One other matter need be noted in connection with the section. What is sought to be taxed must be income and it cannot be taxed unless it has arrived at a stage when it can be called "income." In order to determine whether it is taxable under the Act the place where it has accrued or has arisen or has been received has got to be ascertained. The section ignores the person and only takes into account the place where the income accrues, arises or is received. Income may accrue at one place, arise at another and be received at a third. Again it may accrue or arise in respect of or out of something situated at one place but accrue or arise to a person at a different place.

To apply the provisions of secs. 3 (*1*) and 5 aforesaid to concrete cases, six different classes of cases will have to be taken into account: *viz.*, where the income accrues in British India, where it is deemed to accrue in British India, where it arises in British India, where it is deemed to arise in British India, where it is received in British India and where it is deemed to be received in British India. Upon the plain meaning of the two sections aforesaid in all the above six classes of cases the income, provided it comes within one or other of the classes of income mentioned in sec. 5, and is not otherwise saved or excepted by the Act, is chargeable to tax. Once an income is found to exist it will have to be examined whether it has accrued or arisen or been received in British India. If so, it is chargeable. If not, the provisions of the Act will have to be looked into to find whether there is any provision under which it is deemed to accrue or arise or to be received in British India.

Now of the six classes of cases aforesaid, the last two may be dealt with in very few words. If the income is received in British India no matter wherever it may have arisen or accrued, that is to say, if it is received by a resident in British India from sources that lie outside, it is taxable. If it is income derived from an outside source and is received outside British India by a person resident in British India it is chargeable if this receipt outside is deemed under the Act to be receipt within British India. The Act does not expressly say what income received by a person outside British India shall be deemed to be received in British India so as to be chargeable to tax by the operation of sec. 3 (*1*). So far as receipt outside British India is concerned there are two instances where such receipt has been made chargeable. The Act by sec. 10, sub-sec. (*3*) has made provision for a particular case of this nature by enacting that professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be income chargeable under the head of professional earnings. By sec. 6, sub-sec. (*2*), any income which would be chargeable under the head of salaries if paid in British India shall be deemed to be so chargeable if paid to a British subject or any subject or any servant of His Majesty in any part of India by Government or by a local authority established by the Governor-General in Council. I have not been able to discover any other provision in the Act by which income which is received outside British India (and which neither accrues nor arises in British India nor is deemed by the Act to accrue or arise in British India), has been made chargeable. Both these cases, however, are cases where the imposition may be justified by the consideration that in one the income has accrued to a person who is ordinarily a re-

sident of British India and in the other it has accrued or arisen to a British subject or a servant of His Majesty and has been paid out of the British Indian Exchequer and has so accrued or arisen in British India.

To turn, then, to the first four classes of cases, for the sake of brevity and convenience they may be dealt with as really of two kinds, the distinction between "accruing" and "arising" being left out of account for the moment. Taking the cases of a resident and a non-resident separately in connection with the accruing or arising of income as aforesaid, the position is this. If income accrues or arises in British India either to a resident or a non-resident it is chargeable; for as already observed, sec. 3 does not make any distinction between residents and non-residents. In the case of a non-resident such or so much of his income as arises or accrues to him, whether directly or indirectly from any business connection in British India, is, under sec. 33 (*1*) to be deemed to accrue or arise in British India, and is so chargeable under the Indian Income Tax Act. It will be seen from the very nature of the cases contemplated by the section that no income which does not represent profits or gains, not accruing or arising in point of fact within British India, has been made chargeable by this section, nor is a non-resident made liable by this section, as he is already liable by reason of sec. 3 of the Act. The profits or gains made chargeable are profits or gains which have accrued or arisen within British India. Sec. 33 (*1*), therefore, in my opinion does not go beyond sec. 3 in any respect: it really makes no income chargeable which is not chargeable under sec. 3, it imposes no liability on a non-resident which is not imposed by sec. 3, it merely explains what kind of income, in fact arising or accruing in British India to a resident outside, is to be deemed as arising or accruing in British India for the purpose of the Act and provides for a method of realization, namely, by assessing the agent and holding him liable for payment of the tax. It is interesting to note that whereas in sec. 3 (*1*) it is the income that is charged to tax, in sec. 33 (*1*) the "profits" or "gains" are deemed to be the income so liable, indicating that only so much of the income as represents the profits or gains derived under conditions specified in the section are so deemed.

The section as I read it only means that the non-resident assessee is to be made liable to tax for such profits or gains which accrue or arise to him directly or indirectly through or from any business connection within British India. He may have received the income outside British India; it may have accrued or arisen to him while he was outside British India; but the same or such parts of it as may be taken to be profits or gains accruing or arising through such connection is to be deemed as income accruing or arising in British India and so chargeable to tax. In my opinion, in such cases it will have to be ascertained by the taxing authorities what profits or gains (out of the income made by such a person) accrued or arose to such person, directly or indirectly, through or from any business connection in British India. This to my mind is the plain interpretation of the statute. The accrual or arising of income to a person is different to my mind from the receipt of the income by him; and the overlooking of this distinction in my opinion creates a confusion and makes the interpretation difficult.

The argument that sec. 33 (*1*) is only a "machinery section" and should not be treated as a "charging section" loses all its force in the light of this interpretation.

As already observed the charging section in the Act is sec. 3. Sec. 33 (*1*) does not mean to travel beyond sec. 3. Its position in Chap. IV is not altogether undeserved as it really imposes a liability on the agent as a special case. The drafting of the section, however, is not free from defects.

We are not concerned with the policy of the legislature or the question whether the statutes infringe any principles regarded sacred by the comity of nations: but at the same time I do not see how the above interpretation will lead to an unreasonableness or absurdity as it would only charge to tax profits or gains which may be attributable to business connection in British India. It is obvious that if they are attributable to such connection there is no reason why they should not be legitimately charged to tax. It is sufficient to say that the imposition of a tax under circumstances such as these would not in any way militate against the well-known principle that the power of taxation of any State is, of necessity, limited to persons, property or business within its territorial jurisdiction.

This brings us to the next question as to what is meant by "business connection." By sec. 4 of the Act "income derived from business" is liable to tax. It has been argued that unless the income which is now sought to be charged amounts to income derived from business, it would not be chargeable under sec. 3 (*1*); and that sec. 33 (*1*) by enacting that profits and gains accruing or arising directly or indirectly through or from business connection with British India professes to make something chargeable which is not chargeable under sec. 3 read with sec. 5. The answer to this argument, however, is that sec. 5, cl. (*vi*) includes "income from all other sources" and by sec. 11 "income derived from all other sources" include income and profits of every kind and from every source to which the Act applies if not included under any of the preceding heads, *i.e.*, (*i*) to (*v*). But even if it be argued that "income derived from all other sources" may not refer to income of this description, a question, with regard to which I do not wish to pronounce any definite opinion, I do not see why "profits and gains from business connection" should not be included in the general expression "income derived from business" which is used in sec. 5. The expression, it must be admitted, is dangerously vague and it is much to be regretted that in a fiscal enactment a more precise expression has not been used. The meaning, however, does not admit of much doubt; for the context shows that it is such gains or profits as may be calculated to have been made as being that part of the income of the non-resident which is attributable to the connection he has with a business in British India. The word business is one of large and indefinite import and connotes something which occupies attention and labour of a person for the purpose of profit. The word means almost anything which is an occupation or a duty requiring attention as distinguished from sport or pleasure and is used in the sense of an occupation continuously carried on for the purpose of profits [*Smith* v. *Anderson* (12), *Rolls* v. *Milner* (13) and *Re* : *Marine Steam Turbine Co.* (14)]. A concern by reason of which one can be said to have connection with such an occupation is business connection.

Act XI of 1922 emphasises the distinction between "income" and "profits or gains" by introducing "profits or gains" in sec. 4 which is the charging section

(12) 15 Ch. D. 247 at p. 258 (1880).
(13) 27 Ch. D. 71 at p. 88 (1884).
(14) 1 K. B. 193 (1920).

corresponding to sec. 3 of Act VII of 1918, and instead of the expression "classes of income" and "income derived from business" in sec. 5 of the latter Act, speaks of "heads of income, profits and gains" and "business" in sec. 6. In sec. 42 of Act XI of 1922 we find the words "business connection or property" in the place of the words "business connection" in the corresponding sec. 33 (*1*) of Act VII of 1918. These amendments cast the net wider by including profits or gains arising or accruing from property as well. It is not inconceivable as to how a non-resident can have profits or gains accrued to him through or from property in British India, *e.g.*, if a property in British India is let out or the value of property in British India is increased and profits or gains accrue or arise, but accrue or arise to a non-resident, sec. 42 (*1*) will bring these profits and gains within the Act, they being deemed to have accrued or arisen within British India. Such profits or gains accrue in British India where the property is situate, though they may acquire only a tangible shape where they are actually received. A further amendment in the shape of the introduction of a sub-section, *viz.*, sub-sec. (*2*) together with an explanation as to what is or is not to be deemed to be received in British India is also noticeable.

Turning now to the English statutes, in *Colquhoun* v. *Brooks* (11), Lord Herschell observed: "The Income Tax Acts themselves impose a territorial limit: either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there." This fundamental principle of the English statutes does not appear in Act VII of 1918 or Act XI of 1922. The question of residence does not arise nor any territorial limits are recognized by the charging sections of the said Acts. Under the Income Tax Act, 1842 (5 and 6 Vic., c. 35) and the Income Tax Act, 1853 (16 & 17 Vic., c. 34) the duty is charged upon annual profits and gains in the nature of income from whatever source derived and is imposed under sec. 5, Schs. A to E inclusive, which are framed to include all such sources of income. Sch. D, the operation of which is limited to the classes of income not charged under any other schedule, charges to tax income "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere;" "and for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not although not resident within the United Kingdom, from any property whatever in the United Kingdom or any profession, trade, employment or vocation exercised within the United Kingdom." In the case of a non-resident, therefore, question would arise as to whether the profits or gains have arisen or accrued to him from any trade exercised within the United Kingdom. In *Sulley* v. *Attorney-General* (2), it was held that wherever a merchant is established, in the course of his operations his dealings

(11) 21 Q. B. D. 52 at p. 59 (1888); 14 A. C. 493 at p. 509 (1889).

(2) 5 H. & N. 711 (1860).

must extend over various places; he buys in one place and sells in another; but he has one principal place in which he may be said to trade, *viz.*, where his profits come home to him; and that is where he exercises his trade. In the Indian statute the question where the trade is exercised does not come in at all. In *Grainger & Son* v. *Gough* (3). it was held that a foreign merchant who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. Lord Herschell in that case observed that there is a broad distinction between trading with a country and carrying on a trade within a country. Lord Watson observed that there may be transactions by or on behalf of a foreign merchant in one country so intimately connected with his business abroad that without them it cannot be sufficiently carried on, which are nevertheless insufficient to constitute an exercise of the trade within that country within the meaning of Sch. D. Lord Watson further went on to observe referring to the case of *Sulley* v. *Attorney-General* (2) as follows:—"The learned Judges recognised the principle that purchasing of stock in this country with the view of trading in it elsewhere, does not of itself constitute an exercise of the trade in the United Kingdom when that department of the business from which profits or gains are directly realized is carried on in another country." These observations indicate that profits or gains may accrue or arise to a non-resident or may be realised or received by him in respect of business in a country which does not amount to exercise of trade in that country, and that such profits or gains may arise directly or indirectly. The English statutes by using the words "from any trade exercised within the United Kingdom" left such profits or gains free, while the Indian Acts using a different phraseology in their charging sections included them. By the terms of sec. 33 (*1*) of Act VII of 1918 and sec. 42 (*1*) of Act XI of 1922 they are to be deemed to have accrued or arisen in British India for the purpose of making the resident agent responsible for the tax. Sec. 41 of the Act of 1842 may be read as follows: Any person not resident in the United Kingdom whether a subject of Her Majesty or not, shall be chargeable in the name of any factor, agent or receiver having the receipts of any profits or gains arising as herein mentioned. By sec. 31, sub-sec. (*2*) of the Finance Act (No. 2) of 1915:—"A non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly, through or from any branch, factorship, agency, receivership or management and shall be so chargeable under sec. 41 of the Income Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver or manager." In *Smidth & Co.* v. *Greenwood* (4), the House of Lords affirmed the decision of Rowlatt, J., in *Smidth & Co.* v. *Greenwood* (4) and of the Court of Appeal in *Smidth & Co.* v. *Greenwood* (4). In that case it was held by the Court of Appeal that the sub-section was not a charging sub-section but that it merely summed up the effect of sec. 41 of the Act of 1842 as extended

(2) 5 H. & N. 711 (1860).
(3) [1896] App. Cas. 325.
(4) [1920] 3 K. B. 275; [1921] 3 K. B. 583; [1922] 1 A. C. (H. L.) 417.

by sub-sec. 1 of sec. 31 of the Act of 1915 still keeping within the limits of Sch. D, and it was observed that to hold otherwise would be to hold that such an important alteration has been made on the basis of taxation as the abolition of the condition of exercise of trade within the United Kingdom before a person not there resident can be taxed. "To take the latter course," Lord Sterndale observed, "would be to violate the well-known canon of construction of taxing Acts that no one is to be taxed except by express words." The Indian law does not proceed upon the basis of such a condition but upon the taxability of the income regarded from the point of view, of the place where it accrues, arises or is received or is deemed to accrue, arise or be received under the Act. I am unable to assent to the view taken by the Madras High Court in the case of *The Board of Revenue* v. *The Madras Export Company* (1) for it seems to me that the learned Judges in that case proceeded upon the supposition that the legislature intended no change from the earlier statutes which to a large extent were modelled on the English statutes. That there is now a substantial difference is clear, and has been recognised in the cases, amongst others, of *Board of Revenue* v. *Ramanadhan Chetty* (15), *In re Aurangabad Mills Ld.* (16) and *In re John & Co.* (17).

An objection has been urged that to include income which did not arise or accrue in British India to a non-resident of British India would be to make not actual but "notional" income chargeable. The taxability of "notional" income is an idea not foreign to the Act, for by sec. 8 of the Act *bonâ fide* annual value of property has been made assessable as being income which has accrued to the property, though it may not have actually arisen from it. It is notional in the sense that its quantum has to be determined by calculation but it is real in the sense that it has actually accrued.

In my opinion therefore the answers to the questions submitted for our decision should be in the affirmative.

The question as to how the profits or gains attributable to business connection in British India have to be calculated or ascertained is not a matter within the scope of this reference. The Board of Inland Revenue in the exercise of the powers conferred by sec. 59 of the Indian Income Tax Act (XI of 1922) have framed certain rules of which r. 33 runs as follows:—"In any case in which the Income Tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of British India whether directly or indirectly through or from any business connection in British India cannot be ascertained, the amount of such income, profits or gains for the purpose of assessment to income tax may be calculated on such percentage of the turn-over so accruing or arising as the Income Tax Officer may consider to be reasonable, or an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income Tax Act) as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income Tax Officer may deem suitable." The rule is drawn from the English statutes and its sufficiency or

(1) I. L. R. 46 Mad. 360 (1922).
(15) I. L. R. 43 Mad. 75 at p. 86 (1919).
(16) I. L. R. 45 Bom. 1286 (1921).
(17) I. L. R. 43 All 189 (F. B.) (1920).

validity is not a matter for our consideration in this reference.

Messrs. Orr, Dignam & Co., Solicitors for the Company.

Mr. Gooding, Solicitor for the Government.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 657 OF 1922.

GREAVES, J. CHAKRAVARTI, J. 1924, 5, May.

PRAMATHA NATH CHOUDHURI and ors., Defendants, Appellants, *v.* KRISHNA CHANDRA BHATTACHARJEE and anr., Plaintiffs, Respondents.

Documents between third parties—Recitals of boundaries in, if admissible in evidence—Indian Evidence Act (I of 1872), secs 11, 13 and 32 (3).

Recitals of boundaries of other lands in documents between third parties are not admissible in evidence either as regards the question of the boundary or as to the nature of the land.

SAROJ KUMAR *v.* UMED ALI (1) *followed.*

A mere description of boundaries in a document between third parties cannot be said to be a statement against the proprietary interest of the person making it and is not admissible under sec. 32 (3) of the Indian Evidence Act.

ABDULLAH *v.* KUNJ BEHARI LAL (3) *dissented from.*

BRAJESWARI PESHAKAR *v.* BUDHANUDDI (5) *referred to.*

This was an appeal against the decree of Babu Satis Chandra Basu, Officiating Subordinate Judge, 1st Court of Pabna in Zillah Pabna and Bogra, dated the 22nd of November 1921, affirming the decree of Babu Srish Chandra Chakravarti, Munsif, third Court at Pabna, dated the 28th of February 1921.

(1) 25 C. W. N. 1022: s. c. 35 C. L. J. 19 (1921).

(3) 16 C. W. N. 252: s. c. 14 C. L. J. 467 (1911).

(5) I. L. R. 6 Cal. 268 (1880).

The facts of the case are shortly these :—

This was a suit for declaration of title and recovery of possession of a plot of land as the *brahmattar* lands of the Plaintiffs. The Courts below decreed the suit relying partly on statements contained in a certain *kabuliyat* between third parties. This document Ex. 4 recited that the land with which it was concerned was bounded by the lands in dispute in the present suit. Some of the plots were therein described as *brahmattar* lands and one plot as Plaintiff's *brahmattar*. The executant of the *kabuliyat* was dead.

Babu Ramesh Chandra Sen for the Appellants.—The document is inadmissible in evidence.

Saroj Kumar v. *Umed Ali* (1) relied on.

Babu Atul Chandra Gupta (for *Babu Mohini Mohon Chakravarty*) for the Respondents.—The recitals are relevant under sec. 13 of the Evidence Act and also under sec. 11. They are also admissible under sec. 32 (3).

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal by the Defendants. The suit was one for declaration of title to and for possession of a certain plot of land. Both the lower Courts have decreed the suit in the Plaintiffs' favour. The judgments of both the Courts are attacked on the ground that it is said that a document between third parties, namely, a *kabuliyat*, Ex. 4, was admitted and wrongly admitted as evidence in the

(1) 25 C. W. N. 1022: s. c. 35 C. L. J. 19 (1921).

suit. This document Ex. 4 purported to show that the land with which it is concerned was bounded by some of the lands in suit which were therein described as *brahmattar* lands, another plot being described as Ishan's *brahmattar*. There is no doubt that if this document Ex. 4 is admissible in evidence it supports the Plaintiffs' contention and the judgments of both the lower Courts are correct. But, in our opinion, this document Ex. 4 which was between third parties was not admissible in evidence either as regards the question of the boundary or as to the nature of the land, namely, that it was *brahmattar* and Ishan's *brahmattar*. We agree with the decision in *Saroj Kumar Acharji Choudhuri* v. *Umed Ali Howladar* (1), where it was decided that a document of this nature was not admissible in evidence under the provisions of either sec. 11 or sec. 13 of the Indian Evidence Act. The authorities, some of which are conflicting, are discussed at p. 22 of that judgment. Mr. Justice Mookerjee who, in the case of *Bisheswar Dayal* v. *Harbans Sahay* (2) had apparently held that a document of this nature was admissible in evidence under the provisions of secs. 11 and 13 of the Indian Evidence Act, altered his view in the decision in *Abdullah* v. *Kunj Behari Lal* (3), where he held that a document of this nature was not admissible in evidence under the provisions of secs. 11 and 13 of the Indian Evidence Act, thus differing from the view which he had previously expressed. Both the cases in *Saroj Kumar Acharji Choudhuri* v. *Umed Ali Howladar* (1) and *Abdullah* v. *Kunj Behari Lal* (3) must be taken to overrule the decision in

(1) 26 C. W. N. 1022: s. c. 35 C. L. J. 19 (1921).

(2) 6 C. L. J. 659 (1907).

(3) 16 C. W. N. 252: s. c. 14 C. L. J. 467 (1911).

Dwarka Nath Bakshi v. *Mukunda Lal Choudhuri* (4), where it was held that a document of this nature was admissible under the provisions of secs. 11 and 13 of the Indian Evidence Act.

It only remains to refer to a passage in *Abdullah* v. *Kunja Behary Lal* (3) where Mr. Justice Mookerjee seems to think that although such a document is not admissible under the provisions of secs. 11 and 13 of the Indian Evidence Act, it may be admissible under the provisions of sec. 32 of that Act. But, with great respect to that learned Judge, the reasoning by which he arrives at this view does not seem to me at all conclusive and I find great difficulty in seeing how a mere description of boundaries in a document between third parties can be said to be a statement against the proprietary interest of the person making it. It may well be that, for some ulterior purpose boundaries may not be correctly described in a document, and, if this is so, how a statement of that nature can be said to be against the proprietary interest of the person making it, it is somewhat difficult to ascertain.

I think that the law is correctly stated, if I may say so, in the decision in *Saroj Kumar Acharji Choudhuri* v. *Umed Ali Howladar* (1) to which I have already referred and I am not prepared to say that the document Ex. 4 is admissible in evidence under the provisions of sec. 32 of the Indian Evidence Act.

I wish to say in passing that it does not appear in the case of *Saroj Kumar Acharji Choudhuri* v. *Umed Ali Howladar* (1), whether the executant of the document was dead or not.

(1) 25 C. W. N. 1022: s. c. 35 C. L. J. 19 (1921).

(3) 16 C. W. N. 252: s. c. 14 C. L. J. 467 (1911).

(4) 5 C. L. J. 55 (1906).

PRAMATHA NATH CHOUDHURI *v.* KRISHNA CHANDRA BHATTACHARJEE.

In the present case the executant of the document is dead; but even so, for the reasons which I have already stated I do not think that the document is admissible in evidence under the provisions of sec. 32 of the Indian Evidence Act.

This disposes of the matter. The appeal is accordingly allowed, the decree of the lower Appellate Court is set aside and the case is sent back to that Court in order that the learned Judge may deal with the appeal upon the evidence on the record excluding Ex. 4 from consideration. Costs will abide the result.

I may add that it seems to us that the law was correctly laid down many years ago in *Brajeswari Peshakar* v. *Budhanudhi* (5), where the learned Chief Justice Sir Richard Garth in deciding a difference of opinion between two other learned Judges stated :—" A recital in a deed or other instruments is in some cases conclusive, and in all cases evidence as against the parties who make it . . . But it is no more evidence as against third persons than any other statement would be."

CHAKRAVARTI, J.—I agree.

S. C. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 555 OF 1924.

SANDERSON, C. J.	RAM KHALAWAN
CHOTZNER, J.	AHIR
1924,	*v.*
7, August.	TULSI TELINI.

Criminal Procedure Code (Act V of 1898, before amendment by Act XVIII of 1923), sec. 517, Criminal Court's power of disposal of property regarding which offence committed—Power to order confiscation—Desirability of adjudication by Civil Court when there are rival claimants.

The Criminal Courts had no power, under sec. 517 of the Criminal Procedure Code before its amendment in 1923, to order the confiscation of property in respect of which an offence appeared to have been committed.

Where conflicting claims to such property were put forward before the Criminal Court, the proper order to make was to keep the property in Court subject to any order that might be made by a competent Court of Civil Jurisdiction.

This was a Rule granted on the 2nd July 1924 against the order passed by Mr. A. Z. Khan, Presidency Magistrate, on the 4th May 1923 and the order passed by Mr S. W. Ali, on the 26th April 1924, rejecting the Petitioner's application for return of the properties in question to him.

The facts are fully set out in the judgment.

Babu Haramba Chandra Guha for the Petitioner.

Mr. S. C. Choudhuri and *Babu Phanindra Nath Dass* for the Opposite Party.

Babus Jogesh Chunder Bose and *Apurba Charan Mukherjee* for Beni Madhab Karmakar.

The JUDGMENT OF THE COURT was as follows :—

CHOTZNER, J.—This was a Rule calling upon the Chief Presidency Magistrate and Beni Madhab Karmakar to show cause why the order passed by Mr. Khan on the 4th of May 1923 and the order passed by Mr. Ali on the 26th of April 1924 should not be revised and such other order passed as to this Court might seem fit and proper.

The allegations in the petition may be briefly stated. A theft was committed in the house of the Petitioner on the 24th of April 1922 when jewellery and cash to the value of about Rs. 18,000 were stolen. On the 19th of July the shop of Beni Madhab Karmakar was searched and a quantity of gold ornaments was discover-

(5) I. L. R. 6 Cal. 268 (1880).

RAM KHALAWAN AHIR *v.* TULSI TELINI.

ed. Upon certain statements made by him the Opposite Party Tulsi Telini who was the accused in the case and is said to have been at the time an occupant of a room in the Petitioner's house was arrested on a charge under sec. 380 of the Indian Penal Code. She was, however, not tried under that section but under sec. 54A of the Calcutta Police Act: and, by his judgment of the 2nd of December 1922 the learned Magistrate convicted her and sentenced her to three months' rigorous imprisonment. At that time no order was made by the learned Magistrate as to the disposal of the property recovered which he directed to be kept in the *malkhana*.

On the 6th of February, Tulsi applied to this Court for a Rule against her conviction and sentence but her application was refused and she subsequently applied on the 23rd of February for bail pending her application in England for special leave to appeal to His Majesty in Council. That application was also rejected. Then, on the 4th of May, upon the arrival of the record in the Magistrate's Court, the Petitioner applied under sec. 517 of the Criminal Procedure Code for a return of the property to him. The learned Magistrate made an order upon the petition "To D. C." by which I understand him to mean to the Deputy Commissioner of Police "for disposal." The matter remained pending before the Deputy Commissioner until the 22nd of November when upon a further application by the Petitioner the Deputy Commissioner sent the application to the Public Prosecutor for advice; and on the 27th of that month the Public Prosecutor advised that the Deputy Commissioner had no jurisdiction to dispose of the matter which was one either for the Magistrate or for this Court to decide. Then, a somewhat mysterious order was passed by the Deputy Commissioner, "To Girija Babu." We are told that Girija Babu is an Inspector of the Criminal Investigation Department who had enquired into the case. Then, on the 10th of March the Petitioner moved this Court and the learned Judges who heard the application told him to make another application before the learned Magistrate inviting him to exercise his powers under sec. 517 of the Criminal Procedure Code. Thereupon, on the 18th of March, the Petitioner moved the Magistrate. The Magistrate, Mr. Ali, on the 26th of April disposed of the petition in these terms: "Mr. Khan had already recorded an order regarding the disposal of the property. I cannot hold an enquiry in the matter. Application rejected." It appears that the order made by Mr. Khan on the 4th of May 1923 was to this effect: "The conviction was under sec. 54 of the Calcutta Police Act and the only order possible about the property by the Court was passed sending it to Crown *malkhana* as suspected stolen property. The Court is not in a position to pass definite orders about the property. To D. C. C. I. D. for favour of disposal. This was I am told a C. I. D. case."

The learned Vakil who has appeared on behalf of the Petitioner has urged that the learned Magistrate had no jurisdiction to make the order consigning the property to the *malkhana* without giving him an opportunity of being heard in support of his claim: and, he further complains that the Magistrate has passed a further order by which the property has been confiscated.

It is urged that under sec. 517 of the former Code of Criminal Procedure the Magistrate had no authority to make any order for confiscation because that power has been given to him only by the amend-

RAM KHALAWAN AHIR v. TULSI TELINI.

ing Code of 1923. The former section read : "When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence." Under the amending Code the following words are introduced after the word "disposal," *i.e.*, "by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise."

We are of opinion that the order made by the learned Magistrate directing the confiscation of the property was without authority and cannot be supported.

The question which remains for consideration is what course should now be adopted. It is urged by the learned Vakil for the Petitioner that his client should be given an opportunity of examining witnesses before the learned Magistrate and so establishing his claim. It is argued on behalf of Beni Madhab Karmakar on whom the Rule was also issued that he has a lien on the goods and that that lien should be recognised by any order that may be made by the Magistrate. Evidently this Court has no jurisdiction to deal with that question. It is also argued by the learned Counsel on behalf of Tulsi Telini that the property should not be disposed of until her title has been decided in a civil suit. There is evidently, therefore, a conflicting claim to the property and it is very doubtful whether the Magistrate even if he hears all the evidence will be able to give a final decision as to the ownership of the property. The matter is one which can only be adequately dealt with by a Civil Court. The learned Magistrate in the cause which he has shown has in effect repeated what he said in his original order, namely, that "the ownership of the property was uncertain and could not be definitely adjusted." If, therefore, any further enquiry is held by him, we do not think that any satisfactory result will be attained.

We think that the proper order to make is that the order of confiscation should be set aside and that the property should remain in the Court *malkhana* as at present subject to any order which may be made by a Court of competent civil jurisdiction.

The Rule is accordingly made absolute in these terms.

SANDERSON, C. J.—I agree.

J. N. R. *Rule made absolute.*

END OF VOL. XXVIII

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, NOVEMBER 12, 1923. [No 1.

Contents.

NOTES

Foreword for the coming year.

To-day we have stepped into the twenty-eighth year of our existence and we accord our good wishes to the members of the Bench and Bar whom we have endeavoured to serve in the discharge of their arduous duties all these long years. We are sure they too will reciprocate an equally kindly feeling towards us. The Bench, the Bar and we as legal journalists are co-workers in the field of administration of justice. Of all the functions of the State, that of administration of justice is, perhaps, the noblest one. Of all the British institutions, the law Courts are undoubtedly the most popular. However, there is still a great deal of scope for the improvement of the administration of criminal justice in this country. The vital draw-back in this respect consists in the combination of judicial and executive functions of the District and Sub-Divisional Magistrates. We in common with our countrymen have always pressed for their separation. The principle has been accepted by the highest executive and legislature. The Greaves Committee has reported upon its desirability and feasibility. The only consideration that bars this much needed reform is that it may throw an additional burden on the already strained conditions of the provincial finance. But we are of opinion that this apprehension is unfounded.

If the scheme of the Greaves Committee is adopted and put into operation, it would be found in practical working that by suitable division of work the scheme may be made to work in a manner which might effect a saving instead of increasing the cost of administration of criminal justice. We would urge on the local legislature to give effect to the scheme even at the risk of incurring additional expenditure and make suitable provision for it in the next budget. If an efficient Committee is appointed for effecting a re-organisation of the services on the lines suggested by the Greaves Committee, with such modifications as may be required in its practical working, we believe, it will be found that no additional recurring expenditure need be incurred. Even if some additional and recurring expenditure has to be incurred, it would be quite worth while to risk it, as it is a question that affects the life and liberty of the people. The law Courts and the administration of justice are the greatest bulworks of the British Empire. The present system of the combination of executive and judicial functions is an anomaly.

Worse still, is the blunder that the Executive Government has recently made in arresting and incarcerating without trial several British subjects in Bengal under Reg. III of 1818, even after the highest Legislature and Executive in India decided that it should not be put into operation against British Indians. We would urge on the Government of Bengal to abandon the retrograde and reactionary course that it has adopted and to release the persons arrested or bring them to trial before a Court of justice, if there is any evidence to go upon. *Letter de cachet* should be a dead letter in India. It is highly compromising to this progressive Presidency that the rusty and clumsy weapons from the armoury of the Bourbons should be used so late in the day by our Provincial Government. Since we meet after the *Dushera*, we appeal for peace and good will all round and for forgiveness and oblivion of all transgressions, as well our own as those of others. May we enter upon the duties of the coming year, in a spirit of justice, charity and fairplay?

The late Mr. Dasarathi Sanyal.

We are exceedingly sorry to have to record the death which took place during the vacation at Darjeeling of Mr. Dasarathi Sanyal. That he was the leading practitioner on the Criminal Appellate Side of the Calcutta High Court constitutes but a small part of his claim to remembrance by members of the legal profession and by the litigant public at large in

this and the sister province of Bihar and Orissa; for besides all the qualifications which go to make a successful advocate, he possessed what is rarer, a large and generous heart which endeared him to every one with whom he came into contact, whether professionally or in the more intimate relations of life. With all these, he combined a wide culture and unbending independence. In his untimely death the profession has lost one of these rare spirits who succeed by the very nobility of their character in winning at the same time the respect and the affection of their fellowmen; and the void left in its ranks will not be easily filled. The Vakil Bar, of which he was one of the most trusted leaders and an ornament, will be distinctly the poorer for his death.

Some Official Acts.

A warrant for the arrest of an absconding offender having remained unexecuted, a police officer to whom an enquiry slip has been sent finds a person within his jurisdiction bearing the same name but who, he knows, is not the person for whose arrest the warrant has been issued. The similarity in name is a coincidence, but the police officer, a man of resources, turns it to his own profit, by putting the man (whom let us call X) under arrest and letting him off only on his paying him a certain amount as the price of his liberty. These in substance were the facts of the case reported at page 10 of this issue. The question was whether in arresting X, the police officer was acting in his official capacity, or, to use a colloquial expression, "on his own bat." In the former case X's suit for damages for wrongful arrest and refund of the money extorted was illegally constituted, not having been preceded by the notice prescribed by sec. 80 of the Civil Procedure Code. The Court in effect held that the arrest was made by the police officer "in his official capacity," but that the extortion was entirely a matter of personal enterprise; so that the suit failed in so far as damage was claimed for illegal arrest, but it was properly constituted as regards the claim for refund of money extorted. We find ourselves unable to discriminate between the quality of the initial arrest and of the consequential extortion. Both were parts and parcels of the same scheme of fraud and the same abuse, not of legal authority (for it did not exist either in fact or even in the mind of the officer concerned), but of the *appearance* of it. The act complained of was not merely *malâ fide*, but several degrees worse, being malicious to the extent of rendering it *ultra vires* of the doer. It was not an official act. It was an instance of what French administrative law would characterise as "*detournement du puvoir*." At the same time, we agree that mere proof of *malâ fides* does not necessarily take an act out of the category of "official acts." But in this case, the act was both un-official and *malâ fide*.

Outlook in Europe.

Another year has passed since the conclusion of peace, but peace is not yet in sight. In Europe, the effect of the French policy culminating in the occupation of the Ruhr, in defiance of the terms of the Treaty and the sentiments of the civilized world, has been to reduce Germany to the verge of industrial and political ruin. In another month, we apprehend, this country will present the spectacle of an absolutely bankrupt and starving people and the Reich will break up into a number of petty squabbling republics, each trying to aggrandise at the expense of the other. Such a state of things will, no doubt, suit France admirably, as it will rid her of the nightmare of counter-revenge and secure her political ascendancy for some time to come. But neither Great Britain nor Italy could be expected to take the situation quietly. Great Britain, we have no hesitation in saying, has no desire to acquire an inch of soil on the European continent or elsewhere. What she now is anxious for is the restoration of pre-war trade and prosperity. But unfortunately Italy cannot be credited with any such pacific intentions. Her latest tactics have made it abundantly clear to those who have eyes to see that she is thirsting for dominion and will snatch at the earliest opportunity to extend her rule beyond the Adriatic. Mazzini and Garibaldi worked for a united Italy. That achieved, Mussolini is working for an imperial Italy, and therein lie the seeds of trouble for the future.

Imperial Conference and Indians Abroad.

At the Imperial Conference, General Smuts has propounded a theory of imperial citizenship, which, pushed to its logical conclusion, reduces the Empire to a quiddity. In his view, every Dominion has the inherent right of determining the conditions of citizenship and excluding those who fail to satisfy them. If this view is correct, the Empire is *non est* and im-

perial citizenship, a meaningless combination of words. It is regrettable that none of the members of the British Cabinet (except the Secretary of State for India who listened to this exposition of the subject of citizenship within the Empire) made any serious attempt to controvert it. The impression left on our minds, after a perusal of the report of the proceedings of the Conference, is that, although the British Government provided the Indian delegates with every facility to present their case, they themselves were not anxious to render any assistance in solving this difficult problem. Rather they thought that it was a matter entirely between the Indian delegates and the Dominion premiers and so left it to them to fight it out. An admirable instance of all round, genuine British sportsmanship!

The net result of the Conference is that, although Sir Tej Bahadur Sapru's resolution has been accepted by the Conference, no real gain has accrued to India thereby. For the real trouble for Indians is in South Africa and South Africa has refused to accept the resolution. The Boer General has barred and bolted her doors and has pronounced in no uncertain terms that there is no British citizenship throughout the Empire. For ourselves, we say frankly that the disabilities of Indians abroad will not disappear as the result of pious resolutions passed by Imperial Conferences or of appeals made to Dominion premiers on grounds of humanity, empire and common allegiance to the Crown. They will only disappear when we are in a position to bargain with the Dominions, and that we could do only when we should have an autonomous government as Mr. Fitzgerald pointed out at the Conference. "I do not think," he said, "that the Indian representatives here are on a footing of equality with us, because they are not really here in a representative capacity. They are not really sent by an independent Indian Government and they cannot really be regarded as equal with the rest of us. . . . . . Their treatment outside India arises really from the fact that they have not so far reached the degree of self-government that the rest of us have reached." In these words, Mr. Fitzgerald has, we believe, raised the real point at issue. The question of our disabilities abroad, we repeat, will never be solved by Dominion premiers—it will have to be solved by us as between ourselves and the British Parliament by the establishment of Dominion Home Rule.

The Elections.

The elections, it seems, are going to be fought out much more strenuously on this occasion than on the last. It is not for us to canvass on behalf of any candidate or party. But we do hope that, in view of the momentous character of the questions which will come up before the Council and the Assembly, the electors, at any rate, those of them who have received some political education, will, in casting their votes, not be moved by any personal feelings and interests, but will vote for men of proved ability and independence.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Michaelmas sittings of the Judicial Commitee commenced on the 18th October.

The list contains 21 Appeals from India and only 5 from the Dominions and Crown Colonies.

The first case down for hearing is an appeal from Allahabad, *Raja Brij Narain Rai* v. *Mangla Prasad Rai*.

This raises the whole question of what is an "antecedent debt" so as to justify a transfer of joint family property by the manager of a family in the case of a Hindu family governed by the Mitakshara law.

The Allahabad Court applied the observations of the Board in *Sahu Ram Chandra* v. *Bhup Singh*, reported in 21 C. W. N. 698. A different view has prevailed in the Courts of Madras, Patna and Oudh and the Appellants contend that the observations of the Board have been wrongly interpreted by the Allahabad Court.

The appeal was first heard on the 19th April 1923, and after hearing the arguments of Counsel the Board decided that the importance of the point in issue was sufficient to warrant a re-hearing before a Full Board.

The re-hearing is now taking place before VISCOUNT HALDANE, LORDS DUNEDIN, ATKINSON, SHAW, PHILLIMORE, MR. AMEER ALI and SIR LAWRENCE JENKINS.

Messrs DeGruyther, *K. C.* and *B. Dubé* for the Appellant.

Mr. W. Wallach appeared as *amicus curiæ*.

G. D. M.

Correspondence.

A QUESTION OF COURT-FEE.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,

Will you kindly publish the following matter of some general importance to litigants? Art. 1A, Sch. II of the Court Fees Act, 1870, as amended by Act XV of 1911, provides that a fee of 12 annas is to be paid by all applicants when they pray for calling for records from another Court under circumstances where the transmission involves the use of post. According to the Rules of the High Court for the custody of records, records of cases that are disposed of are periodically transmitted to the District Record Room, but it is apparent that by such transmission the records do not come to the Court of the District Judge, as the District Record Room is not a part of the Court of the District Judge. It therefore appears plain enough that this article should not apply when the record called is the record of the Court to which the application is made, but which has been transmitted to the District Record Room. The words "another Court" have been made to include "Criminal Courts" by High Court's General Letter No. 7, dated the 23rd May 1914. By their Rule No. 2 of 1914 the High Court laid down that the fee is not to be levied where the Court calls for a record from the District Record Room *suo motu* or on the application of a party. But this Rule was cancelled by Rule No. 14 of that very year.

However notwithstanding the plain terms of the article different practices prevail in different Districts, and litigants are charged with this fee, and it is desirable that the High Court should lay down a uniform rule for the whole province, which should be according to law.

Yours faithfully,
GOBINDA CHANDRA CHAKRAVARTI,
Bengal Civil Service (Judicial).

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported
(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before NEWBOULD and RANKIN, JJ. S. A. No. 2318 OF 1920. ISWAR CHANDRA CHOWDHURY, Defendant-Appellant *v.* KAMIRUDDIN MALLICK, Plaintiff-Respondent. The 7th June 1923.

Bengal Tenancy Act, secs. 105 and 108—Service of notice whether gives jurisdiction.

In the record-of-rights published on 7th May 1911 the Plaintiff was recorded as a settled raiyat. The Defendant landlords then applied for the settlement of fair and equitable rent. The Plaintiff tenant claimed a *mokurari maurasi* right and pleaded under sec. 50 of Bengal Tenancy Act uniform payment of rent for over 20 years at Rs. 9-4-9. The Settlement Officer held that the Plaintiff had failed to substantiate his plea and in the body of the judgment found that the Plaintiff was a settled raiyat at a rent of Rs. 10-7-3 but through mistake in the ordering portion of the judgment it was ordered that the Plaintiff was a *makurari maurasi* raiyat and the record-of-rights was corrected and in the schedule, the Plaintiff was shown accordingly. On 8th February 1918 Defendants made an application under sec. 108, Bengal Tenancy Act for correction of the mistake and paid process fees for service of notice on the Plaintiff but through a mistake the notice was not served on the Plaintiff. The application under sec. 108, Bengal Tenancy Act was allowed in favour of the Defendant landlords by the Settlement Officer and the entry in the record was ordered to be corrected and the Plaintiff to be shown as settled raiyat at a rental of Rs. 10-7-3. On 15th April 1919 the Plaintiff instituted the present suit for a declaration that the revision of the previous order and correction of the record under sec. 108, Bengal Tenancy Act was not binding and without jurisdiction as no notice had been served on the Plaintiff. The first Court dismissed the suit on 29th July 1919 and the said decision was reversed on appeal by the learned Additional District Judge on 12th July 1920:

Held—(1) The Plaintiff was entitled to the legal character of a tenant and (2) as the order under sec. 105, Bengal Tenancy Act was in favour of the Plaintiff tenant and the order under sec. 108 was without jurisdiction for non-service of notice on the Plaintiff the suit was not barred under sec. 109, (3) the order under sec. 108 being without jurisdiction it is the clear duty of the Court to set aside the order and make the declaration.

Babus Surendra Ch. Sen and *Narendra Nath Sett* for the Appellant.

Babu Gopendra Nath Das for the Respondent.

S. C. C. *Appeal dismissed with costs.*

THE

Calcutta Weekly Notes

Vol. XXVII.] MONDAY, NOVEMBER 19, 1923. [No. 2.

Contents

NOTES

Arrest under Regulation III of 1818.

The arrest of a number of persons and their detention under Bengal Regulation III of 1818 has come as a surprise to all and has met with a chorus of strong condemnation from one end of the country to the other. As our readers will remember, in March 1921, the Government of India appointed a Committee to examine the repressive laws on the Statute Book and to report whether all or any of them should be repealed. The Committee examined the offending statutes, heard the evidence of a large number of persons representing all shades of opinion and, after a most careful inquiry, submitted a unanimous Report which was accepted by the Government. Although the Committee did not ask for the repeal of Bengal Regulation III of 1818 and the analogous Regulations in the Presidencies of Bombay and Madras, it is clear from their Report that they recommended its retention subject to certain restrictions. To avoid any misconception, we quote below, *in extenso*, their observations on this point.

"Dealing with the older Acts first, we notice that they relate generally to a state of affairs which no longer exists We regard it as undesirable that they should be used for any purpose not contemplated by their authors. The objections to them are obvious. Some, as for example, Bengal Regulation 10 of 1804, or the Forfeiture Act of 1857, are inconsistent with modern ideas; others are clothed in somewhat archaic language and are applicable only to circumstances which are unlikely to recur. Many arm the Executive with special powers which are not subject to revision by any judicial tribunal. Their presence on the Statute Book is regarded as an offence by enlightened public opinion. The arguments for their retention are as follows. The use of the Bengal State Prisoners Regulation, 1818 (Regulation III of 1818) in Bengal was necessitated by the revolutionary movement which the ordinary law failed to check The wholesale intimidation of witnesses rendered recourse to the ordinary courts ineffective. Though we have evidence of a change in the attitude of individual leaders of the anarchical movement in Bengal, we are warned that similar symptoms of intimidation have been noticed, and that, should there be a recrudescence of any revolutionary movement, it would, in the absence of these old preventive Regulations, be impossible to cope with the situation, and fresh emergency legislation would be necessary. Lastly, the plea is advanced that these old Acts may be regarded as measures intermediate between the ordinary law of the land and martial law, the ultimate result in case of extreme disorder. The abolition of those special laws, it is suggested, may mean earlier recourse to martial law than might otherwise be the case.

"We recognise the force of these arguments, in particular the difficulty of securing evidence or of preventing the intimidation of witnesses. We also appreciate the fact that the use of the ordinary law may in some cases advertise the very evil which the trial is designed to punish. But we consider that in the modern conditions of India that risk must be run. It is undesirable that any Statutes should remain in force which are regarded with deep and genuine disapproval by a majority of the Members of the Legislatures. The harm created by the retention of arbitrary powers of imprisonment by the Executive may, as history has shown, be greater even than the evil which such powers are directed to remedy. The retention of these Acts could in any case only be defended if it was proved that they were in present circumstances essential to the maintenance of law and order. As it has not been found necessary to resort in the past to these measures save in cases of grave emergency, we advocate their immediate repeal. In the event of a recurrence of any such emergency we think that the Government must rely on the Legislature to arm them with the weapons necessary to cope with the situation.

"Our recommendation in regard to Regulation III of 1818 and the analogous Regulations in the Bombay and Madras Presidencies is subject, however, to the following reservations. It has been pointed out to us that, for the protection of the frontiers of India and the fulfilment of the responsibilities of the Government of India in relation to Indian States, there must be some enactment to arm the Executive with powers to restrict the movements and activities of certain persons who, though not coming within the scope of any criminal law, have to be put under some measure of restraint. Cases in point are exiles from Foreign or Protected States who are liable to become the instigators or focus of intrigues against such States: persons disturbing the tranquillity of such States who cannot suitably be tried in the Courts of the States concerned and may not be amenable to the jurisdiction of British Courts: and persons tampering with the inflammable material on our frontiers. We are in fact satisfied of the continued necessity for providing for the original object of this Regulation, in so far as it was expressly declared to be 'the due maintenance of the alliances formed by the British Government with Foreign powers, the preservation of tranquillity in the territories of Native Princes entitled to its protection and the security of the British Dominions from foreign hostility,' and only in so far as the inflammable frontier, is concerned from 'internal commotion.'"

We have said already that the Report was accepted by the Government of India. That means that they pledged themselves to apply Regulation III and the analogous Regulations for securing the "due maintenance of the alliances formed by the British Government with Foreign Powers, the preservation of tranquillity in the territories of Native Princes and the security of the British Dominions from foreign hostility and only in so far as 'the inflammable frontier' is concerned, from internal commotion," and not for arresting and detaining British subjects on the allegation that they are engaged in a revolutionary conspiracy. To justify this breach of faith, the Government of Bengal have issued a communique explaining the reasons which induced them to take the step in question. We may point out that these reasons were all considered at great length by the Committee but were considered inadequate to support the retention of arbitrary powers in the hands of the Executive. The communique says: In weighing the undoubted objections to detention in safe custody without trial, the Governor in Council is forced to consider whether there is a greater evil than the alternatives which are presented. They involve, on the one hand, the gravest risk to the lives of the officers and members of the public . . . . and, on the other hand, the exposure to danger of immature youths . . . ." We can well understand the solicitude of the Government for the welfare of the immature youths of this country; we also appreciate their anxiety for the lives of their officers and of the members of the public; but we are not convinced that they justify in any country where there is any respect for personal liberty the detention of persons without trial except in circumstances of real peril to the existence of the State. During the War, Acts and Regulations were passed arming the Executive with powers of a most arbitrary character for safe-guarding the defence of the country. The Legislatures of the country had not a word to say against it. The public, if not glad, at any rate, acquiesced without a murmur. They felt that necessity knows no law and they must submit to it. But the world is now at peace. Except for a few communal riots and the Akali troubles, there is no disturbance in the country. Surely, this is not the time to apply the Regulation in total disregard of the pledge given by the highest executive, and to throw into the dust-bin the considered opinion of the highest legislature and the sentiments of the public at large.

The Government of Bengal, to convince themselves and the public of the propriety of their action, propose to place such evidence as they possess before two judges. This procedure is improper and unconstitutional and not authorised by any law on the Statute Book. It is the same as was provided in the Regulations under the Defence of India Act. The Government of Bengal is surely aware that the Defence of India Act was repealed by the Indian Legislature in 1922 and all the Regulations thereupon fell with it. May we ask under what statutory authority the Government of Bengal are going to place the information or evidence, as it is called, before two judges? It is against the traditions of the judiciary to express any opinion extra-judicially. It is the function of the law-officers of the Crown to express such opinion. It is no part of the work of judges who are appointed to try cases in open Court according to the laws of the country to condemn or justify *in camera* the policy of the Executive.

High Court Rules.

ORIGINAL SIDE.

It is ordered with the approval of the Governor-General in Council that the following Chap. XIII A containing rules as to summary procedure in suits to recover debts or liquidated demands or for immoveable property be added to Chap. XIII, and r. 6 of Chap. XVI of "The Rules of the High Court, 1914" be amended by prefixing the words "Subject to the provisions of Chap. XIII A" with effect from the 12th day of November 1923:—

CHAPTER XIII A.

SUMMARY PROCEDURE IN SUITS TO RECOVER DEBTS OR LIQUIDATED DEMANDS OR FOR IMMOVEABLE PROPERTY.

1. The provisions of this Chapter shall not be applicable save to suits—

(A) in which the Plaintiff seeks to recover a debt or liquidated demand in money payable by the Defendant with or without interest arising—

(*i*) on a contract express or implied; or

(*ii*) on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(*iii*) on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only; or

(*iv*) on a trust; or

(B) for the recovery of immoveable property with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant.

2. A Plaintiff shall not be precluded from proceeding under this Chapter by reason of the fact that the suit might have been brought under the provisions of Or. 37 of the Code of Civil Procedure, but this Chapter shall not be applicable to suits which have been instituted under the said Order.

3. Where the Defendant in any suit which is within the terms of r. 1 has entered appearance, the Plaintiff may, as regards any claim which is within the terms of r. 1, on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no defence to the claim, apply to the Judge for final judgment for the amount claimed together with interest, if any, or for the recovery of the land (with or without rent or mesne profits) as the case may be and costs:

Provided that as against any Defendant who has filed a written statement such application shall not be permissible unless the summons is taken out as in r. 4 mentioned within ten days after the entering of appearance.

4. The application by the Plaintiff for judgment under r. 3 shall be made by summons returnable not less than seven clear days after service accompanied by a copy of the plaint and affidavit.

5. (*a*) The Defendant may show cause against such application by affidavit.

(*b*) The affidavit shall state whether the defence alleged goes to the whole or to part only and (if so) to what part of the Plaintiff's claim and shall deal specifically with all matters of fact.

(*c*) The Judge may, if he thinks fit, order the Defendant, or in the case of the Corporation any Officer thereof, to attend and be examined upon oath or to produce any lease, deed, book or document or copy of or extract therefrom.

6. Upon such application the Judge may, unless the Defendant by affidavit or otherwise as the Judge may direct shall satisfy him that he has a good defence to the claim on its merits or disclose such facts as may be deemed sufficient to entitle him to defend, make an order refusing leave to defend and forthwith pronounce judgment in favour of the Plaintiff.

7. If it appears to the Judge that any Defendant has a good defence to or ought to be permitted to defend the claim and that any other Defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend and the Plaintiff shall be entitled to judgment against the latter, and may issue execution upon a decree to be drawn up pursuant to such judgment without prejudice to his right to proceed with his claim against the former.

8. If it appears that the defence set up by the Defendant applies only to a part of the Plaintiff's claim, or that any part of his claim is admitted, the Plaintiff may have judgment forthwith for such part of his claim as the defence does not apply to or is admitted, subject to such terms, if any, as to suspending execution or payment into Court or costs or otherwise as the Judge may think fit and the Defendant may be allowed to defend as to the residue of the Plaintiff's claim.

9. Leave to defend may be given uncondi-

tionally or subject to such terms as to giving security, or time, or mode of trial or otherwise as the Judge may think fit.

10. In all cases the Judge shall have power to give directions as to the further conduct of the suit.

11. The costs of and incidental to all applications made under this Chapter shall be dealt with by the Judge on the hearing of the application, who shall order by and to whom and when the same shall be paid or may reserve them to the Court at the trial: Provided that in the latter case, if no trial afterwards takes place or no order as to costs is made, the costs are to be costs in the cause.

12. Upon the hearing of an application under this Chapter the suit may, with the consent of the parties, be finally disposed of in a summary manner without right of appeal or referred to such officer and upon such terms as the Judge shall approve.

13. For the purposes of procedure under this Chapter any right to relief against forfeiture shall be deemed to be matter of defence, and upon the hearing of the application for judgment under r. 3 the Judge may, if he shall think fit, determine whether and upon what terms such relief shall be granted.

A judgment for recovery of land given under this Chapter on the ground of forfeiture for non-payment of rent shall have the same effect upon any right to such relief as if the judgment had been given after trial.

14. A special list shall be kept for the trial of causes in which leave to defend has been given under this Chapter, and in which the Judge is of opinion that a prolonged trial will not be requisite; and the Judge may at any time if he thinks it advisable order any such suit to be put into such list. All suits on such list shall be treated as short causes.

15. Unless the Judge otherwise directs the costs of one Advocate will on taxation between party and party, or as between attorney and client, be allowed to the Plaintiff and to each set of Defendants having divergent interests.

31-8-23.

Correspondence

SEC. 16, BENGAL TENANCY ACT—ITS TRUE SCOPE.

To

The Editor "Calcutta Weekly Notes."

Sir,

I shall feel obliged if you kindly insert the following in your esteemed journal with a view to the points raised therein being cleared up by authoritative exposition.

It is well-known that sec. 16 of the Bengal Tenancy Act is often pleaded as a bar in rent suits in the Mofussil Courts. The section runs thus: "A person becoming entitled to a permanent tenure by succession shall not be entitled to recover, by suit, distraint, or other proceeding, any rent payable to him as the holder of the tenure until the Collector has received the notice, etc., referred to in the last foregoing section." Now the question arises whether this objection can be raised by a tenant who has taken settlement, oral or written, from a person after he has become owner of the tenure by succession. Nextly, whether a tenant who, in a previous rent suit against him raised the objection, though the suit was decreed either owing to the landlord's compliance with the aforesaid condition or waiver on the part of the tenant, can legitimately raise the same objection in subsequent rent suits against him. As this is often done in the pleadings of Mofussil Courts, and as the points are not free from ambiguity, they require elucidation. It seems but reasonable that the penal provision should not be enforced in such cases, for, in the first case no succession has taken place during the tenancy of the Defendant, and in the latter two cases, no succession has taken place after the successful rent decree. It would be well if you discuss these points in the journal.

Truly yours,

Rajendra Nath Ghosh, B.L.,

Pleader.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, NOVEMBER 26, 1923. [No. 3.

Contents.

NOTES

Indian Bar.

The Government of India, as our readers are aware, have appointed a Committee to examine and report on (1) the proposals for constituting an Indian Bar, whether on an All-India basis or provincial basis with particular reference to the constitution, statutory recognition, functions and authority of a Bar-Council or Bar-Councils and their position *vis a vis* the High Courts; and, (2) the extent to which it may be desirable to remove the existing distinctions between Barristers and Vakils. The *personnel* of the Committee consists of men of ability, integrity and experience and we have no doubt that their recommendations will not only be comprehensive in their scope, but will also seek to do justice to all parties concerned. A Vakil of the Calcutta High Court, we feel, should have been on the Committee. It should not be forgotten that of the three Bills introduced into the Assembly in connexion with the legal profession, that of Mr. Neogi was the first in order of time and that under the present system the Vakils of the Calcutta High Court profess to be the worst sufferers. Their exclusion from the Original Side is absolute, whereas in Bombay and Madras, Vakils, subject to certain limitations, may be and are in fact enrolled as advocates and allowed to practise on the Original Side. In view of these facts, the Vakil Bar here should have been represented on the Committee. We hope that, if it is not too late, this omission may be rectified.

The question of the creation of an Indian Bar will, no doubt, be the main question before the Committee. Public opinion, so far as we can ascertain, is strongly in favour of such a Bar. The right of members of the English or Scotch Bar *as such* to practise in the Courts of this country is an anomaly and inconsistent with our present political status. In our opinion, if there is to be an Indian Bar, there should be one uniform theoretical and practical test for enrolment to it. A mere university degree or certificate from the Inns of Court should not be a pass-port to it. There should be an All-India Bar-Council or a Bar-Council in every province which will determine the requisite qualifications for those who want to practise the legal profession. It may be said that the effect of this will be to shut out European lawyers and that that would not be fair to the large number of Europeans who are settled or doing business here and who would naturally prefer to get their legal business done by Europeans. To this our answer is that the creation of an independent Bar will not necessarily have the effect apprehended. It will be possible to make arrangements with the authorities in Great Britain by which reciprocal rights of audience as between Courts in Great Britain and Courts in this country may be granted to members of the legal profession here and in Great Britain, and such an arrangement, if made, would secure the presence of a number of European lawyers whose services may be requisitioned by those who want them.

Elections.

We heartily congratulate Mr. B. Chakravarti, Mr. A. C. Banerjee and Dr. Pramatha Nath Banerjee, members of the Calcutta Bar, on their success at the polls. Needless to say that they will prove a valuable asset to the new Council and considerably add to its strength and independence.

Appointments.

We understand that Mr. B. L. Mitter and Mr. Langford James have been appointed to act as Officiating Advocate-General and Standing Counsel respectively. We congratulate them both.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The following appeals have been taken up by the Privy Council during the past week.

Oct. 18th. *Brij Narain Rai* v. *Mangla Prasad.* The hearing was concluded by the Full Board of this appeal which raised the question as to the meaning of "antecedent debt" so as to justify alienation of the joint family property by the manager of a Hindu family. The argument was concluded by *Messrs. DeGruyther, K. C.* and *B. Dubé* on behalf of the Appellants.

The Respondents were not represented, but *Mr. W. Wallach* appeared as *amicus curiæ.* Judgment was reserved.

Oct. 19th. *Khanderao Vithoba Kore* v. *Corporation of Bombay* concerned the powers of the Respondents to acquire surplus property for the purpose of recoupment under a street scheme. The Board dismissed the appeal without calling on the Respondents.

Messrs. L. DeGruyther, K. C. and *Kenworthy Brown* for the Appellants.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Respondents.

Oct. 19th and 22nd. *Obala Kandama Naicker Ayyan* v. *Kandasamy Goundar* (Madras). The suit out of which this appeal arose was brought by the Plaintiffs as reversioners to their grand-father's estate for a declaration that a compromise and alienations in pursuance thereof were invalid. Judgment was reserved.

Messrs. L. DeGruyther, K. C. and *Kenworthy Brown* for the Appellants.

Sir W. Finlay, K. C. and *Mr. K. V. L. Narasimham* for the Respondents.

Oct. 23rd. *Ramlal Hargopal* v. *Kisanchandra* (Berar). This was an appeal from an application under sec. 525 of the old Civil Procedure Code for filing an award. The subject-matter of the arbitration was the right to manage the affairs of the temple of Shri Sitaram Maharaj at Hyderabad, Deccan. The validity of the award is challenged by the Appellants who further contend that the Court was without jurisdiction. The argument is not yet concluded.

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Appellant.

Sir G. Lowndes, K. C. and *Mr. J. M. Parikh* for the Respondents.

Special leave to appeal was granted in *Nagubai Manglorkar* v. *Manghibai* (Bombay) and *Jacob* v. *Wills* (Bengal).

G. D. M.

25-10-23.

High Court Rules.

APPELLATE SIDE.

The following amendments in Chap. VI of the Rules of the High Court, Appellate Side, 1922, relating to appeals to the Privy Council, are published for general information. These Rules will come into operation, with effect from the 12th November 1923, the date on which the High Court will re-open after the annual vacation.

By order of the High Court,
N. G. A. EDGLEY,
Registrar.

ADDENDA AND CORRIGENDA TO THE RULES OF THE HIGH COURT, APPELLATE SIDE, 1922.

1. *Cancel* rr. 5 to 19, Chap. VI, at pp. 37 to 40, and *substitute* therefor the following:—

5. In all other applications regarding matters connected with appeals to His Majesty in Council, including petitions for leave to appeal, notice under r. 6 of this Chapter is necessary, in addition to any other notice herein prescribed.

6. Notice of an application under the preceding Rule shall be given by the applicant or his vakil by delivering to the proper person a copy of the petition, together with a notice in the following form:—

Take notice that this application will be made in Court on the day of 19 , at o'clock in the forenoon, when you are required to attend and show cause against the application, if you desire to do so.

7. All applications which have been duly filed with the clerk in charge of Privy Council Appeals will be set down in a list in the order in which they are notified to him. The cases in the list will be called on peremptorily in their turn, and if, by the fault of the applicant, the application cannot be proceeded with, it will be liable to be dismissed.

8. Every petition under Or. XLV, r. 2, Civil Procedure Code, shall be presented to the Stamp Reporter. Such petition shall be accompanied by—

(1) a court-fee of Rs. 16 for drawing up an estimate of the expense of preparing and forwarding to the Registrar of the Privy Council the record of the case;

(2) the fee for the issue of the notice of the application for leave to appeal to all the Respondents who did not enter appearance in the High Court at the hearing of the appeal;

(3) forms of notices to all Respondents duly filled up in the manner prescribed in r. 14.

If the Stamp Reporter finds that the petition is barred by limitation he shall forthwith lay the same before the Court for orders. If it is filed within the prescribed period of limitation he shall lay it before the Registrar with a report whether it has been filed in accordance with the Rules of the High Court and whether the stamps filed therewith are sufficient.

9. Upon receipt of such petition with the Stamp Reporter's report, the Registrar shall, in case the petition is not in proper form or is not accompanied by the requisite court-fee stamps, fix a period within which the additional fees may be paid or within which the petition may be amended or lay the same before the Court for orders. If such petition is sufficiently stamped and complies with the provisions of the rules, he shall, upon receipt of such petition, direct notice to be served on the Opposite Party to show cause why the certificate should not be granted.

10. Where more than one such application is made by the same party at the same time relating to decrees or final orders made in pursuance of the same judgment and only one record is required to be printed, the Registrar may order that only one court-fee of Rs. 16 be paid, or may refer the matter to the Court for orders.

11. As soon as the Registrar has directed notice to be served under r. 9 of this Chapter, the clerk-in-charge of Privy Council Appeals shall forthwith proceed to issue notice of the application for leave to appeal to all the Respondents who did not appear at the hearing of the Appeal before the High Court. He shall also serve notices of the application for leave to appeal on the vakils for the Respondents who appeared at the hearing before the High Court.

12. A notice which it is necessary to serve under these rules (other than notices under r. 6 of this Chapter) or under Or. XLV, r. 3, or r. 8, Civil Procedure Code, may be served in the manner provided by the Code for the service of notices, or unless the Court or the Registrar otherwise directs, upon any vakil who appeared for the party to whom notice is to be given in the appeal to this Court, unless the *vakalatnama* of such vakil has been cancelled with the sanction of the Court. If there is no vakil upon whom notice can be served, then unless the Registrar shall otherwise direct, the notice must be served upon the party in Calcutta through the Sheriff, or in the mufassal through the proper Court in the District in which such notice is to be served on paying the usual fee. The fee for the issue of the notice must be paid into Court at the time of filing the application. Such payment is to be made by stamp affixed to the notice intended to be served.

13. Nothing in these rules requiring any notice to be served on or given to an Opposite Party or Respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased Opposite Party or deceased Respondent in a case when such Opposite Party or Respondent did not appear either at the hearing in the High Court or at any proceedings subsequent to the decree of the High Court:

Provided that notices under sub-r. (2) of r. 3 and r. 8 of Or. XLV, Civil Procedure Code, shall be given by affixing the same in some conspicuous place in the Court house of the Judge of the District in which the original suit was brought and by publication in such newspapers as the Court may direct.

Notices under the proviso to this rule may be issued in the manner prescribed to the legal representatives of the deceased Respondent or Opposite Party in question without specifying such legal representatives by name.

14. (1) With the fee for the issue of the notice the applicant shall also file printed forms of such notice duly filled up in the prescribed form (*see* page 46, *post*), the date of appearance and the date of the notice being left blank.

(2) The information entered in the forms must be filled up in the vernacular (or in English if the party to be served is a European British subject or a resident of Calcutta) in a bold, clear and easily legible handwriting.

(3) The date fixed for the hearing of an application will be inserted in the form and the notice will be dated by the clerk-in-charge of Privy Council Appeals, before it is signed by the Deputy Registrar.

(4) The necessary number of printed forms of notice in the prescribed forms will be supplied to applicants or their vakils, free of cost, on application to the Forms clerk.

(5) The Registrar may, in his discretion, direct in any particular case that the forms of notice be entirely filled up in the office of the Court.

15. The date fixed for the hearing of the application shall be regulated by the time-table prescribed in r. 42, Chap. V.

16. As soon as it shall appear that the notice of the application for leave to appeal has been duly served on all the Respondents, the clerk-in-charge of Privy Council Appeals shall lay the application for leave to appeal before the Division Court for orders under Or. XLV, r. 3 (1), Civil Procedure Code.

17. Immediately after the grant of the certificate, the clerk-in-charge shall call for the transmission, ordinarily within seven days, of the record and all material papers.

18. The applicant shall be notified of the arrival of such record as soon as it is received in the office of the Court.

19. Whenever it shall be impossible for the lower Court to comply with the requisition within the time stated, such Court shall report the reason of its inability, and shall ask for such further time as may be necessary.

20. Within two weeks of a certificate for leave to appeal being granted, the applicant shall deposit with the Accountant of the Court a cash deposit of Rs. 100 towards the cost of the preparation of the Index.

21. Immediately after the deposit of the fee referred to in r. 20, the clerk-in-charge of Privy Council Appeals shall cause to be prepared an Index of all the papers to be included in Part II of the paper-book and a list of all papers, documents and exhibits in the cause not included in the transcript. Such list shall be typed as soon as it has been prepared, provided there is sufficient money in deposit to cover the cost of typing.

† NOTE.—The list of omitted documents should be inserted at the end of the Part to which they belong.

II. *Re-number* the existing rr. 20, 21, 22 and 23 as rr. 22, 23, 24 and 25.

III. *Re-number* the existing r. 24 as r. 26 and *insert* the following "Note" after item (*e*):—

NOTE.—When marginal notes only have to be inserted in Parts I and III of the paper-book, the editing charge should be calculated at the rate of two annas a page.

IV. *Re-number* the existing rr. 25—43 as rr. 27—45.

30-8-23.

Review.

THE LAW OF PRIVATE DEFENCE. *By Anukul Chandra Moitra, M.A., B.L., Calcutta. Butterworth & Co. (India), Ltd., 6, Hastings Street. Price Rs. 5.*

It seems extraordinary that the book under notice should be the first to deal systematically and exhaustively with a subject of such outstanding importance as the law of private defence. The plea of self-defence, as Sir Asutosh Chaudhuri points out in his foreword, is very far from being a technical plea. The right of private defence is a substantive right, and one which the Law Commissioners did not fail to observe, the circumstances of this country specially required should not be unduly restricted. That the right fails to receive adequate recognition in the actual administration of the criminal law in the Mofussil is in a large measure undoubtedly due to a want of proper appreciation of the fundamentals of the law of self-defence. These have been effectively and scientifically dealt with in the present treatise. After briefly discussing the basic principle of self-defence in the introductory chapter, the details of the subject are considered under the following heads: (1) Pleading, (2) Commencement of the right, (3) Continuance of the right, (4) Defence of property, (5) Justifiable homicide, (6) Acts of public servants, (7) State help, (8) Exceeding the right and (9) Non-criminality and self-defence. The topics dealt with under each of these heads are logically arranged and lucidly analysed with reference to statutory provisions and the case-law, the English cases being referred to wherever they are calculated to throw light upon the law. The subject-index provides further facilities for handling the material for purposes of practice. The book is handy and for its price fairly well got up. No criminal lawyer and Judge should be without it, and it is bound to secure an honoured place in every lawyer's library.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, DECEMBER 3, 1923 [No 4

Contents.

NOTES

The present election and its lessons.

There is no question that the *Swarajya* candidates have scored a singular success at the present election to the Bengal Legislative Council. The significance of this is that the verdict of the country is in favour of early establishment of *Swaraj* or provincial autonomy and responsibility in the Central Government. There are no two opinions in the country about this. The only difference of opinion that exists between the more sober section of practical politicians and our idealist friends is that the former apprehend that it will be suicidal to attempt to wreck the reforms which were won by life-long exertions of their predecessors. We believe that the *Swarajya* party will be convinced of the impracticability of their procedure when they proceed to work in Council. From the very nature of the constitution of the Council they will find that they cannot command a majority in the Council without forming a coalition with the representatives of the various sections of the Indian communities and interests. If the *Swarajya* party members are agreeable to form such a coalition, they will have to modify their views with regard to many matters, especially about wrecking the Council. Then it is said that the members of the *Swarajya* party are pledged not to assume any office in the provincial Council. If they mean by this that none of them would assume the office of a minister or ministers, their party will be unable to control the policy of Government or bring about a dissolution when the executive Government may act irresponsibly. If they agree to the election of ministers from amongst the coalition candidates and if such ministers are not prepared to oppose every Government measure, they will not be able to have such ministers removed unless they can command an absolute majority in the Council. If they oppose the ministers selected from amongst members who do not belong to their party, without forming any coalition, they will be in a perpetual minority and their opposition or resignation will be ineffective.

The ministerial offices are not Government service in the ordinary acceptance of the term. A minister is a servant of the Council and the public. It has to be given up no sooner than one forfeits the confidence of the Council. The members of the *Swarajya* party may very properly say that they would not accept any salary, but we see no sense in their saying that they would not assume ministerial offices which are stepping stones to *Swaraj*. After all, if they resile from their pledge and their leaders assume ministerial offices, they will even then have to look to coalition support in Council and for this they will have to modify their policy of obstructing every measure or of wrecking the Council. If the *Swarajya* party desire at any time to bring about a dissolution of the Council on any question on which the Executive Government and the Council may differ, it may only be done if any minister or ministers oppose such Government measure or policy in the Cabinet Council of the Governor and if outvoted or overruled there, such minister or ministers oppose such measure or policy in the Council with the support of a majority of members. It is by such means that dissolution of the Council may be brought about. The resignation of individual members or even of a party, who do not command absolute majority in the Council, imposes no obligation on the Governor to dissolve the Council. If a group of members resign their seats as a protest against any Government measure, the seats will be declared vacant and the constituencies will be called upon to elect members in their places. These considerations will show that the avowed object of the

Swarajya party of wrecking the Council by entering it is chimerical. They can only achieve their object of securing *Swaraj* by forming a coalition within the Council, following a course which will commend itself to the majority of members representing different communities and interests and making use of the constitution to make the Executive responsible to the Legislature, which is the aim and end of *Swaraj* in every self-governing country.

The Indian Bar Committee.

The Indian Bar Committee now holding meetings in Bombay have issued a questionnaire inviting public and professional opinion on a large number of points affecting the legal profession in all its branches. Space does not permit us to print it in our columns. But members of the profession will do well to peruse it carefully and ventilate their views in the press. One of the questions mooted is, whether "the control of matters relating to professional conduct and etiquette might be removed from the hands of the High Court." In our opinion, if there is to be a Central Bar Council or a Bar Council in every province, all matters of professional etiquette and discipline should be exclusively within their jurisdiction. It has been suggested that during the non-co-operation movement, the judges in dealing with practitioners under the Legal Practitioners Act for having taken part in the movement were influenced by their political views. True or false, judges should be placed above any such suggestion.

Lord Justice Scrutton commenced his judgment in the *O'Brien* case with the following observation :—

"This appeal raises questions of great importance regarding the liberty of the subject, a matter on which English law is anxiously careful and which English judges are careful to uphold. As Lord Herschell says in *Cox* v. *Hakes* : 'The law of this country has been very jealous of any infringement of personal liberty.' This care is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious. It is one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech, if you are really willing to allow it to men whose opinions seem to you wrong and are dangerous; and the subject is entitled only to be deprived of his liberty by due process of law, although that due process, if taken, will probably send him to jail."

The Bengal Government, we hope, will carefully weigh these words when they are again tempted to apply Reg. III.

Lord Hewart, the Lord Chief Justice, speaking at a general meeting of the Magistrates' Association in London, exhorted his audience to think twice and thrice before sending a man or woman to prison for the first time. In most persons, he said, the notion of going to prison, when it was still in the future, was a dreadfully repugnant one. But once a person had gone to prison, it proved, he feared, a place so much more comfortable than any body had contemplated that one element, at any rate, in that repugnance permanently disappears after the first imprisonment. It is a common thing for our Magistrates in security cases to send a man to prison in default of finding security. It is equally a common thing for them to inflict heavy fines on accused persons without considering whether they have any means to pay them, and, in default, to send them to prison. It is to be hoped that these guardians of criminal justice will recall the words of Lord Hewart before they decide to send a man to jail for the first time.

LONDON NOTES.

(From our Correspondent.)

Two Boards are still sitting, Lord Dunedin presiding over that in the Council Chamber where appeals are being heard that deal more especially with Indian law. In the Board Room Lord Atkinson presided over a Board composed of Lords Shaw, Wrenbury, Carson and Younger. The cases heard by the latter Board were :—

Macmillan & Co., Ltd. v. *K. & G. Cooper* (Bombay) and *The I. G. Nav. and Ry. Co.* v. *The Dekhari Tea Co., Ltd.* (Bengal).

The former (heard on Oct. 25, 26, 30) raises a question of copy-right law. The Appellants published extracts from North's translation of Plutarch's life of Alexander and they complain that the Respondents have published a volume which contains almost identical extracts and notes. Judgment was reserved.

Sir John Simon, K. C. and *Messrs. Mackinnon, K. C., Macgiltwray* and *Macmillan* for the Appellants.

Messrs. W. H. Upjohn, K. C., E. B. Raikes, and *Harold Hardy* for the Respondents.

The other case (heard on Nov. 1, 2) raised a question of the liability of the Appellants for damages for goods destroyed by fire during carriage. Judgment was reserved.

Messrs. Dunne, K. C. and *K. Brown* for the Appellants.

Messrs. Neilsan, K. C. and *Spence* for the Respondents.

In the Council Chamber the following is the record of business :—

Satya Narayan Singh v. *Satya Niranjan Chakravarti* (Patna) (heard on Oct. 26).

The judgment of the Board in this case which was heard in May last was delivered by LORD SUMNER. The questions in issue are of importance and the judgment deals at length with the incidents of *ghatwali* tenures. The broad outlines of the decision are to the effect that the tenure in regard to which the appeal arose was a Government *ghatwali*, that it was inalienable, and that it remained so although the services of the *ghatwal* were no longer exacted.

Pujari Lakshmana Goundan v. *Subramania Ayyar* (Madras) (heard on Oct. 26, 27). The question at issue in this appeal is whether the temple of Sri Kandaswami at Kalipatti is the private property of the Appellants or is a public religious trust. The Board did not call on Counsel for the Respondents but reserved judgment.

Messrs. L. DeGruyther, K. C. and *B. Dubé* for the Appellants.

Mr. Narasimham for the Respondents.

Kanga v. *Kanga* (Bombay) (heard on Oct. 29, 30) raises a question as to the validity of a Will and undue influence by the Appellant is alleged. Judgment was reserved.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellant.

Mr. T. Bucknill for the Respondent.

Ram Singh v. *Ram Chand* (Lahore) (heard on Oct. 30). This was a suit for the dissolution of partnership and accounts. The High Court decided that the Plaintiff was not entitled to relief owing to his destruction and falsification of the accounts. The Board delivered judgment allowing the appeal.

Messrs. Dubé and *Bishan Narain* for the Appellant.

Messrs. DeGruyther, K. C. and *Parikh* for the Respondent.

Baijnath Singh v. *Jamal Bros. & Co., Ltd.* (Upper Burma) (heard on Oct. 30, Nov. 2). A suit to enforce a mortgage of oil wells. Judgment was reserved.

Messrs. DeGruyther, K. C. and *Parikh* for the Appellants.

Messrs. N. Micklem, K. C. and *Dubé* for the Respondents.

Walireddi Ayyareddi v. *Adusumilli Gopalakrishna* (Madras) (heard on No. 1) raised a question whether a purchaser of the equity of redemption discharging a mortgage is not entitled to subrogation. Judgment was reserved.

Mr. Narasimham for the Appellant.

Mr. Dubé for the Respondent.

Nagendrabala Dasi v. *Dinanath Mahish* (Bengal) (heard on Nov. 1 and 6). One of the Appellants is a pleader and had acted for the Respondents in suits relating to the properties in dispute, the other Appellant is his wife and the lower Courts held that he had bought the suit properties *benami* in her name and the suit was brought by the Respondents for a reconveyance. Judgment was reserved.

Messrs. L. DeGruyther, K. C. and *Dubé* for the Appellants.

Mr. A. Majid for the Respondents.

Nainapillai Marakaryar v. *Ramanathan Chettiar* (Madras) (heard on Nov. 6). A suit for ejectment raising the question whether the trustees of a temple held the *melwaram* as well as the *kudivaram* rights in certain property.

Sir G. Lowndes, K. C. and *Mr. Narasimham* are opening the case for the Appellants.

G. D. M.

8-11-23.

Review.

THE INDIAN CANDIDATE AND RETURNING OFFICER. *By E. L. L. Hammond, I.C.S., C.B.E., with a Foreword by the Rt. Hon. E. S. Montague. Oxford University Press.*

This is a manual giving the law and procedure of elections in British India and Burma. Mr. Hammond is well-known as an authority on the subject through his work on Indian Electioneering and Election Petitions which he published in 1920 and 1921. The work under review covers the grounds of his two previous works but is in every respect an altogether new work. Mr. Hammond was a member of the Electoral Rules Revision

Committee. This, together with his previous experience in framing and editing the previous election rules and regulations, has furnished him with a rare opportunity of compiling a comprehensive election manual in which the rules which are common to all India as also the provincial regulations are to be found. Evidently Mr. Hammond's work was under preparation and in the press before these rules and regulations were finally revised by the Government of India and the Provincial Governments. We have compared some with the final Government publications. There is some discrepancy in the numbering of the schedules giving the rules and regulations but on the whole the rules and regulations are correctly given. The chief merit of the work does not rest in the compilation. Its chief value consists in the guidance that it gives to candidates, their agents, the voters and the returning and other officers concerned in conducting the election. The suggestion it contains for party organisation will be found very valuable. In England, in every constituency there are party organisations of those who represent different interests and political views, such as, the Conservatives, Liberals and Labour. They have their permanent officers and offices and each of them take care to keep an up-to-date register of voters and keep a note of their own supporters. For such purposes they constantly apply to the officer in charge of electoral rolls for excluding names of deceased and disqualified persons and the inclusion of qualified persons. Each party organisation selects its candidates and publishes its political programme. A re-adjustment of party supporters takes place in accordance with the extent of support that such political programme receives amongst the voters. Each candidate also expresses his views about local questions. Voters are influenced chiefly through views of candidates announced at public meetings and through the public press. Each party keeps a vigilant watch over any attempt at corrupt practice. In this way English elections and public life have become much more clean than it used to be before. Mr. Hammond's book will be found a valuable guide in this respect.

Without organisation of parties the election in India will continue to be a very expensive affair too and able men of humble means will never get a chance. Each party should have a party fund to which its supporters and sympathisers contribute.

There is a great deal of misapprehension in the mind of persons who are deeply interested in the present election with regard to contributions to party funds. It is quite legitimate for those who belong to any particular party or who sympathise with them to contribute to party funds for election purposes. There is no impropriety on the part of party in selecting a candidate from amongst them on condition that he should contribute a substantial sum of money to the party fund. But it amounts to bribery and corruption both according to the election rules in this country and in England for any candidate or his party to withdraw or propose or offer to withdraw on payment or any promise of payment of any sum of money either to the candidate or his party by another candidate who does not belong to the party. We invite attention in this connection to the rules relating to corrupt practice and bribery in Sch. V (in Hammond's book put down as Sch. IV), Parts I and II. Part I, r. 1 says: "A gift, offer or promise by a candidate or his agent, or by any other person with the connivance of a candidate or his agent, of any gratification to any person whatsoever, with the object, directly or indirectly, of inducing a person to stand or not to stand as, or to withdraw from being, a candidate" amounts to bribery. Then again in the same Schedule, Part II, r. 3, says: "The receipt of, or agreement to receive, any gratification, whether as a motive or a reward by a person to stand or not to stand as, or to withdraw from being a candidate" amounts to bribery. The electoral rules contemplate by using the term "bribery" that for any breach of such rule an election may not only be declared void but for such an offence a person may be punished under sec. 171E, Ch. IXA of the Indian Penal Code. Reference may be made to Ch. XI of Mr. Hammond's work. The chapters on corrupt practices and election petition in Mr. Hammond's book are very valuable and should be perused by every one interested in election affairs. Mr. Hammond has given references to English standard works and cases throughout his book, which makes it very helpful. Representative Government is a blessing no doubt but if it brings in its train bribery and corruption it would be a curse to our countrymen. It is therefore of the utmost importance that our party leaders and public men and the people at large should make every endeavour to keep public life clean in this country.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, DECEMBER 10, 1923. [No. 5.

Contents.

NOTES

Governor and his duty in selecting ministers.

We are very much surprised at the misconceptions prevailing amongst many new and old members of the Bengal Council and also amongst journalists as regards the responsibility of H. E. the Governor with regard to the selection of ministers. Suggestions are being freely offered to H. E. the Governor of Bengal for the selection of certain individuals by name as the next ministers. It is commonly believed that the power or discretion of the Governor in this respect is absolute, unfettered and unlimited. But those who are familiar with the Joint Committee's report and appreciate the significance of para. 6 of the Instrument of Instructions to the Provincial Governors and know how such instructions to the Dominion Governors have been interpreted by the Colonial Office in cases of conflict between the Governor and the Legislature in the Dominions, are aware that the power of the Governor in this respect is a strictly constitutional power which is governed by the parliamentary convention that obtains in this behalf in the United Kingdom and the Dominions. Sec. 52 (*1*) of the Government of India Act confers on the Governor the same absolute powers that H. M. the King has in appointing and dismissing his ministers. But such powers can only be exercised subject to parliamentary practice and conventions.

Like H. M. the King in the United Kingdom, the Governor here, as those in the Dominions, has to ascertain after a general election, which party is likely to command majority in the House. He has to send for the leader or leaders of the party and ascertain from them who would be acceptable to the party as ministers. The recent instance, when speculation was rife whether Lord Curzon, the Foreign Secretary or Mr. Baldwin, occupying a much humbler position, would be selected as Prime Minister and the ultimate selection of Mr. Baldwin, according to party wishes, is very instructive in this connection. The Dominion Governors, who were formerly erratic in this respect, now-a-days follow the same practice. Interpreting para. 6 of the Instrument of Instructions to the Provincial Governors in India in the light of the recommendations of the Joint Parliamentary Committee, there is little doubt that they should follow a similar practice here also..

So we repeat our advice to the newly elected members of the Provincial Council that they should meet and form a coalition and the coalition party should settle amongst themselves as to whom they would like to take charge of the ministerial portfolios. This would relieve H. E. the Governor of the responsibility in selecting ministers. We understand that there was a ministerial party in the Bengal Council. Very few of their members have been elected at the recent election. So H. E. the Governor would not, as he cannot constitutionally, offer any ministerial portfolio to any member of that party. The reason for this is also very simple. If he did, he would have to change his ministers after a motion of want of confidence is passed against them. Then the Governor will have to select his minister from the majority party by the process we have already explained. It would therefore be wise on the part of the Governor to select such ministers only as would command the confidence of the majority immediately after the newly elected members have taken their oath.

The members also have a serious responsibility with regard to the matter. They must learn to act together and select their own leaders in a spirit of compromise. Unless

they do this, they will not be able to work their way up to parliamentary government or *Swaraj*. The only other method is revolution, which is admittedly out of the question. We have always maintained that the idea of attaining *Swaraj* by wrecking the Councils is no less absurd and that it can only be attained by the promotion of unity and co-operation amongst the members of Council and thus availing themselves of the constitutional powers to make the executive responsible to the legislature. We have explained before how popular ministers with the support of the House can control the policy even of the Governor and his Executive Council. The Joint Committee expressly says that a Governor may discharge an opposing minister, order dissolution, but on re-election if the ministers return with a majority, the Governors should abide by the advice of the ministers. What a pity that so few of our members know so little of their constitutional powers.

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The late Mr. Inverarity of the Bombay Bar.

For the last four decades the late Mr. Inverarity was just as much an outstanding figure amongst the members of the Bombay Bar as Mr. Jackson has been in Calcutta. Both have been noted for remarkable personality, force of character, sturdy independence and great ability which made them a terror to their opponents. Mr. Jackson in the zenith of his career was popularly known as "Tiger Jackson." Inverarity, on the other hand, was a great sportsman and as his favourite pastime outside the Bar was hunting down lions, he was known as a lion-hunter, an appellation which was not altogether inappropriate in many a forensic contest. While Bombay could boast of one Inverarity, Calcutta had many such stalwarts who were more than a match for him in any fair forensic fight at the Bar. In Calcutta we have always appreciated merit and been above all provincial jealousy. Thus, about 32 years ago when Mr. Inverarity came down from Bombay with a junior from another provincial Bar to defend Jacob in the Nizam's diamond case in which Jacob was prosecuted before the Calcutta High Court Session, the members of the Calcutta Bar welcomed him and his coleague in quite a sportsman-like spirit. The Bar in India is distinctly the poorer through the death of this distinguished advocate.

Correspondence.

To

The Editor, "Calcutta Weekly Notes."

Sir,

I shall feel much obliged if the following few lines find space in your much esteemed journal. There is now a distinct pronouncement from the highest authority that the present delay in civil litigation amounts to a denial of justice. Their Lordships of the Privy Council exposed this in no uncertain terms (which is the subject-matter of your editorial published in your issue dated 18th of june last); the Viceroy repeated the same thing in his speech at the Lahore High Court on 23rd October 1923 published here on 24th October 1923. The press persistently clamour against this delay of civil justice and the cognate subject of the corruption of the ministerial officers of Civil Courts; this last subject is under discussion in the Behar Council. But it is a matter of surprise that while this condemnation of the present system is proceeding from the highest authority on the one hand, there is the same effort going on to perpetuate it on the part of those entrusted with the administration of the machinery, I speak specially, of the mofussil Courts.

The present delay is largely responsible for the idea that contested civil suits or appeals need not be decided before they are nearly twelve months old. The direct consequence of this standard is that Courts are abolished in places where it is found that there are not too many of such suits or appeals pending there. How can the public expect speedier justice so long as this system continues? I shall quote a notification in the *Calcutta Gazette*, dated 31st October 1923, published after the pronouncement of the Viceroy to illustrate this:—"Babu Romesh Chandra De, Officiating Additional Munsif of Dacca, now employed at Barisal in the District of Backergunge, is appointed to act until further orders, as a Munsif in the District of Jessore, to be ordinarily stationed at Bhanga, but for the present to be employed as Additional Munsif in the District of Rajshahi." Any intelligent reader will observe that this notification means that this officer could not find any work in the Districts of Dacca, Barisal and Jessore. Now we may ask if there is no delay in civil litigation in those districts. Undoubtedly the answer would be that there is.

There are two other notifications in the same Gazette which point to the same conclusion.

Thus the foremost remedy is to employ all the available Courts in bringing down the age of contested suits and appeals. Once the duration of suits and appeals has been brought down, say to three months, the number of Courts may be reduced to the normal level. There is another advantage in the speedy disposal of cases; there will be a fewer number of records to be dealt with every day, as the cases will come before the Court only during three months instead of rotating throughout the year, and thus afford the presiding officers more time to direct their personal attention to the work that is now left to clerks, and thus less opportunity for the ministerial staff to blackmail the litigant public.

Yours, etc.,
JUSTICE.

Reviews.

THE CONSTITUTION AND JURISDICTION OF COURTS OF CIVIL JUSTICE IN BR. INDIA. *By Sir Earnest John Trevelyan, D.C.L. Thacker, Spink & Co., Calcutta and London. Price Rs. 35.*

The name of the work is sufficient to convince one of the patience and labour involved in compiling a work of the kind. The subject is almost cyclopaedic and it is a pleasurable surprise to find that all essential information regarding the subject covering such a wide field is given within 658 pages. From the High Courts in the Presidencies and Provincial capitals to the Courts of village Panchayat, the constitution of different grades of Civil Courts and their jurisdiction—original, Appellate or revisional are sufficiently set out. The magnitude of the ground covered may well be conceived from the fact that the territorial limits extend from Assam to Aden and its dependencies on the one hand and from North Western Frontier Province, Beluchusthan and the Andaman and Nicobar Islands on the other. It must not be supposed that all this information is given in a haphazard way on any territorial basis. The constitution and jurisdiction of the different classes of Courts are classified under appropriate headings. The High Courts are first dealt with and the statutes and Letters Patent relating to them are not only given *in extenso* with very valuable annotation supported by references to the case-law on the subject. Next, the Subordinate Civil Courts are dealt with, giving references to enactments and cases concerning their jurisdiction. The general provisions of the Civil Procedure Code relating to the jurisdiction of Civil Courts and that of the High Court in respect of appeals, reference and revision as also of appeals to the Privy Council are specially dealt with in a separate part. Part V deals with jurisdiction of Courts under special Acts, such as those relating to Income Tax, Limited Companies, Patent, Designs, Copy-right, Municipalities, Lunacy, Marriage and Divorce, etc. Part VI deals with special Tribunals, such as, Improvement Trust, Land Acquisitions. The work closes with an account of the Revenue Courts in different parts of India. The information given under these heads may not be quite exhaustive in every case but as references are given to the enactments relating to the same, further information is readily available. This work has removed a great want that legal profession has long felt. To a jurist or an academic lawyer it is by no means of less interest. We congratulate the author for this valuable contributions to the Indian legal literature.

THE LAW OF MINORS IN BRITISH INDIA. *By P. Ramanatha Aiyar, B.A., B.L., Vakil, Trichinopoly. Madras Law Journal Office, 1922.*

This work deals with the rights and liabilities of minors. It commences with an introductory chapter in which the jurisprudence and legal history of the subject is given not merely from English law, for the provisions of the Roman, Hindu and Mahomedan law are also noticed in this connection. Coming to the practical portions of the work we find that the rights and liabilities of the minors in respect of contracts, torts and acquisition of property are very fully dealt with, giving references to the High Court and Privy Council decisions from the official and non-official reports. The adjective law on the subject such as the proof of age, domicile, estoppel, ratification, avoidance, is also treated with care. The author acknowledges his indebtedness to such standard works as Trevelyan on Minors, but he has drawn his materials from various sources and carefully edited them in a manner which makes it a quite comprehensive work on the subject. The industry and labour that the author has bestowed in the preparation of the work is very commendable and practising lawyers will find it very helpful as a work of reference.

THE LAW OF GUARDIANSHIP AND PROCEDURE. *By P. Ramanatha Aiyer, B.A., B.L., Vakil, Madras Law Journal Office. 1923.*

This is a companion work to the one above reviewed. It deals with the relationship of guardians and wards and the procedure in suits by and against minors. The subject is of much wider range as it has to deal with the personal law of the Hindus, Mahomedans, Budhists, Christians and other communities. The law as administered in British India in this respect is largely borrowed from English law, the principles of which are adequately noticed and illustrated by reference to cases. The general law with regard to guardianship and the rights and liabilities of guardians are explained. The personal laws of the different communities are very appropriately dealt with, supported by case-law. Chapters are devoted to Court of Wards. Pleadings and the procedure in suits by and against minors will furnish practical guidance to the profession. A chapter is devoted to offences by and against minors. In the appendix the enactments of general application as also the provincial enactments relating to the subject are given. On the whole, it is an up-to-date comprehensive work on the subject which will surely be found useful by practising lawyers.

GHOSH'S DIARIES. *Compiled by J. N. Ghosh. Published by M. C. Sarkar & Sons, Law Book-Sellers and Publishers, 90/2A, Harrison Road, Calcutta.*

As many as six varieties of Ghosh's Diaries have been sent to us for notice. The Kohinoor Diary priced Rs. 1-6 and the Lawyer's Diary priced Rs. 1-4 have similar contents, but the former is flapped. Besides a large repertory of miscellaneous information, such as are usually found in publications of this kind, it will interest lawyers to know that there are in both issues tables of court-fees, stamp duties, registration-fees, the limitation schedule, model legal forms, table of statutes, a digest of recent cases and a calender for two hundred years. The remaining four issues are pocket diaries, two (one of which is flapped) priced Re. 1 and as. 12 respectively and giving a day to a page containing much useful information of constant reference, including legal information of the kind mentioned above, a third, two days to a page diary, flapped and priced as. 10 but otherwise like the two previously mentioned, and the last, a small day to a page diary, which will go into any pocket and fitly named the "Gem," suited for general use, and having prefaced to it just a list of public holidays, indispensable postal information and a table of memorable dates which, if not useful, are at any rate interesting. The get-up of all the issues is praiseworthy.

THE BIHAR AND ORISSA MUNICIPAL ACT and other laws relating to Municipalities. *By S. K. Sahay, Barrister-at-Law, Calcutta : Butterworth & Co. (India) Ltd., 6, Hastings Street. Price Rs. 10. 1923.*

This is the only commentary on the Bihar and Orissa Act, VII of 1922, we have come across and, with an appendix of related statutes and rules, covers all phases of Municipal activity within the province and is in consequence bound to provide a fairly complete book of ready reference on the law relating to Municipalities applicable to the province. The Appendix contains the Bengal Vaccination Act, 1880, the Vaccination Rules, the Cattle Trespass Act, 1871, the Local Authorities Loans Act, 1914, the Loans Act Rules, the Municipal Taxation Act, 1881, the Government Buildings Act, 1899, the Notifications relating to Taxation of Railways, the Motor Vehicles Act, 1914, the Bihar and Orissa Places of Pilgrimage Act, 1920 and the Rules thereunder, the Bengal Ferries Act, 1885, the Bihar and Orissa Primary Education Act, 1919 and Rules thereunder, the Bengal Births and Deaths Registration Act, 1873, the Election Offences and Inquiries Act, 1920, the Bihar and Orissa Food Adulteration Act, 1919 with Rules, the Bihar and Orissa Municipal Survey Act and Rules and Orders under the Municipal Act. Mr. Sahay has made full use of his experience as Chairman of the Ranchi Municipality. An introductory note by Mr. M. G. Hallett, Secretary to the Bihar and Orissa Ministry of Local Government, comparative tables of the old and the new Acts and a carefully prepared subject-index enhance the value of a treatise which should be in the hands of all lawyers and laymen interested in the Municipal administration of the province. It is a substantial piece of work honestly executed and shows immense industry and much judgment. The get-up is all one could wish.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, DECEMBER 17, 1923. [No 6.

Contents.

NOTES

Ministers, if officials.

We stated in our last issue that a minister is not a Government servant in the ordinary or legal sense of the term. We shall now quote chapter and verse to show this. In Part V of the Government of India Act which deals with Local Governments, sec. 52 (*1*) says that the "Governor . . . . may appoint ministers, not being members of his Executive Council or other *officials*, to administer transferred subjects, etc." That a minister on being so appointed does not become an *official* or cannot be said to accept *office* is expressly stated in sec. 80B of the Act. This section says in the first place, "if any *non-official* member of the local Legislative Council, whether elected or nominated, accepts any *office* in the service of the Crown in India, his seat in the Council shall become vacant." Thus if a minister's office was considered an *office* in the service of the Crown he would have to resign on assuming office. But a minister on appointment is not required here to vacate his seat and seek re-election, as in England. Proviso to sec. 80B provides an express saving in this respect in the following terms :—"Provided that for this provision (*i.e.*, sec. 80B) a minister shall not be deemed to be an official and a minister shall not be deemed to accept office on appointment as a minister." Then amongst the definitions, with which the Act concludes, we find it stated quite at the end of sec. 134 that "the expressions 'official' and 'non-official,' where used in relation to any person, mean respectively who is or is not in the civil or military service of the Crown in India." In terms of this definition also, which is quite general, a Provincial minister cannot be said to be a servant of the Crown or an official or to have accepted office under the Crown. That he shall hold office *during the Governor's pleasure*, as provided in sec. 52 (*1*), means, that he may be removed from office forthwith, without notice or without the assignment of any reason. The significance of this is that on an adverse vote of the Council or when the Governor is of opinion that he does not command the confidence of the House, he may be dismissed at once. The proviso in sec. 52 (*1*) which says that his salary may be reduced practically without any limit by the vote of the Council, makes the Council, for all intents and purposes, his master and his responsibility is primarily to the Council.

May a non-member be a minister.

Another misconception that is current with regard to the office of a minister is that a Governor of a province may appoint as minister any non-official member he likes and retain him in office for six months. This misconception has evidently arisen from a failure to appreciate the constitutional significance of sec. 52 (*2*) of the Government of India Act which says : "No minister shall hold office for a longer period than six months, unless he is or becomes an elected member of the local legislature." Similar provisions occur in some of the Dominion constitutions. The meaning of it is simply this that if the Governor with the concurrence of the party who command a majority in the legislature summons a party leader who may not be a member of the Council, or one who may have been defeated at the election, he may be appointed a minister. But if he is so appointed he must seek election and get elected within six months, otherwise he is to vacate office on the expiry of six months. For a minister so appointed, it would not be difficult to get elected because some member of his party will vacate his seat and get him elected in his place. The provision above quoted only gives him a reasonable time for such election. Further, it gives the Governor and members of the Council a very wide choice in the election of a capable minister. That cl. (*2*) in sec. 52 does not mean that the Governor, as we have already explained in our last issue, can arbitrarily offer the ministerial portfolio to any one he likes, is evident for the obvious reason, that if he did so against the wishes of the House, the Council may vote want of confidence in the minister and he will have to be removed by the Governor. Under the unwritten English constitution a prominent party

leader, although not a member of Parliament, may be included in the cabinet. For instance, the late Mr. W. E. Gladstone after he lost his seat at an election was accepted as a cabinet minister by his party and held the portfolio of Council Secretary for some time. He was subsequently elected as a member of Parliament. It is for providing for such contingencies that the cl. (2) in sec. 52, quoted above, has been introduced in the Indian constitution. It does not mean that a Governor can appoint or keep in office an outsider or an ex-minister or any minister he likes for six months against the wishes of the House. That our view is correct is supported by the constitutional course recently adopted by H. E. the Governor of Bengal.

The Bar and professional courtesy.

We mentioned in our last issue that the late Mr. Inverarity and members of the Bar from other High Courts were allowed to appear before the Calcutta High Court without any objection from the Calcutta Bar. But the welcome we accorded to members of the Bombay Bar was denied to members of the Calcutta Bar when they went to Bombay to defend Balgangadhar Tilak in the *Kesari* sedition trial. As Mr. Inverarity was not available then for defending Mr. Tilak, the late Mr. L. P. Pugh, Mr. William Garth and Mr. J. Chaudhuri went down to defend Tilak in Bombay. On their arrival, the members of the Bombay Bar objected to their appearing on behalf of the defence, because they came from Calcutta and were not members of the Bombay Bar. When they applied formally to the Hon'ble Judges of the Bombay High Court for leave to appear, Mr. Pugh was given permission on the ground that no Counsel of his standing was available in Bombay but his juniors were not. Mr. Davar, who subsequently became a High Court Judge, appeared for Tilak as Mr. Pugh's junior. Mr. Garth and Mr. Chaudhuri, however, sat next to them for taking notes. As they sat there in their robes, some members of the Bombay Bar considered this too as an infringement of their privilege and they invited the attention of the Court to it, whereupon Mr. Justice Stratchey asked them to put away their gowns, which they did. They, however, remained in Court, watched the case, took notes and instructed Mr. Pugh as mere members of the public. This is a case which would be full of lessons to the Indian Bar Committee. We know of many subsequent occasions, when the members of the Calcutta Bar raised no objections to members from other Provincial Bars appearing before the Calcutta High Court in special cases in the interest of their clients.

A Redoubtable Litigant.

The death of Mr. Shrager, well-known in Calcutta, will recall to many of our readers what is known as the *Old Furniture case.* With reference to this case, our English contemporary, the *Law Journal*, writes as follows :—

"With the merits of the deceased gentleman's action against the antique furniture dealers, this journal has nothing to do. It is, however, impossible to withhold a certain professional admiration from a litigant so stout-hearted. For twenty-five days he bore the brunt in the Court of the Official Referee. Dissatisfied with the decision there, he appealed to the Divisional Court, and there he was bold enough to put forward the case that the cause had been placed in the list of a particular Official Referee by a process which was, not unfairly, described as "Jockeying." Ultimately the Court of Appeal dealt with the matter, partly in favour of and partly against the Appellant; but the Lords Justices all took occasion to animadvert on the irregularities that had attended the placing of the case in the list. Lord Justice Atkin, commenting on the fact that the Plaintiff naturally objected to a judge who was a near relative of his opponent's leading counsel, repeated Lord Reading's well-known dictum that—"It is of as much importance that justice should seem to be fairly administered as that it should in fact be so"; and he added: "To obtain by improper means a particular judge may be as bad as to obtain a particular judgment." These great principles, which should be engraved on the heart of every judge and officer of the law, were, then, asserted by the late Mr. Shrager, so that his litigious career, if it ruined him financially—as it is believed to have done—was, at any rate, of considerable value to the community."

The Bench and the Bar.

Talking about judicial unfairness, this commodity is not a monopoly of any one country. It exists wherever there are law courts, judges and lawyers. Personal likes and dislikes, social and political views, in fact, all the infirmities of body and mind to which man is subject, play their part in judicial pronouncements. It is for the public, and, in particular, the legal profession, to keep them within reasonable limits so that they may not result in any serious miscarriage of justice. Judges also will do well to remember that judicial scenes and proceedings take place in open Court, and that, although the public do not rush into print as often as they might, they

are not slow to form their own views about judges and their idiosyncrasies. It cannot be too strongly impressed on them that they occupy a most responsible position and that as the present Lord Chief Justice remarked in the case of *The King* v. *Hurst and others*, that the rule of conduct for them "is that nothing is to be done which so much as creates even a suspicion that there has been an improper interference with the course of justice." While on this point we cannot do better than quote the following from Lord Bacon.

"Patience and gravity of bearing is an essential part of justice, and an overspeaking judge is no well-tuned cymbal. It is no grace in a judge first to find that which he might have heard in due course from the bar, or to show quickness of conceit in cutting off evidence or counsel too short or to prevent information by questions, though pertinent."

A great deal is now being said and written about the dignity of the legal profession and as to what steps should be taken to maintain it. The dignity of the profession, we need hardly point out, is in the hands of those who practise it. Differences between the Bench and the Bar will arise from time to time. It is to nobody's interest nor is it consistent with the dignity of the Bench and the Bar that they should be magnified. As Mr. Justice Richardson said in a case (reported in 27 C. W. N., at p. 98).

"After all men are human whether on the Bench or at the Bar and in the heat of the moment, or on the impulse of the moment expressions may be used on one side or the other which are not within the bounds of propriety, but in the great majority of such cases an apology or an expression of regret for over-hastiness in speech tendered and accepted in the right spirit would be sufficient to terminate the incident."

Where, however, a serious affront is offered to a member of the Bar, it is for him to do whatever he thinks necessary to maintain the dignity of his profession. He may do what Sir John Simon did the other day by openly calling for an explanation from Lord Birkenhead, the Ex-Chancellor and the presiding judge of the Court. Of course not many are in a position to do what Sir Simon did. But some undoubtedly are and the Bar looks to them to preserve its old traditions of independence and fearlessness.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Nainapillai Marakayar v. *Ramanathan Chettiar*, the appeal from Madras, is still being heard.

On Nov. 13, judgment was delivered by the Board in *Obala Kondama Naicker Avergal* v. *K. Goundar* (Madras), the appeal being allowed.

On Nov. 14, the judgment of the Full Board in *Brij Narain* v. *Mangla Prasad* was delivered by LORD DUNEDIN. The Board held that the prior mortgages were "antecedent debts" and allowed the appeal.

The following Criminal petitions were heard by a Board composed of VISCOUNT HALDANE, LORDS DUNEDIN and CARSON, SIR JOHN EDGE and SIR LAWRENCE JENKINS.

(1) *Waryam Singh* v. *King-Emperor*.

Mr. Dubé for the Petitioner.

Mr. Kenworthy Brown for the Crown.

(2) *Rustom* v. *King-Emperor* and (3) *Randhir Singh* v. *King-Emperor*.

Messrs. A. M. Dunne, *K. C.* and *Jackson* for the Petitioners in each application.

Mr. Kenworthy Brown for the Crown.

In each case the Board pointed out that the alleged reasons put forward for the Petitioner were pleas which might be considered by a Court of Criminal Appeal but which were quite inadequate to justify an appeal to His Majesty in Council.

The Petitioners had been convicted of murder and had been sentenced to death, for special leave to appeal.

LORD DUNEDIN said that he had sat in a great many of such cases, but he did not remember any attempts so glaringly made as these to bring up for review a question of mere evidence. Of course, he could understand that a man who was going to be hanged clung at any straw and he could understand that counsel only obeyed instructions and did their duty in putting forward such petitions, but he thought that it ought to be clearly appreciated and recognized in India that there was not a chance of the Judicial Committee's turning itself into a mere Court of Criminal Appeal. They could not take up the two cases before them without making themselves such a Court.

Mr. Dunne, K. C., said that the difficulty in which counsel and solicitors were placed was that while as in these two cases they knew the application for leave to appeal was

hopeless, their clients in India insisted on such applications.

LORD HALDANE said that it was very desirable that what LORD DUNEDIN had said should be well understood all over India. As for preventing people from appealing to the King-Emperor they must remember that they were dealing with the East and that people had a constitutional right to present these petitions for leave to appeal. But it was an idle form when it was a mere question of evidence. The sooner that was understood the better.

Mr. Dunne said these people, as LORD DUNEDIN had said, caught at the last straw, and it was difficult to persuade them that there was no chance of the petitions being granted. He hoped their Lordships' comments would be communicated to the various Courts and circulated all over India.

15-11-23. G. D. M.

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

In Issue No. 2 of the current volume of the Calcutta Weekly Notes, Mr. Rajendra Nath Ghosh has raised some questions about sec. 16 of the Bengal Tenancy Act. The first is: "Whether objection under this section can be raised by a tenant who has taken settlement from a person after he has become owner of the tenure by succession." In such cases the tenancies for which rents have been claimed were not in existence when the succession opened for the tenure-holder, and so the provisions of sec. 16 have no application.

The next question is whether a tenant can raise objection under that section when that objection having been raised in a previous suit was successfully met by the landlord on the ground of compliance. In such cases the judgment in the previous suit will show clearly that the landlord did comply with the provisions of sec. 16 and it being *inter partes* will operate as *res judicata* and this objection in the subsequent suit can be successfully met by the landlord by the production of the judgment of the previous suit.

Lastly, there is the case where the objection having been taken by the tenant was waived by him at the trial. This waiver on the part of the tenant did not require that point to be decided in that suit. The question therefore was kept open in that suit and the position is the same as if no such objection was taken in the suit. The matter, therefore, was not *res judicata*. The tenant can certainly raise that objection in a subsequent suit. Mr. Ghosh says that in such cases no succession has taken place after the successful rent suit. But sec. 16 is not concerned with that. It simply bars a decree being passed whenever there is a succession to a permanent tenure, and it applies to all rent suits brought after the succession.

Yours truly,

SURENDRA NATH ROY,

10-12-23. *Munsif, Narail.*

Review.

SALES IN EXECUTION (PRINCIPLES AND PRACTICE). *By Swaminathan Iyer, Vakil, High Court, Madras. Second Edition; Madras Law Journal Office, 1923.*

The troubles of a litigant in this country, specially in the mofussil, begin with the execution of a decree and its realization by sale. The dictum of Sir Barnes Peacock in this connection is well-known. The Viceroy also has been recently complaining about law's delay in India. This is chiefly to be attributable to the circumlocution of the procedure of execution and sale that obtains in this country. The author of the work under review has with a great deal of labour dealt with the subject analytically and evolved a systematic work on the subject. In the present edition, the addition of a chapter on attachment which is the first stage for bringing the property to sale has enhanced the usefulness of the work. A special treatment of the incidents of sale under the provisions of the Bengal Tenancy Act and the Madras Rent Laws will add to the value of the work to practitioners in these Presidencies. The author has noticed the principles of English and American law in appropriate places. But he has taken care not to encumber his work by references to foreign decisions which are often confusing than otherwise. In America each State has its own laws and unless one can refer to their details, the decisions based upon their interpretation are of little help to us. The author has, however, devoted two chapters for explaining the principles of English and American law. The questions of Hindu and personal laws that may arise in the course of execution proceedings and sale are noticed in their appropriate places. The work is undoubtedly a very valuable guide to the difficulties that frequently arise between the decree stage and sales which lead to more complications than at any other stage of a suit.

THE

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Contents.

NOTES

Appointment of Mr. Manmathanath Mukerjee as Judge of the Calcutta High Court.

The appointment of Mr. Manmathanath Mukerjee as an additional Judge of the Calcutta High Court to fill up the vacancy caused by the retirement of Sir Asutosh Mookerjee has given general satisfaction. Mr. Mukerjee is in the prime of his life, though he has already put in more than twenty-five years' practice, during the greater part of which he has been one of the leading practitioners on the Criminal Appellate Side of the Calcutta High Court and latterly the leader of the bar on that side. Besides being firmly grounded in the principles and practice of law, he possesses balance of judgment and a strong common sense; he is also by nature patient, courteous and painstaking, all of which are qualities which should provide the coping-stone for the building up of a successful career as a Judge. He is popular with the bar and possesses the respect and confidence of the Judges. We welcome him to his new office with pleasure.

Selection of Ministers by Governor.

We congratulate H. E. the Governor of Bengal for having followed a perfectly parliamentary course in the selection of ministers. He has also displayed a true statesman-like tact and judgment before making his final choice in favour of Mr. Surendra Nath Mallik and Moulavi Fazlul Huq—both of whom are very capable men. As H. E. the Governor's action has been variously criticised in the public press, we have no hesitation in repeating that the course followed by him is strictly constitutional and in accordance with the established conventions of the British and Dominion Parliaments. We were the first to suggest in these columns that the *Swarajya* party should try to form a coalition with the Independents and their other sympathisers and in that case we felt confident that the Governor would ask them to form a ministry to take charge of the transferred department. H. E. Lord Lytton exactly fulfilled our expectations in this respect and scored over Mr. C. R. Das and very skilfully put him in a rather embarrassing and awkward position. If Mr. Das had formed a coalition he would have had to act with responsibility to the members of the Coalition. If on the other hand he had assumed office with only 45 followers pledged to the party's policy of obstruction or destruction, he and his brother ministers could not have remained in office for many days. The next offer of ministry to the so-called Independent party was a no less adroit move. The Independent party under Mr. Chakravarti did not exceed a dozen in strength. Even if they had joined the *Swarajya* party the total strength of the coalition could hardly have exceeded 57 in a House of 140. But the Independents are not wholesale obstructionists, so coalition between them and the *Swarajya* party was not possible. His Excellency did well in giving Mr. Chakravarti a chance of forming a party. Since he could not find a sufficient following from the rest of the House, the attempt of Mr. Chakravarti to form a ministry naturally failed.

It is by such a process of elimination that His Excellency as a last resort has selected Mr. Mallik and Mr. Huq as ministers, which is very appropriately described in the Government communique given below :—

His Excellency the Governor then invited Mr. B. Chakravarty, the leader of the Independent Nationalist group, to become a Minister in coalition with representatives of other groups in the Council. Mr. Chakravarty after consulting his followers, agreed to take office if the other two Ministers were also selected from his own party,

but was not prepared to enter a coalition Ministry. As the Independent Nationalist group was not large enough to secure a majority over all other parties, and as the reasons given by Mr. Das for refusing to take office must necessarily also prevent his followers from supporting any Minister who tried to work within the present constitution, Mr. Chakravarty's proposal was not acceptable and His Excellency was therefore obliged to select his Ministers from among other groups in the Council. He has appointed Mr. Surendra Nath Mallick to take charge of the portfolio of Local Self-Government and Public Health and Maulvi A. K. Fazlul-Huq to take charge temporarily of Education, Agriculture and Industries until a third Minister is appointed, when the distribution of the portfolios will be reconsidered. The new Ministers will take over their duties on January 2nd.

Apprehension is expressed in the public press that if Mr. Mallik's election is set aside in the result of the election petition that is now pending, Lord Lytton may have to change his minister. We have explained in these columns before that under sec. 52 (2) of the Government of India Act, Mr. Mallik may continue in office for six months, if he can command the confidence of the House, and in such a case the Governor would not have to remove him till his re-election within such period.

His Excellency has acted very wisely in offering the ministry last of all to a party who together with the official block in the House may be able to command a majority. If he had done so at the very outset, it would have met with much adverse criticism. That Lord Lytton has effectively disarmed criticism is evident from the fact that even the organ of the *Swarajya* party has paid a handsome tribute to his statesmanship by admitting that he has acted constitutionally and sympathetically. If this spirit of giving credit where credit is due and of opposing or condemning measures which deserve condemnation prevails it would surely make for much more orderly progress.

Gladstone as Colonial Secretary when not in Parliament.

In our last issue we cited the instance of Mr. Gladstone continuing in office as a Cabinet Minister for some months without a seat in Parliament, to explain the provision of sec. 52 (2) of the Government of India Act. Unfortunately the words "Colonial Secretary" were misprinted as "Council Secretary." But the fact is so well-known that, we expect, it is not likely to mislead any one. Still it is worth while referring to it with greater precision to refresh public memory. It was on the 20th of December 1845 that Gladstone was appointed Secretary of State for the Colonies in the Peel Ministry and vacated his seat in the House of Commons for Newark but did not get re-elected. He, however, continued in office as Cabinet Minister and Colonial Secretary till the 28th of June 1846 when he went out of office with his chief, Sir Robert Peel. It will be seen that the period for which he remained in office as Cabinet Minister without being a member of Parliament was six months. The limit of time that has been adopted in the Government of India Act is the same.

The Bar and professional courtesy and etiquette.

We publish in another column a letter from Mr. B. Misra of Darbhanga alleging that the Bombay Bar only retaliated when permission was refused to Mr. Garth and Mr. Chaudhuri to appear in the Bombay High Court because the Calcutta Bar had on a previous occasion objected to Mr. Rattigan appearing with Mr. Inverarity in the *Jacob Diamond* case. We have no desire to re-open the old controversy regarding Mr. Rattigan. That the reason why the Calcutta Bar objected to his appearing with Mr. Inverarity was quite different from the ground on which Mr. Garth and Mr. Chaudhuri were refused permission would have been evident to our correspondent if he had paid attention to the fact (he himself mentions) and tried to appreciate its significance. It is very ordinary professional etiquette amongst Counsel that after one has appeared in a case and done part of the work it is improper on the part of a client to cancel his engagement and engage another Counsel in his place. A Counsel (*i.e.*, a barrister-at-law) cannot sue his client for such arbitrary cancellation of engagement but the professional etiquette that prevails amongst them furnishes a sufficient remedy, if he choses to enforce it. When such engagement is cancelled, no other Counsel can appear in the case without his leave or permission. In case of infringement of the rule, he would report to the Bar and the Bar would take the necessary steps to prevent a breach of such professional etiquette. It is for such reasons that the Calcutta Bar had objected to Mr. Rattigan supplanting Mr. Manamohan Ghose who was his

senior by many years and the Calcutta High Court did not allow such a breach of professional etiquette. We must also say in common fairness that, except in cases of infringement of professional etiquette, the Calcutta Bar has always welcomed members of the Bar from other Presidencies and Provinces when they have come to the Calcutta High Court at the request of their clients. For instance, no objection was taken to Mr. Ross Alston appearing in the case of *Capt. Hearsay* v. *The Pioneer*, although Mr. Alston was then junior to many members of the Calcutta Bar. It was also not very long ago that Mr. Macinerny of the Karachi Bar, also junior to many at the Calcutta Bar, appeared in a case against the Calcutta Tramway Co. in the Calcutta High Court without any body objecting to it. The late Mr. Pherozsha Mehta, during his stay in Calcutta as member of the Imperial Legislative Council, was elected as an honorary member of the Calcutta Bar Library club.

THE RETIREMENT OF SIR ASUTOSH MOOKERJEE.

Sir Asutosh Mookerjee's intensely active career as a Judge of the Calcutta High Court comes to a close with to-day. To have been a Judge of the High Court for nearly twenty years and to have retired from the Bench in the full possession of powers and faculties which the youngest and most brilliant of his colleagues may well envy would have been distinction enough, measured by ordinary standards, but Sir Asutosh Mookerjee's is just one of those personalities which do not admit of being measured by ordinary standards. Great as he has been as a Judge and indefatigable though he has been in the discharge of his duties, the fact is obvious that they proved all too insufficient to give full occupation to his exceptional abilities. Amonst the tributes paid to him by the Bench and the Bar on the eve of the closing of the Courts for the Christmas holidays, that from his Lordship the Chief Justice struck the right note when he remarked that the many activities of the retiring Judge presented a proposition of such dimensions that he despaired of being able to deal with them at the short time at his disposal. His Lordship also gave correct expression to the passing thought of every one present when he said that Sir Asutosh's had been an outstanding personality not only in the Court, and not merely in Bengal but throughout the whole of India. We may add that it is owing to want of opportunities (which again is due mainly to the subordinate position that India holds in the Council of Nations and the unfavourable political conditions of the country which cramps and paralyses all indigenous talent) that Sir Asutosh is not at this moment one of the outstanding personalities of the world. Learning, courage, organising power, capacious memory, keen intellect, unlimited capacity for industry and a masterful personality are amongst the qualities that have helped him to push his way to the front rank amongst his contemporaries in this country. Although we have differed from him at times on public questions, yet we have never failed to recognise that the Bar, the Bench, the Calcutta University and its associated activities have failed to provide adequate scope for the unusually rich heritage of faculties and powers which by nature is his and which unlike many men similarly endowed he has spared no pains to cultivate and develop.

Speaking of Sir Asutosh's judicial career, the outstanding feature is undoubtedly his erudition. His reported judgments which touch and illuminate almost every topic of legal learning, collected together, would cover volumes. It will be years before it will be possible to appraise correctly at their real worth the services he has rendered in exploring and interpreting a system of laws which is not the less difficult of application and elucidation because it is so largely and incoherently statutory. With untiring industry and wide research he carried on for twenty years a work initiated by the late Sir Bhashyam Ayyangar during his all too short tenure of office as a High Court Judge. This alone would have been sufficient to perpetuate his memory as one of the most eminent Judges and lawyers India has produced. But the quality and quantity of his written opinions, however remarkable by themselves, form but a small part of his claim to remembrance as a Judge. His manner of dealing with cases in Court was ideal from the point of view as well of the parties concerned as of the legal practitioners appearing for them. His relations with the latter were of the happiest and that not in the conventional sense only. A deeply learned and knowing lawyer may, and as we know often does, prove a most trying person on the Bench. He is apt to be impatient of the facts

and contemptuous of the law sought to be presented before him. But Sir Asutosh's avidity for getting in and analysing all the relevant facts in every case that came before him and his longing for knowing all the law bearing thereon was extraordinary. His attitude therefore to the members of the Bar appearing before him was always of one desirous of knowing and expecting to be informed. The veriest junior had therefore no occasion to feel diffident over his case, if he had real assistance to render to the Bench, and work well and conscientiously done whether by junior or senior never failed of quick and generous recognition. In the appreciation of merit, whether on the Bench or outside, Sir Asutosh was absolutely impersonal. His courtesy towards members of the Bar—and indeed towards all with whom he came into contact—has always been unassumed and cordial. It is owing to this that through the bitterest of controversies, of which a man of his varied activities, accustomed to give and receive hard knocks, has often inevitably found himself the target, his genuine hold on the admiration of his countryman has never waned.

Sir Asutosh's retirement from office is a grievous loss to the Bench and to the public. Nevertheless, we venture to think that the loss to the latter through his absorption in the work of the High Court and the University, great as that work has been intrinsically, is even greater. Looking back to the day when he accepted the Judgeship, when Lord Ampthill was Governor-General, we cannot help thinking that had he remained at the Bar and taken his share in the political life of the country, he would have found work to-day more commensurate with his commanding abilities. Even now, it is impossible to believe that these, liberated as they have been from the calls of an exacting office, will not hereafter be placed more freely at the service of his countrymen in the very critical times through which they are now passing. Sir Asutosh retires from the Bench with his faculties unimpaired and his capacity for work and labour and his influence over the educated community undiminished. It lies in him to make this day, the day of his retirement, the turning point for a new career. Is it too much to expect that he will respond to the call, when the call comes?

SIR A. MOOKERJEE'S RETIREMENT.

TRIBUTES FROM BENCH AND BAR.

Mr. Justice Mookerjee bade farewell to the High Court, Calcutta, on the 21st of December last at the rising of the Court for the Christmas vacation after a distinguished career on the Bench for over 20 years.

Members representing every branch of the legal profession assembled in the Court of the Chief Justice, when the Vakils' Association presented an address to the retiring Judge.

The address, which was read by Babu Basanta Kumar Bose, (President of the Association) was as follows:—

"It is with feelings of the deepest regret that we, the Members of the Vakils' Association, approach your Lordship to bid you farewell on the eve of your retirement from the Bench, which you have so conspicuously adorned for the last twenty years.

Your career as a Judge has been characterised throughout by profound learning, great ability, marked independence, untiring patience and uniform courtesy, qualities by which you have always commanded the respect and admiration of all branches of the profession.

Your successful and brilliant career as a Judge is a source of pride to the members of the profession to which you belonged, and will ever remain an illustrious example to the body.

While discharging your arduous duties as a Judge, you have not been sparing in your labours for the advancement of the country in educational and other matters. As a Fellow of the Calcutta University for the last thirty-five years, and as its second Indian Vice-Chancellor you secured to the graduates of the University many valuable privileges and you have always worked for the welfare of our youths with singular zeal and wisdom.

And now in taking leave of you, my Lord, we fervently hope and pray that many years of health and strength may yet be vouchsafed to you to work with greater vigour in various spheres of usefulness for the Motherland."

Mr. B. L. Mitter, acting Advocate-General, on behalf of the Bar, associated himself with the address read by Babu Basanta Kumar Bose. Mr. Justice Mookerjee's services in educational, literary, scientific and social spheres were, he said, well-known. Apart from his outstanding personality and the brilliance of his career on the Bench, he had earned the esteem and affection of the Bar by his invariable courtesy, quick appreciation and constant encouragement of diffident merit. No junior felt diffident in his Court where good law was administered. In the maze and labyrinth of adjudged cases he had walked with firm step holding aloft the torch of justice. "May you long be spared," Mr. Mitter concluded, "in the service of the country. We bid farewell with a heavy heart."

Sir Deva Prosad Sarbadicary, in the unavoidable absence of the President of the Incorporated

Law Society, associated himself and his colleagues whole-heartedly with the sentiments that had been so admirably expressed in the address presented by the vakils and endorsed by the Advocate-General. The void created by Sir Asutosh's retirement would be difficult to fill. In his activities outside the Court, whether in the University, Asiatic Society, Mathematical Society or various other interests with which he had been identified, Mr. Justice Mookerjee had always worked with a whole-hearted devotion that would be difficult to equal or replace.

The Hon'ble the Chief Justice said:—

My learned brothers and I join in the expressions of regret which have been made at the Bar with reference to the retirement of Mr. Justice Mookerjee. The many activities of the learned Judge present a proposition of such dimensions that it would be difficult, if not impossible, to deal adequately with it in the short time which is at my disposal. I feel however, that it is not necessary for me to dwell upon them at any length because the learned Judge and his strenuous life are well-known to you all. The point which is uppermost in my mind, and which I desire to emphasise, is that I am sure that among all his interests—and their number is legion—those which have been, and, I believe, always will be, dear to his heart are the welfare of this Court and the profession to which he belongs. In all that he has done during the many years that he has sat on the Bench I am convinced that he has been actuated by one desire only, namely, to maintain the great traditions of the Court and to promote the administration of justice in all its branches.

His great knowledge, his wonderful memory and his untiring energy have been devoted to this purpose for nearly twenty years and his service in this respect will always be remembered and will constitute a record of which any man is entitled to be proud. He has been an outstanding personality, not only in the Court, but also in Bengal, and I think I may say with propriety that his name has been known and his influence felt throughout the whole of India. Though he is retiring from the Bench, I am confident that he will continue to take a lively interest in the welfare of the Court and the profession and I hope that the relations between him and the Judges of this Court, which have been so cordial in the past, will long continue in the future.

Though I am sorry to say he is not in the best of health at the moment, I sincerely hope that the rest which he has so well deserved will soon restore him to his usual robustness and that he may be privileged to enjoy good health for many years. I feel sure that opportunities will present themselves for doing much useful work in other capacities.

In conclusion, I desire to take this opportunity of acknowledging my own indebtedness to my learned brother for the unfailing and loyal assistance which he has always rendered to me as Chief Justice of this Court.

The Hon'ble Mr. Justice Mookerjee in reply said:—

The addresses which you have just delivered have afforded me the greatest gratification. It is impossible for a Judge to receive such addresses on the eve of his retirement from office without feeling greatly honoured and, at the same time, without being deeply affected. To be told, as I have been told, that I have earned the esteem and affection of the members of the profession by my patience, courtesy and encouragement of diffident merit and to receive that assurance in the terms which have just been addressed to me by so learned and independent a body as those whom I am now addressing is a matter of true self-congratulation.

During the 20 years that I have been privileged to administer justice in the name of my Sovereign in this great Court, I have never spared myself in the discharge of my responsible duties. You have referred to my knowledge of law and to my efforts to hold aloft the torch of justice in the maze and labyrinth of adjudged cases. I have worked strenuously in the firm belief that without great labour success cannot be attained and that it would have been impossible otherwise to do justice in dealing with those important and abstruse questions which have come before me for adjudication in the course of my career.

But notwithstanding diligent study of the Science of Law for more than a third of a century, I have now a more profound and abiding sense of ignorance than oppressed me in the beginning of my career. I have ever felt that it would have been almost impossible for me to arrive at sound and correct conclusions without the valuable assistance which I have always derived from the members of an intelligent, learned and independent legal profession. I frankly and gratefully acknowledge my debt to the distinguished practitioners whose arguments have been characterised by learning, ingenuity and research. But for such assistance I could not have realized even to a limited extent, my desire to decide every case upon its merits, to administer justice according to right and to act upon the true and sound principles of justice, equity and good conscience.

You have referred to my independence as a Judge. I have throughout endeavoured strenuously to hold the scales of justice even and to treat alike all litigants without distinction of caste, creed, race or position, regardless of the status of the Counsel engaged before me, whether Barrister or Vakil, whether senior or junior. I have tried uniformly to keep wide open the gates of justice so that every litigant who considered, rightly or wrongly, that he had a grievance, might not have his cause summarily rejected and might have the fullest opportunity to place his case fully on the merits before the highest tribunal—the ultimate Court of Appeal in the land.

My ambition has been to attain the ideal of Judicial administration, to hear patiently, to consider diligently, to understand rightly, to decide justly. It is for others to judge what mea-

sure of success I may have achieved, notwithstanding inevitable errors of judgment.

I have now, gentlemen, to bid you all collectively farewell. It is my sincere wish that you may all enjoy health, happiness and prosperity, and that you maintain the highest dignity and noblest tradition of the profession to which we all belong, for I am firmly convinced that the function of this Court as the potent instrument for the administration of justice amongst the people of this land can be completely fulfilled, only with the aid of a learned, independent and respectable legal profession.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Judicial Committee have not been hearing Indian appeals for the past 10 days, owing to the illness of LORD CARSON who was a member of the Board hearing the part-heard case of *Mirza Abid Husain Khan* v. *Mt. Kaniz Fatima* (Oudh). The hearing of this appeal was commenced on Nov. 23rd. The question at issue is whether the Appellant, a mortgagee in possession, was entitled to charge the legal representatives of the deceased mortgagor with enhancements of Government revenue and local cesses.

Messrs. DeGruyther, K. C. and *E. B. Raikes* represent the Appellant.

Messrs. A. M. Dunne, K. C. and *S. Hyam* for the Respondent.

On Dec. 6th the hearing was commenced of an appeal from the Central Provinces, *Waman Ganesh* v. *Sarnbai*. The validity of a Will is in question. The trial Judge found in favour of the Will but the Appellate Court was of opinion that the evidence in support of it was not satisfactory or strong enough.

Messrs. DeGruyther, K. C. and *S. Hyam* for the Appellant.

Mr. L. M. Parikh for the Respondent.

Judgment was reserved.

Nov. 15th was the sixth day occupied in the hearing of the appeal from Madras, *Nainapillai Marakayar* v. *Ramanathan Chettiar*. The Respondents, represented on this appeal by *Messrs. DeGruyther, K. C.* and *Kenworthy Brown*, filed the suit as trustees of a temple in Korilur to recover possession of certain lands from the Appellants. The Respondents claim both Meluvaram and Kudiram rights. The Appellants contend that the temple is the owner of the Meluvaram right alone. The Appellants are represented by *Sir Geo. Lowndes, K. C.* and *Mr. K. V. L. Narasimham.*

Judgment was reserved.

Nov. 16. *Kaju Mal* v. *Salig Ram* (Lahore). This appeal referred to the Kangra Valley Tea Estate. The Plaintiff successfully established his right to pre-empt certain portions of the estate. The Plaintiff was successful in both the lower Courts, and his Counsel *Sir G. Lowndes, K. C.* and *Mr. W. Wallach* were not called upon to defend the judgment of the Chief Court.

Messrs. Dunne, K. C. and *Hyam* appeared for the Appellant. The appeal was dismissed.

Nov. 16th and 19th. *Raghunath Sahu* v. *Saraju Prasad Sahu* (Patna). The Respondents sued to recover the amount due under a mortgage. The Appellant resisted payment on the ground that the rate of interest was excessive, penal and unconscionable.

Messrs. DeGruyther, K. C., H. N. Sen and *R. Majid* for the Appellant.

Messrs. Dunne, K. C. and *Hyam* for the Respondent. Judgment was reserved.

Nov. 19th and 20th. *Ma Thaung* v. *Ma Than* (Upper Burma). The contest centres round the estate of U. Nyein, a wealthy Burman Buddhist who died in 1914. The children by his first wife claim a share in his property, their claim is resisted by the Respondent, the second wife, who contends that U. Nyein during his life-time and in view of his approaching marriage with the Respondent divided his inheritance among his children.

Sir G. Lowndes, K. C., Parikh and *Maung San Wa* for the Appellant.

Messrs. A. M. Dunne, K. C. and *Kenworthy Brown* for the Respondents.

Judgment was reserved.

Nov. 20th, 22nd and 23rd. *Md. Raza* v. *Syed Yadgar Hussain* (C. P.). In this appeal the question for determination is whether a religious foundation is or is not a *wakf*. The founder was a Hindu and an objection has been raised that a Hindu cannot found a *wakf*.

The Appellant who was represented by *Messrs. DeGruyther, K. C.* and *A. Majid* contended that a valid *wakf* had been created and that he was the *mutwalli*.

Judgment was reserved.

Nov. 23rd. In *Maung P. Kaing v. Maung Pau Maung, Mr. E. B. Raikes* applied for special leave to appeal to His Majesty in Council.

The applicant, he informed the Board, had been successful in the first Court but had lost an appeal. There were 8 connected suits, in each of which the value was over Rs. 10,000. Owing to an error on the part of his legal adviser, who advised that he had 6 months in which to apply for leave to appeal to the Privy Council, the Petitioner was out of time in making his application in the High Court which decided that the fault of a legal adviser was not sufficient cause for granting an extension of time and they refused leave. Leave was refused by the Board.

The following judgments have been delivered.

On November 26th. *Pujari Lakshmana Goundan v. Subramania Ayyar* (Madras). The appeal was dismissed. *Baijnath Singh v. Jamal Bros. & Co., Ld.* (Upper Burma). The appeal was dismissed.

On November 23rd. *India Gen. Nav. & Ry. Co., Ld. v. Dekhari Tea Co., Ld.* (Bengal). The appeal was dismissed.

On November 26th. *Mahreddi Ayyareddi v. Adusumilli Gopala Krishnaya* (Madras). The appeal was dismissed.

On November 29th. *Sm. Nagendrabala Dasi v. Dinanath Mahish* (Bengal). The appeal was dismissed.

On Nov. 30. *Kanga v. Kanga.* The appeal was allowed.

On Dec. 6th, arguments were heard and judgment delivered dismissing the appeal in *Haji Hedayatulla v. Mahomed Kamil* (Bengal).

Mr. W. Wallach for the Appellant contended that the High Court were in error in ordering that the representatives of a deceased partner were entitled to the share in the business, carried on by the surviving partners, which the deceased would have taken had he been alive.

Mr. Abdul Majid for the Respondents was not called upon.

6-12-23.

G. D. M.

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

DEAR SIR,

In the last two numbers of the C. W. N. you have been referring to the *Jacob Diamond* case of Hyderabad. You have said that the Calcutta High Court allowed Mr. Inverarity to appear for Mr. Jacob in Calcutta, but under similar circumstances the members of the Bombay Bar opposed the appearance of Messrs. Garth and Chowdhry in Bombay and allowed only Mr. Pugh to appear for Mr. Tilak. I fear your memory is not correct. Mr. Inverarity and Mr. Rattigan both had applied to appear for Mr. Jacob. The Calcutta Bar raised no objection to the appearance of Mr. Inverarity but objected to the appearance of Mr. Rattigan on the ground that Mr. Monomohan Ghosh had appeared for Mr. Jacob in the earlier stage of the case and was sufficient for Mr. Jacob's defence, there being no reason why Mr. Ghosh should be given up by Mr. Jacob. This was done with the consent of Sir Charles Paul and Sir J. T. (then Mr.) Woodroffe. The Calcutta High Court thereupon refused permission to Mr. Rattigan who, however, being a part proprietor of the *Pioneer* and the *Civil and Military Gazette* raised a great noise in those papers. The members of the Bombay Bar therefore only retaliated when they opposed the appearance of Messrs. Garth and Chowdhry and did not oppose the appearance of Mr. Pugh. I hope you will kindly refer to this subject in your editorial in a future issue of your paper if only to show that you are not averse to state a fact against your own argument.

Your Sincerely,
BHUWANESWAR MISRA,
Pleader, Darbhanga.

17-12-23.

Notes of Cases.
CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY and SUHRAWARDY, JJ. M. A. Nos. 138 AND 139 OF 1923. KALI CHURAN BANIK, Appellant *v.* MON MOHAN BANIK, Respondent. The 23rd November 1923.

Indian Stamp Act, secs. 35 and 36, Art. 5—Deed of reference to arbitration, when to be stamped.

A dispute relating to the common boundary of the lands belonging to the Appellant and the Respondent respectively was referred to the arbitration of three persons named in the deed of reference which was duly stamped under Art. 5 of the Stamp Act. Subsequently one of the

persons failing to act, the parties appointed another person in his place by a written document which was not stamped. An award was given by these persons whereby it was held that the land in suit belonged to the Appellant. The Respondent thereafter instituted a suit for the recovery of the same ignoring the award and the Respondent filed a cross suit to enforce the award. The Court of first instance admitted in evidence the second deed by realizing a penalty under sec. 61 of the Stamp Act. It was held at the trial that it did not require to be stamped and in any event under sec. 36 the question as to the insufficiency of the stamp would not be raised and dismissed the Respondent's suit and decreed the Appellant's one. The lower Appellate Court held otherwise and remanded the suit for adjudication upon merits:

Held per WALMSLEY, J.—That the question about the insufficiency of stamp could not be raised in the suit and that the award based upon reference insufficiently stamped or not stamped could not be said to be invalid and the Court had jurisdiction to enforce it. 27 C. W. N. 513, followed.

Held per SUHRAWARDY, J., also—That the deed appointing an arbitrator in the place of the one named in the original deed of reference did not require to be stamped under Art. 5 of the Stamp Act.

Dr. S. C. Bysack (with him *Babu Kanai Lal Saha*) for the Appellant.

Babu Rupendra Coomer Mitter for the Respondent.

S. C. C. *Appeal allowed with costs.*

CIVIL APPELLATE JURISDICTION. Before NEWBOULD AND B. B. GHOSE, JJ. CIVIL REVISION CASE NOS. 521 AND 522 OF 1923. KULO CHANDER BISHARAD, Decree-holder, Petitioner *v.* SHEIKH ASMATALI, Judgment-debtor, Opposite Party. The 26th November 1923.

Civil Procedure Code (Act V of 1908), sec. 141, Or. 9, r. 9, Or. 21, r. 2, Or. 41, r. 1 (c), sec. 115—Dismissal of application under Or. 21, r. 2 for default, rejection of application under Or. 9, r. 9 for restoration, if appealable—Or. 9, if applicable to applications under Or. 21—Operation of sec. 141.

The Petitioner applied for execution of a mortgage-decree in the Court of the Munsif of Brahmanberia on 9th January 1922. The judgment-debtor, Opposite Party, filed an objection under Or. 21, r. 2, Civil Procedure Code, which was fixed for hearing as miscellaneous case No. 96 of 1922 and was dismissed for his non-appearance on 28th August 1922. He thereupon applied under Or. 9, r. 9 for setting aside the said order of dismissal, dated the said 28th August 1922. The Munsif dismissed the judgment-debtor's application on the merits. The judgment-debtor then preferred an appeal against the Munsif's order of dismissal to the Court of the District Judge of Tipperah. The question before the learned District Judge was as to the competency of this appeal, who, overruling the (decree-holder) Petitioner's objection, was of opinion that an appeal lay in his Court under Or. 41, r. 1 (c) and set aside the Munsif's judgment of dismissal upon facts.

The question for adjudication in this rule was whether sec. 141 made the procedure laid down in Or. 9, applicable to the application, which was made before the Munsif by the judgment-debtor, Opposite Party, if not, whether the Munsif's order dismissing the Opposite Party's application under Or. 9, r. 9 was applicable under Or. 41, r. 1 (c):

Held—That the procedure laid down in Or. 9 does not apply to application made under Or. 21 and therefore the order of the Munsif on the Opposite Party's application under Or. 9, r. 9 for setting aside the order of dismissal for default passed on his application under Or. 21, r. 2 was not appealable and so the order passed on appeal was *ultra vires* and without jurisdiction.

Charoo Chander Ghose v. *Chandi Charan Rai Chowdhuri*, 19 C. W. N. 25, *Bhubun Behary Nag* v. *Dhirendra Nath Banerji*, 20 C. W. N. 1203, *Diljan Nichha Bibi* v. *Hemanto Kumar Roy*, 19 C. W. N. 758, *Thakur Prasad* v. *Fakirulla*, 17 A. 106; 22 I. A. 144 and *Bunkoo Behary Ganguly* v. *Nilmadhub Chatterjee*, 18 C. 635, referred to.

This rule was originally heard by Mr. Justice Chotzner who referred the case to a Division Bench.

Babu Gopal Chander Dass for the Petitioner.

No one appeared for the Opposite Party who was represented by vakils before Mr. Justice Chotzner.

H. D. C.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, JANUARY 7, 1924. [No. 8.

Contents.

NOTES

Knighthood conferred on Mr. Justice Greaves.

It is with pleasure we note that a Knighthood has been conferred on Mr. Justice Greaves on the New Year's day. Sir Ewart Greaves is the seniormost Barrister Judge of the Calcutta High Court. He has always been noted as a very patient and painstaking Judge and his relations with the Bar have been unexceptionable. His regard for justice, equable temper and bearing on the Bench have made him popular with the profession and the public alike. As the President of the Committee appointed by the Bengal Government for reporting on the question of the separation of the judicial and executive functions, he has done very valuable work in formulating a scheme for such separation. His report is marked by his sympathy with the popular demand in this respect. The local Legislature and the Government ought to take into consideration the report and give effect to it at an early date. A Knighthood conferred on him is honouring one to whom honour is due.

Sankaritola Post Office Murder Case.

Beside raising important questions of law, this case has raised certain questions of practice. Cl. 26 of the Letters Patent authorises the Advocate-General to certify that there is an error in the decision of a point or points of law, decided by the original court, or that a point or points of law which has or have been decided by the said court should be further considered. But it does not indicate the procedure to be followed by him when he is called upon to grant a certificate. In the present case, the Advocate-General gave his certificate on a petition by the accused, after consulting the defence Counsel. At the hearing of the reference, Counsel for the Crown made a grievance in that he had not been consulted before the certificate was granted. There is a great deal of substance in his grievance having regard to the fact that the petition contained a few incorrect statements. Mookerjee, J., after making inquiries about previous practice, has settled the procedure to be followed in future. "The certificate of the Advocate-General," he said, "which reflects his judgment and is naturally entitled to respect, should be granted after he has heard representatives of the prisoner and of the Crown and has carefully considered all the materials whose accuracy had been verified by Counsel or other responsible persons." With these observations, Richardson, J., generally concurred.

It is unfortunate that no proper record is kept of the proceedings of the Criminal Sessions of the High Court. The result is that at the hearing of references before the Full Bench under cl. 26 of the Letters Patent, serious differences between the trial Judge and Counsel occasionally arise as regards what actually transpired in Court. The principle is well-settled that "when the Court is called upon to review a cause under cl. 26 of the Letters Patent, it will accept as unquestionable the statement of the trial Judge as to what actually took place before him in Court." But although much may be said in support of this principle on grounds of policy and expediency, it is neither grounded in rules of common sense nor of justice. In the present case, the accused, when called upon to answer to the charge under sec. 394 of the Indian Penal Code, it appears from the minutes kept by the Clerk of the Crown, answered "yes." But we are informed by his Counsel as well as by many of those actually present in Court that his answer

was, yes, subject to the reservation that he did not hurt, the actual Bengali words used by him being কিন্তু আমি মারি নাই। The trial Judge's minutes threw no light on what the accused actually said. And so Mookerjee, J., appears to have accepted the answer as taken down by the Clerk of the Crown as the accused's answer to the charge under sec. 394. Fortunately, in the present case, nothing turned on the point as to what the accused's answer really was. But in any other case, the point might be of the utmost importance to the accused or the Crown. In these circumstances, we strongly urge upon His Lordship the Chief Justice to give effect to the recommendations of Mookerjee and Page, JJ., by appointing competent stenographers to take accurate shorthand notes of proceedings at the High Court Sessions. It will be their duty to take in shorthand everything that occurs at the trial, so that if there is a reference to the Full Bench, the latter may be in a position to form as good an opinion as is possible when reading the transcript.

One of the special features of this case was supplied by the unusual step which was taken by the defence Counsel in approaching the trial Judge, immediately before the trial, with certain proposals on behalf of the accused. At the hearing of the reference, this incident was brought to the notice of the Court. Mookerjee, J., commented on it in very strong terms. But we take this opportunity to point out that irregularities in the administration of justice in this country are not by any means rare. Not many years ago, Mr. Gibbons, then Advocate-General, withdrew, on behalf of the Crown, cases against certain gentlemen involving very serious charges, although he was confident that the prosecution was in a position to prove the cases up to the hilt. It is a notorious fact that in the Police Courts in Bankshall Street and Jorabagan, the parties are allowed to compromise criminal cases involving charges of cheating, defalcation of accounts, etc., with the knowledge and consent of the Magistrate. Even in the High Court Sessions, we hear, arrangements are sometimes arrived at as the result of compromise and given effect to solemnly in open Court. It is to be hoped that after what has happened in the present case, these irregularities will not be encouraged by those who are responsible for the administration of justice. Cheating is now a compoundable offence. Still the Courts ought to see that a criminal process is not abused for the realization of civil claims.

THE STAMP AMENDMENT ACT: ACT XLIII of 1923.

The recent amendment of the Stamp Act, Imperial Act, XLIII of 1923, raises a question of considerable difficulty. The Act received the assent of the Governor-General in Council on the 1st October 1923 and was published in the *Fort St. George Gazette* on the 16th October 1923. The Act does not say when it comes into operation. Under the General Clauses Act, sec. 5 (*1*), this Act would come into operation on the 1st October 1923. Documents dealt with under this Act and taken by parties between the 1st and 16th October 1923 have naturally been stamped under the old law. Promissory notes which have been taken between those two dates with an one anna stamp under the old law would require to be stamped with two annas and four annas respectively according as the amounts covered by them exceed Rs. 250 or Rs. 1,000. A suit to enforce a promissory note for more than Rs. 250 and executed between these two dates would be unsustainable as the document could not be put in evidence and stamp-penalty could not be levied therefor. (*Vide* secs. 35, 40 and 41 of the Stamp Act). This result was apparently not foreseen and the legislature should take the earliest opportunity of giving legislative sanction to such documents taken before the 16th October 1923, or what is more reasonable, the Act itself should be made to operate from a date certain, of which the public could have due notice.

Another question arises with reference to sec. 47 of the Stamp Act. It would appear that the section was formerly applicable to bills of exchange and promissory notes chargeable with a duty of one anna. If so, promissory notes payable on demand which are now chargeable with a duty of more than one anna will be outside the scope of this section. This aspect also does not appear to have been considered by the legislature.

Further the application of sec. 47 to promissory notes even under the old Act is itself an anomaly, as the very person who is bound to affix the stamp is enabled thereby to charge the payee with the stamp duty which he himself had defaulted to pay. (*Vide* 19 Bom. 635 at p. 639).

Instruments chargeable under the old Act with a duty of one anna under Arts. 19, 36, 37 and 52 are by the new Act made chargeable with two annas. The result of this is that these documents have now become immune from the disabilities which formerly attached to them under secs. 35, 40 and 41 of the Stamp Act in case of such documents not being duly stamped. The Madras Stamp Amendment Act VI of 1922 when it made a similar enhancement of duty on mortgage of crop, Art. 34 (a) of Sch. I (a), from one anna to two annas, correspondingly amended secs. 35, 40 and 41 by bringing it within the exceptions in those sections.

Another question of interest arises as to how promissory notes with a duty of two annas and four annas are to be taken. Sec. 11 of the Stamp Act permits the use of adhesive stamps for instruments chargeable with a duty of one anna. R. 5 of the Government of India Stamp Rules made under the Act provides : "A promissory note or bill of exchange shall, except as provided by sec. 11 or rr. 13 and 17, be written on paper on which a stamp of the proper value with or without the word 'Hundi' has been engraved or embossed." It would therefore appear that promissory notes for more than Rs. 250 should be engrossed on general stamp paper or impressed sheets bearing the word "Hundi." This result has one advantage, that it will now be more difficult to forge or ante-date such pronotes. It is, however, attended with some amount of inconvenience to bankers and money-lenders who are accustomed to keep printed forms and do business on a large scale.

It is not unlikely that promissory notes are taken with "postage and revenue" stamps of the requisite value exceeding one anna in ignorance of the rule referred to above. In such cases the remedy will be under r. 18 of the Government of India Stamp Rules, by a suitable application to the Collector.

S. GOVINDARAJAM,
Pleader.

KUMBACONAM.
31-10-23.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Dec. 6th. The argument was concluded and judgment reserved in *Waman Ganesh* v. *Sarnbai*, an appeal from the C. P., in which the validity of a Will was in question.

Haji Hedayetulla v. *Mahomed Kamil*, an appeal from Calcutta, was argued on behalf of the Appellant by *Mr. W. Wallach.*

On the death of a partner in a hardware business part of his assets was retained in the business by the surviving partner. The Respondents were the representatives of the deceased partner and claimed an account of the business after the death of the deceased. The order of the High Court declared their interest to be the same as that of the deceased partner and to this the Appellant objected on the ground that their share in the business could only be ascertained after the Commissioner had reported how far the deceased's assets were utilised in the business.

Mr. A. Majid for the Respondents was not called upon and the appeal was dismissed with costs.

Mirza Abid Husain Khan v. *Mt. Kaniz Fatima* (Oudh) of which the hearing was adjourned on November 23rd was further heard on December 7th and judgment was reserved.

Dec. 10th and 11th. Judgment was delivered in *Ramlal Hargopal* v. *Kisanchandra* (C. P.) allowing the appeal but inasmuch as the contentions put forward on appeal had not been raised in the lower Courts nor in the Appellant's case, no costs were awarded.

Mt. Lajwanti v. *Sapa Chand* (Punjab). The Appellant as a posthumus daughter of one Jawahar Mall claimed certain property from the Respondents who were in possession as the nearest reversionary heirs after the death of Jawahar Mall's widows. The Respondents allege the birth of a posthumus son of Jawahar Mall through whom they claimed. The Appellant further sets up adverse possession by the widows and *res judicata.* Judgment was reserved.

Messrs. DeGruyther, K. C. and *Wallach* for the Appellant.

Sir G. Lowndes, K. C. and *Messrs. H. N. Sen* and *Bishan Narain* for the Respondents.

G. D. M.

Correspondence.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."
DEAR SIR,

You state in your last issue that except in cases of infringement of professional etiquette the Calcutta Bar has always welcomed members of the Bar from other Presidencies and

Provinces when they have come to Calcutta. This is not, however, exactly the fact. After its establishment, the Patna High Court was rather freely granting permission to eminent members of the Calcutta Bar to appear in that Court. But later on, when permission was sought for Mr. Hassan Imam, the leader of the Patna Bar and an ex-Judge of the Calcutta High Court, to appear in a criminal case in the Calcutta High Court, this latter Court refused such permission. Since then the Patna High Court became stricter in giving permission to members of the Calcutta Bar to appear before it. In my evidence before the Indian Bar Committee I mentioned this incident, and when I said: "We became stricter," Mr. Justice Coutts Trotter, one of the members, said "you retaliated" and I said "yes." As a matter of fact, the Calcutta High Court lawyers are the greatest gainers if permission is granted to appear in other High Courts and it is a matter of regret that the Calcutta High Court refused permission to Mr. Imam to appear.

Yours truly,
NARES CHANDRA SINHA.

4th January 1924.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before NEWBOULD AND B. B. GHOSH. JJ. APPEAL FROM ORIGINAL ORDER No. 352 OF 1921. RAJA BEJOY SINGH DHUDHURIA (Decree-holder), Appellant *v.* ASHUTOSH GOSWAMI and others (Judgment-debtors), Respondents. Heard 26th and 27th November 1923. Judgment delivered on 6th December 1923.

Civil Procedure Code (Act V of 1908), Or. 21, r. 66, sub-r. (2), cl. (e), r. 9—Sale-proclamation, value inserted in, as given by both parties—Material irregularity—Value, estimate of, by Court—Substantial loss to the judgment-debtor.

The Judgment-debtors, Respondents, applied, on 16th December 1920 under Or. 21, r. 90, for the reversal of an auction-sale of their ancestral house, held on 18th November 1920, in execution of a money decree, obtained against them by the decree-holder, Appellant, on the ground that their said property valued one lakh, having been valued at Rs. 5,000 by the decree-holder in the sale proclamation, which was a material irregularity in the publication, it was sold at that inadequate price and purchased by the decree-holder himself, and he alleged that this had caused substantial loss to them. The judgment-debtors had objected to the valuations as given by the decree-holder. And on the objection of the judgment-debtor before the issue of sale proclamation the Court executing the decree had decided that the value as stated by the decree-holder as also that stated by the judgment-debtor, should be both inserted in the sale proclamation and did not itself enter into the question of valuation notwithstanding the judgment-debtor's application in that behalf. The decreed amount was Rs. 20,774-10-9 and attachment was for this sum plus execution costs and interests. The lower Court set aside the sale:

Held—(1) Insertion of the valuations of both parties in the sale proclamation by the Court below instead of attempting to give its own valuation in it *was not a material irregularity* in publishing the sale, this being one of the exceptional cases in which it was most difficult to value the property accurately.

(2) The statement of the two different valuations was not likely to deter and mislead an intending buyer though not of much assistance to him.

Ram Kripal Singh v. *Kader Nath Bose,* (1915) 20 C. W. N. xliv and *Saadatanand Khan* v. *Phul Kuar,* (1898) 20 A. 412; 2 C. W. N. 550; 25 I. A. 146 *referred to.*

Dr. Sarat Chandra Bysack and *Babu Ramani Mohon Chatterjee* for the Appellant.

Babus Ram Chunder Mojumdar and *Mani Lal Bhuttacharjo* for the Respondents.

H. D. C.

THE
Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, JANUARY 14, 1924. [No. 9.

Contents.

NOTES

Sankaritola Post Office Murder Case.

The most important question of law raised in this case relates to the interpretation of sec. 34 of the Indian Penal Code. The difficulty arose from these words of Mr. Justice Page's charge to the jury:—"I say if you doubt that it was the pistol of the accused which fired the fatal shot; that does not matter. If you are satisfied, on the other hand, that the shot was fired by one of those persons in furtherance of the common intention, if that be so, then it is your duty to find a verdict of guilty."

The defence contended that this portion of the charge was a mis-direction inasmuch as if the jury had any doubt in their minds that it was the accused's pistol which fired the fatal shot, it was the Judge's duty to direct them to return a verdict of "not guilty." In support of this contention, reliance was placed on the decision of Mr. Justice Stephen in *King-Emperor* v. *Nirmal Kanto Roy* (18 C. W. N. p. 723). In that case, the learned Judge observed as follows:—"The only act that the accused can be liable for under the section (sec. 34) is one done by several persons of whom he was one, that is, by the man who escaped and himself. They may have committed many criminal acts together: but they did not both kill Nripendra. The difference between the acts of two men is that the one actually killed the Inspector and the other merely attempted to kill him. In order to make the accused liable for murder under sec. 34, it would be necessary to say that an offence and an attempt to commit it are the same 'act' which seems to me not to be the case." If the interpretation placed on sec. 34 by Mr. Justice Stephen be good law, there is no answer to the defence argument; and hence, the necessity felt by the Full Bench to attempt a fresh interpretation of the section.

Mr. Justice Mookerjee after a most exhaustive survey of the decisions on the section and a most learned research on the whole law with regard to abetment and accomplices and principals in the first and second degree in this country as well as in England and America, declined to commit himself to a definite interpretation of the section. "This analysis of the course of decisions," he said "in the different Courts which administer criminal justice according to the Indian Penal Code, discloses a deep-seated divergence of judicial opinion as to the true interpretation of sec. 34. The apparent simplicity of the language of the section is delusive, as it furnishes no test to determine when a particular criminal act may be said to have been 'done by several persons'; and the consequence has been that the Courts have sometimes, in their reluctance to apply the section to the facts of the case before them, come to the conclusion that the criminal act was not proved with certainty to have been done in furtherance of the common intention of all. In my judgment, the exposition given by Stephen, J., places too narrow an interpretation upon sec. 34, and that the question whether a particular criminal act may be properly held to have been 'done by several persons' within the meaning of the section cannot be answered regardless of the facts of the case."

Mr. Justice Richardson has assumed a more positive tone in his treatment of the subject. His Lordship said: "It appears to me that sec. 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In *R.* v. *Salmon*, 6 Q. B. D. 79 (1880), three men had been negligently firing

at a mark. One of them—it was not known which—had unfortunately killed a boy in the rear of the mark. They were all held guilty of man-slaughter. Lord Coleridge, C. J., said :—"The death resulted from the action of the three and they are all liable." Stephen, J., said :—"Firing a rifle" under such circumstances "is a highly dangerous act, and all are responsible, for they unite to fire at the spot in question and they all omit to take any precautions whatever to prevent danger." * *

* * * * * * * * * * *

Continued his Lordship: "To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised. This view of sec. 34 gives it an intelligible content in conformity with general legal notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal and leads nowhere."

The sum and substance of Mr. Justice Richardson's view appears to be that if two or more persons have a common intention to commit a criminal offence, and *one* of them commits *the* act which constitutes the offence, but the others are sufficiently close to the spot to be able to influence the act of the perpetrator, then in that case they are all equally liable under sec. 34 for the commission of the offence. We refrain from making any comments. It is possible that the Privy Council will have to interpret the section, if they do not summarily dismiss the accused's appeal which is now pending before them.

Police Methods and the Standard of Justice.

To give our readers an idea of police methods which are sometimes practised even in England and how British Judges deal with them, we quote the following extract from the *English Law Journal* :—

"Another case of doubtfully just methods in the practice of inferior tribunals has afforded the Lord Chief Justice a fresh opportunity for the assertion of the Court's determination to maintain the highest standard in the administration of justice. In a case before the Court of Criminal Appeal this week (*Rex* v. *Coss*, December 12), where the Appellant had been convicted at Cheshire (Kantsford) Sessions of house-breaking, and had been sentenced to three years' penal servitude, it appeared that, before the two principal witnesses were taken to identify the accused person, the police took them into a room and showed them a number of photographs, and the witnesses picked out the photograph of the Appellant. No doubt there are circumstances in which the police may legitimately use photographs, but they cannot do so without suspicion of "coaching" when the question is the identification of the very person whom the witnesses are afterwards going to see. That is a course which the Courts will not countenance, and the fact that what had been done in this case made it possible that a suspicion of unfairness, however unfounded, might arise, was sufficient to invalidate the proceedings."

Journal of Comparative Legislation.

The November number of the *Journal of Comparative Legislation* is a particularly interesting one. The previous number of the journal contained a summary of legislation in different parts of the British Empire. The present number contains contributions from eminent writers on legal topics of international, constitutional and social interest. Prof. Berriedale Keith contributes an article on the "International Status of the Dominions" in which he notices incidentally that of India as well in this connection. He also contributes some "Notes on Imperial Constitutional Law." Dr. Jenk's paper on the "Function of Law in Society" read before the sociological society is reproduced. "The Abrogation of the Turkish Capitulations" by Mr. Bentwich is also a very informing article.

Eugenics and limitation of marriage.

Mr. J. P. Chamberlain's article on the above subject is reproduced in the Society's Journal from the Journal of the American Bar Association. It notices some of the recent Statutes passed in different States in America in restraint of marriages of epileptics, insane, imbecile and feeble-minded persons with a view to restrict the birth of children with hereditary taints and the spread of disease through marriage. The Statutes contemplated gaining this end by forbidding such marriages. The earlier legislation imposed a penalty for such marriages by punishing any person infringing the law to a minimum imprisonment of three years. But the

law Courts seemed to have held that such infringement did not amount to an annulment of the marriage. But if one of the parties who suffered from such ailment fraudulently concealed it from the other party, some States provided for such annulment. In certain other States where the Statutes declared such marriages unlawful and imposed penalty, the marriages were made voidable at the instance of the innocent party. In some States where license is required before any marriage could be celebrated, the Statutes provided that no such license is to be issued unless a medical certificate showing freedom from such diseases was produced. Other States required the applicants for marriages to be examined by physicians and certified to be free from disqualifying diseases. An appeal to the county Court against a disqualifying certificate is allowed and such Court may order re-examination of the applicant by three physicians whose report "shall be final." In some States statutes were passed for the sterilization of certain criminals and feeble-minded and otherwise defective inmates of State institutions. But the Courts declared these Statutes unconstitutional. The article concludes by saying that "a serious impediment in the enforcement of these Statutes is the lack of an exact standard of deficiency," but the writer expresses a hope that when people are convinced that such defects are heritable and can be detected with certainty, "the law will not lag behind medical science in the protection of future generations."

HINDU LAW AND EUGENICS.

The Hindu law from the earliest times has to some extent been socialistic in its provisions. The joint family system, and the law of maintenance have nothing analogous to them in other ancient and even in modern systems of jurisprudence. It was far from democratic, still it showed more concern for the social and moral well-being of the community than for material prosperity of individuals. In the early days when the growth of population was of vital importance to the community, it did not impose any restriction on marriage. The strictest and the loosest forms of matrimony found recognition in it. Even illegitimate sons were assigned a legal status and provision was made for their maintenance. While it did not attempt to check the growth of imbeciles, weaklings or disease-stricken individuals by putting a restraint on marriages, it sought to gain the end by other indirect means. The Code of Manu provided that lunatics and idiots were debarred from inheriting paternal or ancestral properties. They were entitled to be maintained out of joint family estates but not to inherit any portion of it. In case of lunacy, it need not be incurable or congenital but it is sufficient, if the person is insane when the succession opened out. In the case of idiots, however, it must be shown that the idiocy is complete, absolute and congenital. The reason for this is obvious.

The review of the American Statutes shows that the lack of a standard of the mental or physical defects has been a great obstacle in putting the law into operation. The means contemplated by the American Statute is prevention of marriages. The Hindu sages attempted to gain the same end by excluding the afflicted persons from inheritance. Members of a joint family were bound to maintain them, but they would naturally be reluctant to take upon themselves the burden of maintaining the wife and children of an insane or other disqualified persons. But the Hindu law-givers took precautions that the interested members of a joint family did not take advantage of a person's weak intellect and deprive him of his inheritance. Hence the commentators, who, as in Rome, wielded great influence in amending the law, imposed an obligation that in case of idiocy it must be proved to be absolute, complete and congenital. Thus they managed to fix the standard of disability in the cases of debatable disqualifications.

One of the most comprehensive disqualifications in Hindu law was in respect of "incurable diseases." Disqualifications under this head, which has been interpreted in terms of English jurisprudence, have been rather dubious on the ground that hardly any disease may be said to be incurable. But we are disposed to agree with Sir John Trevelyan that there is no reason why the Hindu law text should not be followed in cases of incurable diseases such as cancer or phthisis. When remedies for such diseases are found and satisfactorily established, such diseases may be excluded from the category of incurable diseases. Leprosy, however, is specifically mentioned amongst the disqualifying diseases. It need not be congenital. But more modern interpretations put upon it in our law Courts exclude only those who are afflicted with an

aggravated and incurable form of leprosy. Sir Leonard Rogers claims that leprosy is a curable disease. The drug he has discovered has long been known in India and it is said that injection of it instead of mere superficial application has proved to be a very efficacious remedy. When leprosy is proved to be a curable disease, it may be excluded from amongst the disqualifications.

The other disqualifications are impotence; want of limbs or organs such as legs, nose or tongue; but these must be congenital and in the case of cripples, it must be complete incapacity to walk. Loss of limbs in war would not disqualify. Congenital deafness and dumbness as also blindness are also put down as disqualifications. With regard to deafness and dumbness, it may be said that such defects are not transmissible but as they are frequently associated with idiocy, such disqualification may not be quite unreasonable. But why congenital blindness was put down by the ancient Hindu law-givers amongst the disqualifications, it is difficult to divine. A Bill for removal of some of the disqualifications above-mentioned in respect of those governed by the Mitakshara law was passed by the Legislative Assembly in March last but, we believe, it has not been passed by the Council of State and is not yet law. The Bill excludes Bengal, because under the Dayabhaga law a father possesses absolute power of gift and bequest even in respect of ancestral properties and he may disinherit any disqualified person and make provision for his maintenance. But in cases of intestate succession the disqualifications would come into operation. We consider it preferable that the law Courts should deal with these disqualifications according to the facts of each case and modify their operation when necessary than that the Legislature would sweep them away by one stroke on merely sentimental grounds.

Correspondence.

COURT-FEE UPON EXTENDED SUCCESSION CERTIFICATE BEYOND EXEMPTION LIMIT.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

I shall feel much obliged if you kindly insert the following in your much esteemed journal for favour of your opinion and that of any of your readers.

Sec. 10, cl. 1, of the Succession Certificate Act, being Act VII of 1889, runs as follows:—A District Court may from time to time, on the application of the holder of a certificate under this Act, extend the certificate to any debt or security not originally specified therein, and every such extension shall have the same effect as if the debt or security to which the certificate is extended had been originally specified therein. Under the present amended Court Fees Act no fee is to be paid on the amount or value of any debt or security not exceeding one thousand rupees, and if the amount or value exceeds that amount, two per centum on the amount or value of any debt or security specified in the certificate up to ten thousand rupees. With respect to an extension of such a certificate three per centum is to be paid on the amount or value of any debt or security to which the certificate is extended. I like to cite here a specific instance for true interpretation of law on the subject. A man applied for a succession certificate for a debt valued Rs. 1,000 and was granted the same without payment of any court-fee. He again applies for an extension of such a certificate for a debt valued Rs. 500 not originally specified therein. Now, the point to be cleared up is whether he shall have to pay the amount of fees at the rate of three per centum on Rs. 500 only being the amount to which the certificate is extended or on Rs. 1,500 being the total of the amount specified in the original certificate and that in the extended certificate. I learn that it is the practice with some Courts in such a case to charge three per centum on Rs. 1,500 and some Courts charge the amount of fees at the same rate on Rs. 500 only in a case like that stated above.

I would like to cite another instance for favour of opinion. A man got a succession certificate for a debt valued Rs. 1,000 on payment of usual fees before the amended Court Fees Act had come in force. Now he applies for an extension of such a certificate to a debt valued Rs. 500 not originally specified therein. Will he pay the amount of fees at the rate of three per centum on Rs. 500 only being the amount to which the certificate is extended or on Rs. 1,500 at the same rate minus two per centum originally paid on Rs. 1,000?

Yours sincerely,
SAKHANATH GHOSE.
Pleader, Pirojpur.

8-1-1924.

THE

Calcutta Weekly Notes

Vol. XXVIII.] MONDAY, JANUARY 21, 1924. [No 10.

Contents.

NOTES

Communal representation in the services.

Now that a great deal is being said and written about the Bengal *Swarajya* Hindu-Mahomedan Pact and the Pact is also likely to form the subject-matter of a resolution in the Bengal Legislative Council, we wish to draw public attention to a debate on the question of communal representation in the services which took place in the Legislative Assembly in March last. It shows that it is not merely a Hindu-Mahomedan question, but following the example of our Moslem brothers, the Christians, the Sikhs, the various sects, castes and sub-castes amongst the Hindus are also claiming communal representation not only in the legislature but also in the public services as well. The framers of the *Swarajya* Pact have fallen into the fundamental error of fixing representation in the public services not by reference to the percentage of the educated members of the respective communities but by reference only to the relative population. That the fixing of any definite proportion of recruitment in the public services on communal basis even by reference to education and ability is impracticable and would be prejudicial to the best interest of India is apparent from the debate in the Assembly to which we invite attention.

A resolution was brought on the 10th of March last before the Legislative Assembly by a non-Brahmin member from Madras for communal representation in the services. It was by no means so drastic as the *Swarajya* Pact. It recommended that "in making appointments to the public offices, preference should be given to classes and communities which were not well represented in the services," with a proviso, "where the qualifications of the candidates are adequate to discharge the duties efficiently by their education, ability and integrity." This resolution was much more sensible, for, it referred rather to the maximum qualification and not to the minimum qualification of the Bengal *Swarajya* Pact. Non-Brahmins of Madras, Mahomedans, Shikhs and Anglo-Indians took part in the debate. The leading members of the Democratic and the Nationalist parties who were members of the old Indian National Congress avoided taking part in the controversy. Their ideal was unity and growth of nationality in India. They, therefore, left it to the Home Member to reply. Sir Malcolm Hailey in his speech described the debate as an "Internecine warfare" and remarked that many members who took little interest in general questions that came before the House showed a "morbid interest" in communal questions.

Regarding the resolution Sir Malcolm Hailey said :—

"I have reminded the House that if I were to be called upon in the terms of this resolution to represent adequately the claims of the different communities or to protect minority communities, we must translate those terms into regulations. How are we to do so? The resolution suggests that not neglecting the claims of efficiency and the like, we are to give preference to those who belong to classes or communities who are not well represented in the Services. But we must have some means for deciding if they are adequately represented. Previous references have been made to the extraordinary difficulty which we should find in adequately classifying the communities throughout India and standardising their requirements."

Referring to the Hindus Sir Malcolm said :—

"For census purposes we classify the Hindus as one community; but the very reason why this resolution has been brought to-day is because a large number of Hindus in Madras consider that Hindus do not make a community in Madras and that Brahmins should be separated from Non-Brahmins . . . . . . Then again take the difficulty that confronted us when the Franchise Committee visited Bombay. Lingayts are classified as Hindus, but the Lingayts who number, I think, about two and three quarter mil-

lions claimed separate representation from other Hindus . . . . ."

Referring to his experience in the Punjab the Home Member said :—

"If you were to ask a Pathan of the Punjab what he was, his first claim would be for representation as a Pathan; it would not satisfy him to be told that you were admitting the claims of Mahomedans generally."

Regarding the Hindus of southern and north-western India he said :—

"There are some 5 millions Marathas, nine and half millions Rajputs and both of them would reject a discrimination based on religion as insufficient and claim recognition on tribal and national basis . . . . . We have something like this arising among *Ahirs*, *Gujars* (two millions); Jats (seven millions)"

The Home Member after mentioning that there were 2378 castes and tribes and 43 races and nationalities in India, he asked :—

"Will any one give me a common denominator which will allow me to establish the fractional proportions of representation for the *Gujars* (two millions), *Sikhs* (two and a half millions), *Mahars* (three millions), *Marathas* (five millions), *Rajputs* (nine and a half millions), *Parsees* (one hundred thousand) and *Pathans* (three and a half millions)? I purposely include classes widely differing in claims."

This at once shows the absurdity of the claims to communal representation.

Then Sir Malcolm Hailey, who had a long experience of the Finance Department of the Government of India, bore testimony to the efficiency that had been secured in that Department by discarding a limited competition in favour of an open competitive examination for the recruitment of officers for responsible positions in the Indian Audit and Account Services. He said :—

"In the Imperial Service of Egnineers, Local Governments select Indian recruits for themselves, but mainly by open competition, and then again, when we have to recruit for a technical service, it is difficult to arrange for anything like adequate representation. I come to an interesting case; that of our Indian Audit and Account Service, which as the House knows, has for many years looked to competition for a greater part of its recruiting It has a long and a distinguished record and it has maintained that record by open competition. There were for a few years restrictions in this sense, that it was a competition among nominees and that we attempted in accepting nominations to see that one class in particular did not appear in too great numbers at our examinations, I mean the Madras Brahmins. But lately, the restriction has been felt to be unnecessary and it has now been removed. The result will interest the House. We have twenty-eight Madras Brahmins and three Madras Non-Brahmins, two Syrian Christians, twenty-one Bengal Hindus, eight United Provinces Hindus, six Punjab and Delhi Hindus, three Punjab Mahomedans, three Bombay Hindus and one Sikh. For my part I should be loath to see the final record of their service, which has been obtained by open competition, altered to any system of close nomination to secure representation of different communities or minor classes."

In this respect we may say that Sir Malcolm voices the views of the educated community throughout India, who are in favour of recruitment in the public services, civil or technical, provincial or imperial, by open and unfettered competition.

Sir Malcolm Hailey in opposing the resolution concluded by discouraging any further discussion of the question in the following words :—

"It was betrayed into an exhibition of the existence of separatist tendencies which only supplies arguments to those who claim that Indians can never combine."

The Home Member wound up his speech by appealing to the House in the following terms :—

"We shall do well to avoid placing before the world at large differences which were not edifying in themselves and the arising of which here can lead to no good result."

The champions of communal representation had the good sense of bringing the debate to a close without a division.

Sir Devaprasad Sarbadhikary acting as a peace-maker between the advocates of communal representation and the officials moved an amendment to the resolution in the following terms, which was accepted by both :—

"This Assembly recommends to the Governor-General in Council that in making new recruitment for the Services under the control of the Central Government steps be taken to secure that the Services are not unduly overweighted with representatives of any one community or province and *as far as possible* claims of all communities and provinces are considered."

Thus ended this unseemly strife for communal representation in the services.

THE ABUSE OF ADVOCACY.

The independence of the Bar, which has long been recognised as essential to the administration of justice in the Courts, involves a sense

of responsibility which, happily, is rarely wanting. Whenever a member of the Bar does violate the traditions of his calling by allowing his privilege to degenerate into licence, the profession, no less than the public, have good reason to make an earnest protest. One may hope, therefore, that the strong condemnation' by the Attorney-General of the extraordinary speech which Mr. Cecil Hayes made in defence of Lord Alfred Douglas at the Central Criminal Court—a speech which, in its malignity and baselessness, aggravated the gross offence of his convicted client—will be followed by some inquiry by the Benchers of his Inn into conduct which was condemned by Mr. Justice Avory as well as by Sir Douglas Hogg, and which has been the subject of much vigorous comment in the Press in all parts of the country. The recognised rules of advocacy permit an advocate to do all that he honestly can for his client, but they certainly did not justify Mr. Cecil Hayes in adding his own calumnious attack upon Mr. Winston Churchill to that for which his client was sent to prison for six months. "An advocate," said Sir Alexander Cockburn, in his classic definition of the functions of the Bar, "should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction—that the arms which he wields are to be the arms of the warrior, and not of the assassin. It is his duty to strive to accomplish the interests of his clients *per fas*, but not *per nefas*." A member of a learned profession ought never to stoop to regard himself as a mere hireling—a point which is emphasised by Dr. Showell Rogers in his admirable brochure on "The Ethics of Advocacy":—

"Counsel ought never to sink his own individuality so far as to become the *alter ego* for all purposes of every knave who can find a guinea to employ him; and he is not bound, indeed he is bound not to employ knavish artifices in a knave's defence. He must never forget that the stream of his forensic eloquence should flow from him as through a purifying filter; and it behoves him to guard against opening the sluices of words regardless of evil consequences to others; and he is not to regard himself, nor allow himself to be used, as a mere 'conduit pipe' for the transference of matter, be it never so foul or vile."

That is an excellent statement of the forensic obligation which Lord Alfred Douglas's counsel did not observe. He saw fit to justify the libellous statements of his client by repeating them as his own personal views. He is protected by the privilege of the Bar from the proceedings which might have been taken against him had he made his scurrilous speech in some place other than a Court of Justice; but he is not protected from the censure of those whose business it is to guard the honour of the Bar.—*The Law Journal.*

LOCUS STANDI OF ACCUSED BEFORE BEING SUMMONED.

There is no provision in the Criminal Procedure Code (even in the amended one) by which the accused can appear before the Court, as a matter of right, before being summoned. But some Courts favour such appearance and sometimes call upon the accused to show cause why he should not be prosecuted. But this procedure seems to be quite inconsistent with the scheme of the legislation. Sec. 202 of the Criminal Procedure Code lays down the manner in which the enquiry is to be held, when the Magistrate postpones the issue of process against the accused, recording his reasons therefor. And if after enquiry the Magistrate sees sufficient ground for proceeding, he shall issue process as provided in sec. 204, Cr. P. C. and not before that. This view is supported by the ruling reported in 21 C. W. N. 127 (*Balai Lal Mukherjee* v. *Pasupati Chatterjee*). This was followed in a subsequent case reported in 27 C. W. N. 196 (*Chandi Charan Mitra* v. *Manindra Chandra Roy Chowdhury*), in which the Magistrate taking cognizance of the case directed notice to be served upon the accused to show cause why process should not issue against him. Cause was shown by the accused, and the Magistrate came to the conclusion that he did not find any reason to issue process against the accused. The case eventually came up to the Hon'ble High Court, and the learned Chief Justice was pleased to observe: "The Magistrate did not act in accordance with the provisions of the Criminal Procedure Code as laid down in secs. 202 and 203 of the Criminal Procedure Code and the learned Sessions Judge was quite right in saying that the procedure was improper and irregular. I hope that the judgment which we are delivering in this case and the judgment which this Court delivered in the case of *Balai Lal* v. *Pasupati* (21 C. W. N. 127) will be brought to the notice of Magistrate, and that they will observe in this respect the plain provisions of the Code of Criminal Procedure."

As regards motions under sec. 437, Cr. P.

C., the Full Bench case reported in I. L. R. 15 Cal. 608 (*Hari Das Sanyal* v. *Saritullah*) lays down the principle that no notice to an accused person is necessary in point of law before an order under sec. 437 can be passed, but the discretion of the Court is not in all cases fettered in this matter, and it may call upon the accused to appear and urge his defence. But in a recent case reported in 27 C. W. N. 552 (*Jogesh Ch. Sen* v. *Nikunja Behary Chowdhury*), a fine distinction was made regarding the appearance of the accused. He was given an opportunity of being heard by the Magistrate and no objection seems to have been taken thereto by the complainant. Thereafter the complaint was dismissed under sec. 203, Cr. P. C. The Sessions Judge, on being moved, set aside the order of dismissal and directed a further enquiry without giving the accused an opportunity of being heard. The case came up to the Hon'ble High Court and it was held by the learned Judges, distinguishing the Full Bench case I. L. R. 15 Cal. 608, that in the circumstances of the case, the accused should have been given an opportunity of being heard before the learned Sessions Judge, he having been allowed to be present from the very commencement of the proceedings at the instance of the complainant. So in this case the appearance of the accused before being summoned was not considered improper and irregular, but on the other hand it was thought incumbent upon the Sessions Court to call upon the accused to appear and hear him, as he was heard before the Magistrate at the commencement of the proceeding.

So it appears that the accused has no *locus standi* in an enquiry under sec. 202, Cr. P. C., unless the complainant waives his objection thereto, and the Full Bench case as well as the case reported in 27 C. W. N. 552, favour the opinion that in a motion under sec. 437, Cr. P. C. before the Sessions Judge, it lies in the discretion of the Court, whether notice should be issued against the accused with a view to give him an opportunity of being heard, the discretion to be exercised in each case according to its special circumstances.

RAJENDRA NATH SOM, B.L.,
Pleader, Howrah.

Notes of Cases.

CALCUTTA HIGH COURT.

(Recent decisions not yet reported)
(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY and SUHRAWARDY, JJ. M. A. Nos. 19 and 20 OF 1923. BECHARAM CHOWDHURY *v.* PURNA CHANDER CHATTERJI. The 4th January 1924.

Bengal Tenancy Act, sec. 109, whether bar to suit for enhancement, when previous application under sec. 105, withdrawn—Sec. 98, C. P. C., whether abrogates cl. 36 of Letters Patent.

The Plaintiffs instituted proceedings under sec. 105, Bengal Tenancy Act for enhancement against the Defendants. The said proceedings were withdrawn with leave to bring civil suits in respect of the subject-matter. Accordingly he instituted the present suit for enhancement of rent. The Court of first instance overruled the tenant Defendants' plea that sec. 109 was a bar but held that the rent could not be enhanced as the tenures were permanent. The learned Subordinate Judge on appeal held that sec. 109 was not a bar (following *Soroj Kumar* v. *Umedali*, 25 C. W. N. 1022), and holding that the tenures were not permanent he remanded the cases for fixing the amount of enhancement. The Defendants appealed to this Court:

Held per WALMSLEY, J.—That sec. 109, Bengal Tenancy Act was a bar to the prayer for enhancement (following 24 C. W. N. 1024; S. A. No. 1358 of 1919 decided by Mookerjee and Walmsley, JJ., on 16th January 1923 and 27 C. W. N. 989).

Held per SUHRAWARDY, J.—That sec. 109, Bengal Tenancy Act, was not a bar (following 25 C. W. N. 1022).

At this stage a question arose as to whose judgment should prevail.

Held per WALMSLEY, J.—That cl. 36 of the Letters Patent has not been abrogated by sec. 98, C. P. C.; hence the judgment of the senior Judge should prevail (25 C. W. N. 605 P. C.).

Held per SUHRAWARDY, J.—That sec. 98 of the Civil Procedure Code governs all appeals from the mofussil and therefore the judgment which agreed with the lower Court should prevail.

Held, finally—That as they could not go on differing *ad infinitum*, the appeal must be allowed, Suhrawardy, J., agreeing.

Babu Rupendra Coomer Mitter for the Appellants.

Babu Sib Ch. Palit for the Respondents.

S. C. C.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, JANUARY 28, 1924. [No. 11.

Contents.

NOTES

Parliamentary and unparliamentary obstruction.

We have said before that the *Swarajya* party would have been wise if they had assumed ministerial responsibility when it was offered to them. If after assuming responsibility, the ministers with the support of their party had demanded provincial autonomy or opposed repressive measures, such as the detention or deportation of persons without trial, their demands would have carried great weight with constitutionalists both in England and in this country. They might have brought about dissolution by opposition as we have explained before, and such action could not have been characterised as unconstitutional. A policy of irresponsible obstruction with a view to bring all business before the Legislature to a standstill, as has been done in the Central Provinces, will hardly find favour with any one who is accustomed to parliamentary Government. We must, however, say in all fairness to the *Swarajya* party in Bengal, that they have not so far adopted any such unparliamentary attitude. The Government of India Act can only be amended by the British Parliament and any move for making Government impossible will not find favour with members of Parliament, no matter to which party they may belong. However, parliamentary methods of opposition with a view to bring about reforms in the constitution would draw pointed attention to its defects, for the remedying of which the whole country is unanimous.

Britishers are as a rule very hard-headed, practical and business-like people. They understand opposition and defeating Government in matters of policy or with regard to particular measures and the assumption of responsibility for effecting a reversal of such policy and for the bringing about of reforms. They do not appreciate or understand obstruction for producing a deadlock in the administration. However much the parties in England may fight with each other over momentous constitutional or political issues, they do not produce such a deadlock in the administration that no laws may be passed, no taxes raised or expenditures incurred by Government. If matters are brought to this pass, it amounts to a passive revolution. The Government in such circumstances considers itself justified in assuming extraordinary executive powers. For instance, not very long ago when all transport and traffic in England was sought to be stopped by what was known as the "triple alliance" of powerful labour organisations in England, which though non-violent in its character, was a *quasi*-revolutionary movement, designated as "direct action," the Government of Lloyd George assumed extraordinary powers, took extraordinary precautions and resorted to extraordinary measures to cope with the situation. Since the *Swarajists* have themselves come to the conclusion that civil disobedience is an impossibility, their policy of creating a deadlock with a view to paralyse administration is illogical and inconsistent. From what we have said, it is evident that the Government in such circumstances may plead constitutional justification for carrying on the administration anyhow. If such extraordinary powers or measures cannot be met by effective civil disobedience or some other form of direct action, the only reasonable course would be to work within the constitution and work for its reform and expansion in the manner we have indicated.

(i)

We say this for explaining the significance of what Mr. Ramsay MacDonald said on the eve of his assumption of the office of Prime Minister of England. In bringing the debate on the no-confidence motion to a close, he announced to the House that he was not lacking in the sense of responsibility of the high office that he was going to assume, in the following words :—

A Labour Government might create many fears, but what would be still worse would be any action which should degrade the House and bring it to a deadlock, produce stalemate and show their incapacity for Government.

After this we can hardly expect that the action of the *Swarajya* party in the Central Provinces, which we hope will not be followed by the members of that party in the Central and Provincial Legislatures elsewhere, will meet with the approval of a Prime Minister hailing even from the Labour party in England.

The remarks we have quoted above were not made in connection with India but with reference to the attitude of the Labour Government as regards the policy of that Government generally. In his message to some of our Indian daily contemporaries, Mr. Ramsay MacDonald said :—

I can see no hope if India become an arena of struggle between constitutionalism and revolution. No party in Britain will be cowed by threats of force or of policies designed to bring Government to a standstill, and if any Indian sections are under the delusion that it is not so, events will sadly disappoint them. I urge upon all Indians to come near to us rather than stand apart from us, to get at our reason and goodwill

These words were uttered sometime before the no-confidence motion was brought before the House and before it became a settled fact that Mr. Ramsay MacDonald would be the Prime Minister of England. Since his assumption of office, the inclusion of Sir Sydney Oliver and Lord Chelmsford in his Cabinet is not without significance. Whatever may be his individual views with regard to India, he has been obliged to include some members of the Liberal party in his Cabinet. The Labour party by themselves are not in absolute majority in Parliament and he must rely on the support of the majority of the Liberal members to enable him to remain in office and carry on the Government. So he has been obliged to appoint a Secretary of State for India who would command the confidence of his Liberal colleagues. The newly appointed Secretary of State for India has no Indian experience and we presume for that reason Lord Chelmsford has been included in the Cabinet. Lord Chelmsford, the joint collaborator of the present Indian constitution, has openly declared that he is not enamoured of the virtues of his foster-child, diarchy. We may therefore reasonably expect that if we proceed by constitutional and parliamentary methods to expose and oppose the pranks of this deformed prodigal child and with united voice ask for its recall, diarchy will, before long, disappear from India.

The New British Premier.

The elevation of Mr. Ramsay MacDonald to the office of the Premier is the best commentary on the value of free institutions. Here is a man, son of a farm-servant and educated in a country school, who by dint of hard work, courage and consistency has attained the highest position any Britisher is capable of attaining and been awarded the highest office and honour in the gift of the Crown and the people. Only a few days ago, Mr. MacDonald expressed his misgivings that if he took office, he would not get a fair play. The *Punch* assured him that he would: and now the opinions and comments of journalists and public men leave no doubt that so long, at any rate, as the Labour Government do not launch into the more ambitious items of their programme, but confine themselves to the question of how to relieve unemployment and the existing strained relations between the European Cabinets, no needless obstacle will be raised to their carrying on His Majesty's Government. It is a truism to say that the country must have a Government. Mr. Baldwin's having gone out, Mr. MacDonald, being the head of the Opposition, automatically comes in; and we hope he will have a fair chance to give effect to the policy for which he and his party stand.

Regulation III and Bengal Council.

The speeches which were delivered last week in the Bengal Council as well as the voting constitute the most effective reply to the apologia offered by the Government in support of the arbitrary arrest and detention by them of certain persons under Regulation III of 1818. They demonstrate beyond question that the opinion of the great bulk of the people is against the application of the Regulation. That being so, His Excellency the Governor and his Executive Council will do well to consider whether they

ought not to revise their policy. Supposing there is a revolutionary conspiracy, that is no reason why the conspirators should not be brought to trial. There will be expense, delay and some danger to those who will depose as witnesses as well as to those who will have the management of the trial on behalf of the Crown. But a civilised Government has to risk these contingencies, as the members of the Repressive Law Committee themselves recognised in their report. The subject of deportation without trial has been discussed more than once in these columns and we do not wish to repeat the arguments we have advanced against it. We shall content ourselves for the present by pointing out that by their persistence in an arbitrary policy, the Government are on the high road to alienating the saner sections of the people from them.

The Public and the Courts.

An unusual application was made to the Divisional Court at the close of the last sittings which resulted in a noteworthy exercise of jurisdiction by the Judges—Sankey and Swift, JJ.—who heard it (*Ex parte Everett*: December 18th). The applicant complained that he had been unable to gain admission to the public gallery of the Central Criminal Court during the trial of Lord Alfred Douglas, that the police in charge of the entrance to the public gallery had allowed some persons to enter who had waited not nearly so long as other persons whom they kept out, and that this improper discrimination was due to "tipping." Mr. Justice Sankey, while stating that the "Court could express no opinion on the facts of the case without hearing both sides," showed that both he and Mr. Justice Swift regarded the application with some sympathy by adding that "if the facts had been correctly stated by Mr. Everett, the Court thought that the police officers concerned ought not to have exercised an improper discrimination and ought not to have kept persons out of the public gallery when there was room for them in it, and when there was no legal objection to their being admitted." That goes to prove that the Judges are not unconscious of the undesirable practices by which, whenever a sensational trial is proceeding, certain members of the public are enabled to obtain admission in preference to others. They are practices, be it added, which are not confined to the Central Criminal Court. But what is even more noteworthy is that the Divisional Court, being asked by the applicant to make inquiries into the matter, decided to "request" the Associate to send a copy of Mr. Everett's affidavit to the Lord Mayor and to ask his Lordship to inquire into the matter. The result of the action delicately taken by the Divisional Court will be awaited with much interest. The Central Criminal Court, which is a statute-created tribunal, is peculiarly under the control of the Lord Mayor and the Corporation; the police officers whose conduct as janitors is impugned are also controlled and paid by them. It might, therefore, have been thought that Mr. Everett's application should have been made to the city authorities. The interesting thing about the decision of the Divisional Court, informal as it appears to have been, is that it implies that the King's Bench Division has, by virtue of its general jurisdiction to remedy the grievances of the King's subjects, a right of control even over what may be regarded as the more domestic arrangements for the administration of justice at the Central Criminal Court.—*Law Journal.*

Reviews.

SANJIVA ROW'S ALL-INDIA CIVIL COURT MANUAL. In two Volumes. *Edited by A. K. Nanniah, B.A., B.L., High Court Vakil, Fourth Edition. Lawyer's Companion Office, Madras. 1922.*

We welcome the new edition of this well-known compilation. It comprises the Government of India Acts to which frequent references have to be made by legal practitioners in the course of their professional duties in Court and also for drafting and other purposes in their offices or at home. The previous edition was published in 1915 and such new enactments passed during the next five years which are likely to prove useful to the legal profession are included in the present volumes. The amendments in other Acts are also incorporated and noted in this work. It is difficult to bring a compilation of this kind quite up-to-date. It takes time to edit and print it. Thus, though the amendments and new enactments subsequent to 1920 do not find a place in this compilation yet we have no hesitation in saying that it is the most up-to-date and comprehensive Civil Court Manual that we have come across. Short annotations and important recent rulings are given in the foot-notes, which enhance its usefulness. The

printing, binding and general get-up of the book is no small part of its attraction. We congratulate the Law Printing House and the Lawyer's Companion Office of Madras on the admirable execution of the work in a style which would do credit to any publisher and printer in the world.

THE CHARITABLE AND RELIGIOUS TRUSTS ACT, being Act No. XIV of 1920, with a commentary. *By Kshitish Chandra Chakrabarti Smritibhusan, M.A., B.L., Calcutta: The Standard Law Book Society, 8-2, Hastings Street. 1923.*

This is a commentary on a most important statute which found a place in our statute book none too soon, a somewhat modest attempt previously made by so redoubtable a champion as the late Sir Rashbehari Ghose to provide public control over Hindu religious trusts having been defeated by unreasoning prejudice and stark conservatism so far back as 1908. There is a useful and interesting historical introduction by the annotator who being an orthodox Hindu could not well begin his story from anywhere later than the *Satya Yuga*: and it is not his fault that the light he succeeds in gathering from the Markandaya Purana aided by references to Jimutavahana's Vyavahara Matrika and Narada is exhausted in two short paragraphs. The historical introduction may therefore be taken to deal almost entirely with the events of the *Kali Yuga* and seems to demonstrate that the necessity for the control of religious institutions grows with the progress in intensity of that age. The statute of 1920, itself a mild one, must therefore be taken to mark a not very aggravated stage of that Age, which is surely reassuring. We have also assured ourselves that apart from other interests, the book will prove a convenient aid to the practical administration of the statute, the case-notes having been very carefully compiled.

Notes of Cases
CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before SUHRAWARDY AND PAGE, JJ. CIVIL REV. No. 843 OF 1923. ABINASH CHANDRA SAMUI, Petitioner *v.* UMES CHANDRA SAMUI, Opposite Party. The 11th January 1924.

Civil Procedure Code, Or. 21, r. 89—Decretal amount deposited to set aside a sale with a prayer for restraining the decree-holder from withdrawing the amount deposited—The injunction granted in a title suit and sale set aside—Tender, if valid.

The Plaintiff, Opposite Party, brought a money suit against the Defendant, Petitioner, and the suit was decreed on compromise. The decree-holder, Opposite Party, in execution of the said compromise-decree brought to auction sale some property of the judgment-debtor, the Petitioner, and the decree-holder himself purchased the property on the 14th November 1922. On the 14th December 1922, the Petitioner made an application to set aside the sale under Or. 21, r. 89 of the Civil Procedure Code with a prayer that the decree-holder be restrained from withdrawing the decretal amount, pending the decision of a title suit filed simultaneously with this application under Or. 21, r. 89, C. P. C. On the 15th December the Petitioner filed a title suit to set aside the compromise decree in which he prayed for an injunction restraining the decree-holder from withdrawing the money. On the 16th December his prayer for injunction was granted in this title suit and on the 18th December the auction sale was set aside by the Munsif and the decree-holder was restrained from withdrawing the decretal amount.

The decree-holder preferred an appeal against the order of the Munsif setting aside the sale which was on appeal allowed to stand. The judgment-debtor obtained the present Rule against that order of the Appellate Court:

Held—That the tender was not a valid one and the sale could not be set aside on conditional payments. (16 C. W. N. 904, followed.)

Babus Mukunda Behary Mallik and *Sisir Kumar Ghosal* for the Petitioner.

Babu Panchanan Ghosal for the Opposite Party.

S. C. C. ***Rule discharged with costs.***

THE

Calcutta Weekly Notes.

Vol. XXVIII.] **MONDAY, FEBRUARY, 4, 1924.** **[No. 12.**

Contents.

NOTES

Remnants of the Repressive Laws.

The President of the Bengal Legislative Council and H. E. the Governor are to be congratulated for admitting the resolutions recommending the repeal of Reg. III of 1818, the Seditious Meetings Act and the Criminal Law Amendment Act and allowing a full and free discussion on the resolutions. They or either of them might have objected to admit the resolutions under the rules on the ground that the subject-matter of the resolutions was not primarily the concern of the Local Government, as the Regulation and the Acts referred to can only be repealed by the Central Legislature. The Bengal Council by their votes carried the resolutions against Government opposition, but the debate was of a general character and no serious attempt was made to answer the specific arguments advanced from the Government benches. We would therefore try to meet some of the salient points in the Government case for retaining in the statute books these remnants of the repressive laws, after a whole lot of them have been repealed according to the recommendations of the Repressive Laws Committee which was appointed by the Central Legislature in 1921.

We have always maintained that a person may be arrested on suspicion and kept in custody for a reasonable period pending investigation, for which the Code of Criminal Procedure makes ample provision, but it is contrary to the spirit of modern constitution and civilized system of laws that a citizen should be kept in prison or detention for an indefinite period under an executive order without being brought to trial before a Court of law. That one's guilt or innocence may only be proved before a Court of law by regular trial, is one of the elementary rights of citizenship which when interfered with by the executive, is naturally resented and causes great public discontent. We quite admit, as was said by Sir Hugh Stephenson the other day in the Bengal Legislative Council, that there may be occasions when the executive may be armed with extraordinary powers for ensuring the safety of the State. It is no doubt true that during the Irish rebellions the operation of the Habeas Corpus Act was from time to time temporarily suspended. During the last European war, although it was not so suspended, the Defence of the Realm Act armed the executive with powers of internment with which the law Courts would not interfere. In India too the Defence of India Act armed the provincial executives with similar powers and the Government of India also had resort to Reg. III of 1818 for the arrest and detention of political suspects.

The Committee appointed by the Indian Legislature for examining the Repressive Laws recommended the repeal of the Defence of India Act and it was forthwith repealed. The Committee also recommended the immediate repeal of Reg. III of 1818, with certain reservation in respect of non-British subjects, which we shall notice hereafter. We shall first deal with Sir Hugh Stephenson's argument for putting Reg. III of 1818 into operation at the present moment and for its retention in the statute book. His argument that the *Habeas Corpus* has been known to have been suspended by Parliament only on occasions of grave emergency to the State, supports the view of the Committee, which is in accordance with the public opinion in India, that it should not find a permanent place in our statute books. Reg. III of 1818 not only arms the executive with the power of arrest and detention of all British subjects in India but the *Habeas Corpus* section of the Code of Criminal Procedure, sec. 491, which has recently been extended to

the whole of India, retains cl. (3) which debars even the High Courts in India from issuing any writ for bringing the arrested persons to trial. This means a permanent suspension of the *Habeas Corpus* in respect of all British subjects in India. The law of England is that when the State is in danger, *Habeas Corpus* may be suspended with the leave of the legislature. The law in India is that a citizen may be deprived of his liberty at the will of the executive and he is debarred from the ordinary right of every citizen to resort to a Court of law to have his liberty restored or of being produced and tried before a Court of law.

Sir Hugh Stephenson also referred to passages from the Report of the Repressive Laws Committee where they noticed "the difficulty of securing evidence or of preventing the intimidation of witnesses." As the members of the Bengal Council made no attempt to meet this point either, we would invite public attention to the answer given in the Committee's Report which immediately follows the passage which Sir Hugh quoted :—

"But we consider that in the modern conditions of India that risk must be run. It is undesirable that any Statutes should remain in force which are regarded with deep and genuine disapproval by a majority of members of the Legislature. The harm created by the retention of arbitrary powers of imprisonment by the executive may, as history has shown, be greater even than the evil which such powers are directed to remedy. The retention of these Acts could in any case only be defended if it was proved that they are in the present circumstances essential to the maintenance of peace and order As it has not been found necessary to resort in the past to these measures save in cases of grave emergency, we advocate their immediate repeal."

Such grave emergency might have existed during the great war but no reasonable man would say that any such grave emergency exists now and that the few struggling revolutionaries or demented anarchists cannot be dealt with properly and effectively by recourse to judicial trial.

The Committee, therefore, recommended that Reg. III of 1818 and the corresponding Madras and Bombay Regulations should be repealed except for the original purposes for which they were framed. The Report says :—

"We are in fact satisfied of the continued necessity for providing for the original object of this Regulation, in so far as it was expressly declared to be 'the due maintenance of the alliance formed by the British Government with foreign Powers, the preservation of tranquillity in the territories of Native Princes entitled to its protection and the security of the British Dominions from foreign hostility' and so far as the inflammable frontier is concerned, from 'internal commotion.'"

The Regulation may with propriety be used for deporting Bolshevik agents but the above extracts show that the Committee recommended that Reg. III of 1818 is not to be put into operation against British Indian subjects even in the case of civil commotion except in the north-western frontier. We presume that H. E. the Governor-General will also admit that an inspection of the cases against the detenus even by a lawyer of the eminence of an ex-Attorney-General and ex-Lord Chief Justice of England is no substitute for a public trial.

Those who are apprehensive that in cases of internal disorder the Government, in the absence of Reg. III of 1818, would be powerless to cope with the situation, should remember that Chap. IX of the Code of Criminal Procedure furnishes ample power to the executive to cope with civil commotions. If it is of greater magnitude, resort to martial law is a more drastic remedy. It is a recognised principle of English constitution that force may be repelled by force. The executive in India have also the power of framing ordinances at a time of emergency. But under ordinary circumstances the personal liberty of the subject cannot be interfered with even by the highest executive except by recourse to judicial tribunals. The Resolution passed by the Bengal Council recommending the repeal of Reg. III of 1818 is, however, of no more value than a mere expression of opinion. For, it is only the Legislative Assembly and the Council of State which can repeal the Regulation with the Governor-General's assent. We are sure the Central Legislature of India will now repeal Reg. III of 1818 and the corresponding Madras and Bombay Regulations in accordance with the recommendations of the Committee of the Central Legislature which were accepted by the Governor-General in Council. Thus if the *Swarajists* would follow up the path chalked out by the constitutionalists they may do a lot of useful work.

With regard to the Seditious Meetings Act and the Criminal Law Amendment Act, it is to be noted that Part I of the latter Act has already been repealed in accordance with the recommendations of the Committee. With regard to Part II of the latter and the Seditious Meetings Act, they have also been recommended for repeal by the Repressive Laws Committee. Before we come to that, we ought to mention that these Acts are not ordi-

narily in operation. The former may be put into operation by notification by the Governor-General in Council and the latter under the Devolution Act by the Local Government by notification. The Seditious Meetings Act has not recently been put into operation in Bengal except in Howrah for a few months in 1921. But the Criminal Law Amendment Act was passed in 1908 for the suppression of *Samitis* (Associations) which were alleged to have been organised for unlawful political purposes. In 1913, the English law of conspiracy was introduced into India and was embodied in the Indian Penal Code as secs. 121A and 121B. These sections made any sort of conspiracy political or otherwise between two or more persons punishable, provided the purpose or means is unlawful. In case of conspiracy for the commission of offences, the punishment is the same as for the offence itself. For instance conspiracy for commission of murder or for the subversion of Government may be visited with the same punishment as for the substantive offence.

It was urged before the Repressive Laws Committee that as the conspiracy sections 121A and 121B were sufficient to cope with unlawful associations, Part II of the Criminal Law Amendment Act was no longer required. That secs. 15 and 16 are open to the objection, that if they were brought into operation by an executive order and an association declared unlawful, it is very difficult, if not impossible, to show that it was not so. The conspiracy sections on the contrary cast the onus on the prosecution. In any such case if conspiracy is proved between any two persons and association is established with regard to other members, the onus is shifted on to the latter. So it is by no means so very difficult for the prosecution to prove a case of conspiracy. If cases of conspiracy are proved and punished in due course of law, the accused can make no grievance, the public cannot say that any injustice has been done and the good faith of Government can never be questioned. But it is otherwise with suppression of associations by executive orders. None of these arguments were urged by members of the Bengal Council who made speeches recommending its repeal. But the Repressive Laws Committee took all these facts into consideration as also the opinions of all the Local Governments who were opposed to the repeal of the two Acts.

The Local Governments oppose the repeal of these Acts because they have found them handy in prohibiting meetings and suppressing political organisations of a questionable character. But our view in the matter is that sec. 144 of the Code of Criminal Procedure confers sufficient powers on a Magistrate to prohibit meetings in the interest of peace or order. Further, secs. 107 and 108 (*a*) of the same Code empower Magistrates to adopt speedy measures for preventing likely breaches of the peace or the dissemination of sedition. The only difference between the powers conferred under these sections and of those under the Seditious Meetings Act consists in the fact that the person or persons aggrieved by the Magisterial orders are entitled to show cause and have the propriety of the orders tested before a superior Court, but in the case of executive orders issued under the Seditious Meetings Act no such course is open to them. It is always bad policy on the part of a Government to shut out judicial enquiries with regard to orders affecting the fundamental rights and liberties of a subject. This would have been a sufficient reply to Sir Abdur Rahim's argument to which no cogent answer was given.

With regard to unlawful, revolutionary or anarchical associations we have already pointed out that secs. 120A and 120B of the Indian Penal Code furnish very effective means of coping with such associations. If we referred to the notable trials that have taken place in Bengal in the course of the last fifteen years, we would find that it is by public trials and not by executive orders that such unlawful associations were eventually broken up. Then we have secs. 121, 121A, 124A, 153A of the Penal Code, which are all formidable weapons in the hands of the executive to cope with offences committed or contemplated against the State or public tranquillity. We maintain that it is by judicial trials that offending persons may be brought to book under the provisions of the Code of Criminal Porcedure and the Penal Code and that is, as past experience has shown, the most effective means for the maintenance of law and order. Interference with the rights and liberties of citizens by executive order only promotes public discontent.

While Sir Hugh Stephenson chiefly quoted the argument considered by the Repressive

Laws Committee, he did not place before the Council the definite conclusions at which the Committee arrived. We shall therefore conclude by reproducing them. In fact the Committee accepted the recommendations of Lord Sinha, who was then the Governor of Bihar and Orissa, in the following terms :—

"Our recommendation follows that made by the Bihar and Orissa Government :—'Subject, however, to the reservations temporarily made in favour of the Seditious Meetings Act and Part II of the Criminal Law Amendment Act, which cannot be abandoned until the present tension created by the non-co-operation movement has been relieved by the action of its leading promoters. His Excellency in Council desires again to emphasise the importance of removing from the Statute Book as far as possible all special laws of this character, so that the Government of India under the reformed constitution may proceed with a clean slate. At the same time, however, His Excellency in Council is conscious that in the future the need for special powers may again arise.'"

The Committee thereupon observed :—

"In view of the grave situation which exists and which may become more serious, we also think that it would be prudent to defer actual repeal of these Acts until such time as the situation improves. Many of us hope that it may be possible for the Government to undertake the necessary legislation during the Delhi session. We can make no definite recommendation on this point at present. We trust that the repeal of these Acts may be expedited by a healthy change in the political situation. The duration of retention rests in other hands than ours."

It now rests for the Central Legislature to give effect to the recommendations of the Repressive Laws Committee. If they do, the Governor-General, who accepted the recommendations of the Committee, will surely give his assent to the repeal of these remnants of the repressive laws.

THE UTBANDI ACT.

Bengal Act X of 1923.

(By Radharomon Mukerjee, Vakil, Berhampore.)

Utbandi—peculiar tenancy.

The *utbandi* tenancy is a peculiar tenancy confined to particular districts [Nadia and Murshidabad and Jessore (1)]. And "in view of the fact that the *utbandi* problem is a *local* one, affecting a few districts only and having little connection with the main principles underlying the General Amendment Bill proposed by them," the committee, appointed to consider the amendment of the Bengal Tenancy Act, 1885, "recommended that the matter should be dealt with by *separate legislation*," and they themselves formed a sub-committee to draft a separate Bill for the purpose, which has been passed as an Act.

Meaning of "utbandi."

The term "*utbandi*" is said to be due to the fact that under this system of tenancy, the land at the end of the season or of the period of the lease, may be fallow on account of the exhaustion of its strength, no one coming forward to take lease of it.

Description of tenancy.

The tenancy has been described as follows :—" The holding is not fixed either in area or in position, but consists of a variable parcel or parcels of land ascertained by a measurement or inspection made at least once a year. The rent is fixed for each year or season in respect of 'the land thus ascertained to have been in the cultivation of the raiyat.' The rent, however, is regulated not, as in the case of the ordinary *halhasili* land, by a lump payment in money for the land thus cultivated, but by the appraisement of the crop on the ground and according to its character and so far it resembles the tenancy under the *Bhaoli* system."

Its advantage to raiyat.

The *utbandi* raiyat had thus the *advantage*, which an ordinary raiyat had not, namely, that he was not liable to pay rent for the years he could not cultivate the land and was liable to pay rent only for the portion of his holding which he could actually cultivate during the year.

Legal only in districts where custom prevails.

It may be pointed out that the cultivation of land under the *utbandi* system is *legal only* in those districts *where the custom prevails*. Elsewhere it is illegal. So that if a plot of land is let out to a tenant under the conditions of the *utbandi* tenancy in a district where such tenancy is not customary, it cannot prevent the raiyat from acquiring occupancy right inspite of the contract to the contrary.

Reason of custom.

The reason behind such a local custom was that *lands* in some parts of these districts being of *bad quality* exhausted their productive power with the growing of crop in a particular season.

(To be continued.)

(1) The Committee Report mentions only the first two to which the Act has added the third.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, FEBRUARY 11, 1924. [No. 13.

Contents.

NOTES

Release of Mahatma Gandhi.

The release of Mahatma Gandhi on the morning of the 5th of February last is a very wise and humane move on the part of the Government. It would be an affectation to say that the Government of Bombay and the Government of India have not been influenced by public sentiment and it would be equally so to deny that his illness and the present state of his health had not evoked a very wide-spread sympathy for him and was not also a determining factor in coming to the decision that the Government did. If in the present circumstances the Government has released him in response to public opinion in India, it is to the credit of the Government and not at all otherwise. That the release took place on the morning that a resolution for his release was to have been moved in the Legislative Assembly at Delhi does not at all detract from the merits of this wise act of statesmanship. Surmises are rife as to why he was released on the particular day and not earlier. But those who are acquainted with the working of the constitutional machinery in this country will discern in it no attempt on the part of the Government at producing any dramatic effect.

Although the Provinces in India have not attained political autonomy, the Government of India, since the Government of India Act of 1919 came into operation, regard such Governments, as represented by the Governor and his Council as autonomous. They would not ordinarily dictate to the Local Governments any policy with regard to which the responsibility is primarily that of the Local Government. For instance, the prosecution of the Ali brothers or of Mr. Gandhi was not dictated to by the Government of India but was done at the instance of the Government of Bombay. It may, no doubt, be the case that before the Local Government came to any such momentous decision, an exchange of views took place between the Local Government and the Central Government, and the Government of India, which is invested with statutory powers of superintendence over Local Governments, assented to the decision of the latter but they would not dictate to it any course of action. Assume that the Bombay Government disagreed with the Government of India with regard to the wisdom and propriety of the prosecutions referred to, the Governor of Bombay could hold direct communication with the Secretary of State for India just as the Governor-General and then the decision as also the responsibility would be that of the Secretary of State.

If one views the release of Mr. Gandhi in its constitutional light the apparent delay or coincidence of his release with the date of debate in the Assembly will be evident. The Government of India and the Government of Bombay must have been in communication on the subject since or even before a date was fixed by the Governor-General for a debate on the resolution. The date of the debate was originally fixed for the 4th of February. On that day it was postponed to the 5th. We are informed by Reuter that there was a Cabinet meeting in London on the 4th when some Indian questions were considered. Even if the Bombay and the India Government had come to the unanimous conclusion that Mr. Gandhi should be released, in a matter of such importance, the Government of India would not act without obtaining the assent of the Secretary

of State for India and hence the release of Mr. Gandhi was announced after the assent of the Secretary of State was received sometime on the 4th of February. The announcement in the *Daily Herald*, the labour organ, that the release was the act of the MacDonald ministry lends support to our view.

The Legal Equality of States.

In the British Year Book of International Law, 1923-1924, appears an article on the Doctrine of Legal Equality of States which we commend to our readers. There is much in it with which we do not agree, but we cannot withhold our appreciation of the matter-of-fact style and close reasoning which mark the presentation of the writer's case. The thesis which he sets out to prove is that (1) the doctrine of the legal equality of states is a redundant theoretical abstraction, the rights and rules, which are usually deduced from it, being in fact deductions from the principle of independence; (2) the doctrine is opposed to the facts of international life; and (3) as an ideal, it is dangerous and retrogressive. In municipal law, as the writer himself points out, there is no such thing as the legal equality of persons. On the contrary, "women, children, dukes, bachelors, doctors and idiots respectively have rights conferred upon them . . . . . by rules which apply to them only and create for them special privileges, duties or disabilities." From this one may be tempted to argue that the doctrine of inequality of states will not be such an anomaly in international law as it may appear at first sight. But the argument is as unsound as it is based on a false analogy. The municipal law even in a country governed on democratic principles has to be obeyed by every subject of the state: it does not depend on his individual consent for its validity. But a rule of international law derives its binding character from the fact that the state in question has expressly or tacitly consented to be bound by it and it is a notorious fact that the consent will not be given, unless equality is conceded. Such an attitude may be characterised as perverse and may not be supported by the facts of international life. But there it is and may not be discounted by those who are anxious to see the expansion of the reign of law in the relations of states.

The writer of the article appears to think that the acceptance of the principle of equality by the system of "international constitutional law" which is developing round the political institutions set up by the League of Nations will be a political danger to the latter. We, on the contrary, think that nothing else will so seriously interfere with the growth of the League and of its auxiliary institutions as an open repudiation of the principle of equality. The Minority Treaties of 1919 (noticed on pp. 101-114 of the present volume) have materially cut down the principle in the case of the new states seeking recognition, *e.g.*, Poland, Czech-Slovakia. But any one acquainted with the facts of international life will readily admit that not before many years have passed, these states will resent the infraction of the principle and seek to establish their legal equality.

The doctrine of equality of states has played and will play the same part in international law as the doctrine of equality of men has played and will play in national politics. No one knows whether all men are equal or not. Still, it is the continuous reiteration of this principle which has secured for those who occupy the lower ranks of society many of the rights the latter possess. And so it is with the doctrine of equality of states which has secured for the smaller states many of the rights they possess to-day. If it is desired that the League of Nations should continue as an effective instrument for securing international justice, it is essential that the larger states should not acquire an undue predominance at the expense of and to the prejudice of the smaller ones; and this result could only be secured by an express recognition of the principle of equality. The distinction between positive law and principles of legislation is feasible within the boundaries of the state. But in formulating the rights and rules which are to govern the relations of states, one cannot observe a hard and fast line of demarcation between the two. The doctrine of the legal equality of states is one of the postulates of international law. Exceptions will have to be made in its application to the actual facts of international life. But in our opinion that will be a much sounder procedure than an out and out repudiation of the doctrine.

Application for restitution consequential upon reversal of decree—Limitation.

We draw the attention of the profession to the judgment of a Full Bench of the Patna High Court in *Balmakund Marwari* v.

Basanta Kumari Dasi, [1924] Pat. 33. It illustrates to what extent the time and energies of Judges and legal practitioners may be taken up and incidentally also how unnecessarily and wastefully the purses of the litigants may be depleted in order that at the end of it all to arrive at the best guess as to what the legislature might be supposed to have thought as regards a class of cases which it failed to provide for expressly for the simple reason that the matter escaped its attention. There is no doubt that applications for restitution consequential upon the reversal of a decree which has been executed are generically indistinguishable from applications for execution; and there is no reason why in regard to limitation the former should be governed by the fixed three years provided by Art. 181 whilst the latter should be governed by Art. 182 which permits an indefinite extension of this period beyond the initial three years by steps taken in the interval in aid of execution, limited only in cases of money decrees to a fixed 12 years. The decisions in the various High Courts, as the judgment shows, are conflicting, and it is high time that the law in regard to both kinds was made uniform by expressly making Art. 182 applicable to applications for restitution consequential upon the reversal or variation of a decree which has been already executed.

THE UTBANDI ACT.

BENGAL ACT X OF 1923.

(BY RADHAROMON MUKERJEE, VAKIL, BERHAMPORE.)

(*Continued from p.* lii.)

Char and dearah lands not only land held under it.

It is not a fact, as is sometimes supposed, that the *char* and *dearah* lands are the only class of lands usually held under the *utbandi* system. The Bengal Tenancy Act, while treating the two separately, lays down similar rules regarding the acquisition of occupancy right in such lands, and for having it declared that such lands have ceased to be *char* or *dearah* land and thereupon all the provisions of the Act shall apply to them.

Acts X of 1859 and VIII of 1869, B. C., treated utbandi same way as raiyati.

Under the Act X of 1859 and Act VIII of 1869, B. C., if the raiyat paid rent for the period he could cultivate, and did not pay when he could not do so, or paid only for so much land as he could cultivate in any year, the holding and the *cultivation for more than twelve years, though discontinuous*, gave him a right of occupancy. These Acts thus made no distinction between *utbandi* and ordinary *raiyati* land so far as regards the acquisition of occupancy rights therein.

Bengal Tenancy Act treats them differently.

The Bengal Tenancy Act, 1885, has made material alteration of the law on this point. In this respect the *utbandi* land is dealt with in the Act differently from ordinary *raiyati* land in which, by sec. 21 a settled raiyat has a right of occupancy, no matter how short a time he has held it. Sec. 180, however, prohibits the acquisition of an occupancy right in land ordinarily let under the custom of *utbandi*, until that *particular land* has been *held for twelve years continuously*. A right of occupancy, therefore, cannot be acquired in a piece of land held on that system if the possession of it has not been *continuous* for the period of twelve years.

(*To be continued.*)

Reviews.

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1923-24. (*Published by Henry Frowde and Hodder & Stoughton, London*).

Presents a collection of well-informed articles on some of the present-day topics of international law and notes of cases decided by international tribunals as also reviews of books dealing with international law and politics. The articles on "The Doctrine of Legal Equality of States" and "The Protection of Minorities" will be of special interest to Indian students. The get-up of the book is perfect.

SANJIVA ROW'S INDIAN RAILWAYS ACT (ACT IX OF 1890). *By S. K. Rangachariar, B.L., Vakil, Trichinopoly. Second Edition 1922. Law Printing House and Lawyers' Companion Office, Madras.*

A new edition of this work has been issued after five years chiefly owing to the death of the author. The scheme of the work is similar to those of Sanjiva Row's annotations. The important elements of the sections which have been the subject-matter of judicial interpretation have been put down in the annotations in the form of catch-words and decisions thereon have been set out very briefly. The amendments to the Act have been noted up to

1919 while the case-law has been brought down to the middle of 1922. As the Indian Railways Act follows the English Act closely, a summary of English decision given in appropriate places will be found useful. The work begins by giving in brief, the rules of interpretation of statutes and also references to the parliamentary statute which have a bearing on the constitution and powers of some of the Railway Companies in India. Some of the more important ones are given in the appendix as also the Rules relating to the Indian Act. This is a very useful and well-got-up edition of the Railways Act.

SANJIVA ROW'S INDIAN REGISTRATION ACT (XVI OF 1908), SECOND EDITION. *By P. Hari Rao, B.A., B.L. Law Printing House and Lawyers' Companion Office, Madras.*

Owing to the death of Mr. Sanjiva Row, a second edition of this annotated work has also been published after some time. The present editor, while keeping to the general scheme and plan of the work, has incorporated into it the changes in the law up to the middle of 1922 and also all important decisions up to that date. The Introduction which covers 72 pages gives a historical sketch of the course of legislation on this subject since 1864 as also the conflict of decision that have led to subsequent changes in the law including that effected by Act XV of 1917. The scheme of the work is to dissect the sections into a series of catch-words and insert below them the points of decision relating to each. It cannot properly be called a commentary on the Act, but all the same as numerous cases are cited below each section it will be found useful by practitioners in hunting up references to the case-law on the subject. The get-up of the work like that of its companion volumes is attractive.

SANJIVA ROW'S GUARDIANS AND WARDS ACT AND THE INDIAN MAJORITY ACT. *By A. K. Nanniah, B. L., Vakil, Trichinopoly. Third Edition, 1922. Law Printing House and Lawyers' Companion Office. Madras.*

The scheme of this revised edition is the same. The case-law has been brought down to June 1922. Some of the older Acts as Act of 1858 relating to Bengal minors. Act of 1864 (Bombay minors) are given in the appendix. The Vakils of Trichinopoly seem to be a very industrious class and we are indebted to them for more annotations than to lawyers of any other locality.

The Lawyers' Companion Office has also issued supplements to the following Acts for bringing the legislative changes and case-law relating to them up-to-date on the scheme of other publications already noticed. This will enable the possessors of the old volumes of these annotated Acts to bind up those with the supplement and bring them up-to-date.

The Indian Contract Act.
The Specific Relief Act.
The Easement Act.
The Presidency Towns Insolvency Act.
The Land Acquisition Act.
The Law of Arbitration.
Law Relating to Marriage and Divorce.

Notes of Cases

CALCUTTA HIGH COURT.

(Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before NEWBOULD AND B. B. GHOSE, JJ. APPEAL FROM APPELLATE ORDER, No. 349 OF 1922. JUGGERNATH GOSWAMI, Decree-holder, Appellant *v.* KHETRA MOHAN GHATAK, Judgment-debtor, Respondent. The 26th November 1923.

Limitation Act (IX of 1908), Art. 166, sec. 18, if applicable—Civil Procedure Code, 1908, sec. 47, Or. 21, r. 90.

The judgment-debtor's property was sold on 30th July 1920 in execution of a decree and he applied on 21st December 1920, under sec. 47 and Or. 21, r. 90 for setting aside the said sale. The lower Appellate Court found that the decree-holder was guilty of fraud for non-service of notice and writs of attachment and sale proclamation and also in inserting very low valuation in the sale proclamation and auction-purchaser was accessory to the same:

Held—The judgment-debtor having been kept out of the knowledge of his right to apply by reason of fraud practised upon him by decree-holder the application was maintainable beyond 30 days and sec. 18 of the Limitation Act was applicable to the case.

Babu Ram Chandra Majumdar for the Appellant.

Babu Binode Lal Mukherjee for the Respondent.

H. D. C.

THE

Calcutta Weekly Notes

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Contents.

NOTES

Lord Olivier, if made a life-peer.

India would be naturally interested in the new Secretary of State, Sir Sidney Olivier, being created a peer of the realm immediately upon the advent of the Labour Government. Last Thursday, the 6th inst. one of our daily contemporaries published a special telegram from its own correspondent, dated London, the 5th, that—

"In view of the dislike of Socialists to the hereditary principle it is pointed out that the three new Labour peers—Sir Sidney Olivier, Secretary of State for India, Brig.-General Thomson, Secretary of State for the Air Ministry, and Mr. Sidney Arnold, Under-Secretary for the Colonies—are all life peers."

There is no doubt about the fact that Mr. Ramsay MacDonald must be feeling ill at ease about the attitude of the House of Lords towards his Government, or what it might be even though he has included in his Cabinet so striking a personality as Lord Haldane, perhaps the most outstanding figure among the peers, save the Earl of Balfour. Lord Chelmsford is in the Cabinet also, and his only qualification when he was appointed the Viceroy of India eight years ago, was that he had no past. To successfully fight for the solution of social and international problems from the point of view of the new Government within the walls of the gilded chamber is a difficult, nay, impossible task even for Lord Haldane. It is not at all unnatural therefore that the Premier is anxious to strengthen the hands of his supporters in the upper chamber by the elevation to peerage of persons of proved intellectual eminence and administrative capability such as Sir Sidney Olivier, or Brigadier-General Thompson. Sir Sidney would undoubtedly be a valuable acquisition to the House of Peers and would add materially to the strength of the Labour Party there. But can it be that he has been made a life-peer? We have hitherto had no confirmation of the report and in the absence of further details connected with his life peerage we would be inclined to question its accuracy on constitutional grounds. A similar mistake was made in the newspaper press with regard to Lord Sinha, when he was made a member of the House of Lords as Under-Secretary of State for India but the peerage conferred on him is hereditary and not for life.

The House of Lords, it is well-known, is composed of—(1) the hereditary peers of the United Kingdom; (2) hereditary peers who are not hereditary Lords of Parliament, comprising (*a*) the 16 representative peers of Scotland elected by the Scotch peers for each Parliament, and (*b*) the 28 representative peers of Ireland elected by the Irish peers to sit for life; and (3) peers who are Lords of Parliament for life, but transmit no peerage or Lordship of Parliament to their heirs, *i.e.*, (*a*) the 26 spiritual peers, and (*b*) the four Lords of appeal in ordinary. There is no place in the English constitution for life peers other than law-lords, a rule steadfastly adhered to since 1858. In the early days when the constitution of England was still in the making much difficulty was experienced

in bringing about harmony between the House of Lords and the House of Commons, when they differed. Two facts in the past history of England are cited as indicating the method of securing harmony. The first belongs to a period when the theory of the subordination of the Lords was not developed any more than it was accepted, when the personal will of the monarch was a potent factor dominating the conduct and action of the executive. In 1711, Queen Anne created twelve new peers to secure the passage of a Bill through the Lords. And a threat was held out to create as many peers as would be necessary to ensure the passage of the Reform Bill of 1832, to which course, the great Duke of Willington offered opposition with all the vehemence at his disposal in a speech in the House of Lords that "if this be a legal and constitutional course of conduct, there is no doubt that the constitution of this House and of this country is at an end." As is well-known to all students of English history, the peers yielded and passed the Reform Bill and thereby helped to firmly establish the theory of the subordination of the House of Lords. A similar threat was held out by Mr. Gladstone when he re-introduced his Franchise Bill in unaltered form after the Lords had thrown it out in 1884. The peers thought better of the situation and decided not to allow him to use all the power which the constitution of England furnished in order to carry his bill to its final passage.

Mr. Gladstone could not have meant that he desired to overcome the opposition of the Lords to his Re-distribution Bill by the creation of enough life peers, for he could not possibly be forgetful of the case of Sir James Parke created Baron Wensleydale by Lord Palmerston of whose Cabinet Mr. Gladstone was himself a member, as Chancellor of the Exchequer, in 1858. A committee of the Lords reported against the power of the Crown to admit life peers to Parliament, which it attempted to do in the case of Baron Wensleydale. Consequently, the Queen on the recommendation of the Premier had to make the peerages conferred upon both the distinguished lawyers, Parke and Pemberton Leigh, hereditary, to enable them to sit and vote in the House of Lords as Lord Wensleydale and Lord Kingsdown. We have it on the authority of Anson that "the authority of the Crown to create peers for life with a right not merely to possess rank, precedence, and the other attributes of peerage, but to sit and vote as Lords of Parliament, was called in question in the year 1858 in the Wensleydale Peerage Case. It was then held that the Crown had no such power." "Life peerages, except in the case," says Lord Halsbury, "of spiritual peers and the four Lords of Appeal in ordinary, cannot be created by the Crown so as to confer a right to sit and vote in the House of Lords." That is the last word on the subject of the creation of life peers in England. Neither Mr. Ramsay MacDonald nor the Crown has any constitutional power to create a life-peer and so we presume that Lord Olivier has been made a hereditary peer.

Is India the most litigious country in the Empire.

The English *Law Journal* states: "One interesting fact which the Judicial Committee's list scarcely ever fails to disclose is that India is the most litigious part of the King's Dominions beyond the seas. Of the twenty-eight appeals awaiting hearing by our Imperial Court of Appeal, no fewer than nineteen are from the Indian Courts. Canada contributes but three cases to the list and Australia but two . . . . Of the four Crown Colonies, Malta supplies two, Gibraltar and St. Lucia one each." The above only discloses what ignorance regarding India exists even amongst lawyers in England who are expected to be better informed about the Empire than other classes of Englishmen. It never struck the writer that India has a population of over 315 millions, while Canada a little over 8¾ millions, Australia a little over 5½ millions, New Zealand not over 1¼ millions, South Africa a little over 7 millions of whom the Europeans are only 1½ millions. This at once demonstrates the fallacy of drawing inference from such data that India is the most litigious country in the Empire. It should further be noted that the Dominions have by legislation considerably restricted the right of appeal to the Privy Council. It is of interest also to note that Gibraltar has only a population of 17,327 and Malta a population of 2,18,510. Further comment is superfluous.

The Betting Vice.

Betting in England has assumed such scandalous dimensions amongst the common people that a commission was appointed to enquire and suggest remedies. The Committee

has recently issued a report in which they observe: "Work in our mills and factories is stopped and damaged by the amount of time given to the discussion and thought about betting." Then the report comes to the finding "that the betting habit has spread and is spreading; that it is practised by the wives and children of working men; and, in fact, it is a cancerous growth on the body politic." We ought to take a warning in India, as the vice seems to be on the growth in our big cities. Our Provincial Legislatures ought to be on the alert and they would be well-advised in tackling such social evils and promoting social wellbeing of the people by suitable measures instead of frittering away all their time and energy in political polemics.

The majority of the English Committee are not in favour of suppressing all betting by legislation. It is for limiting the number of betting places by requiring them to be licensed and providing that all bettings in such places are to be carried out by stamped tickets thus restricting betting and at the same time enabling the State to derive a revenue therefrom. The minority report, however, does not approve of the suggestion and we believe that every honest citizen will agree with them that the vice requires a more drastic remedy and should be put down with a strong hand. Our English legal contemporary takes the same view and says: "Betting has, in truth, become one of the greatest of national evils, and it is idle to expect to cure it otherwise than by drastic police action and such an alteration in the law as would make it compulsory for weak-kneed Magistrates to impose the penalty on street book-makers and their agents. It would on the whole do more good than harm to make it illegal for anyone to carry on the business of book-makers under heavy penalties. Gaming in itself may be merely unsocial; but professional gaming deserves a much greater condemnation." That legislation for the stamping out of this evil is effective, is proved by the fact that cotton-gambling houses were swept away from Calcutta by special legislation.

THE UTBANDI ACT.

Bengal Act X of 1923.

(By Radharomon Mukerjee, Vakil, Berhampore.)

(*Continued from p.* lv.)

Retards occupancy right therein.

It thus, as the sub-committee observe, "retards the acquisition of occupancy rights and restricts the application of ordinary *raiyati* rights in any part of the country where the custom prevails in the lands ordinarily, and for the time being let under that custom."

No necessity for continuing system.

The cultivation of these lands during the period of over hundred years, (under the British Rule), intermittent though it might be, has, however, very much improved the nature and quality of their soil and their fertility, and the pressure of a growing population has very much increased the demand for land for the purpose of cultivating it. "The system has"—as the sub-committee rightly point out—"now largely *developed* in practice *into a species of settled cultivation* in which it is undesirable to restrict the acquisition of ordinary *raiyati* rights or to retard the acquisition of occupancy rights." There is therefore *no necessity* now for allowing the custom to continue and for keeping these lands as a class separate from the ordinary *raiyati* holdings. "A change in the law is therefore called for."

Proposal to convert utbandi into raiyati holding.

The committee recommended that the law should be so modified as to enable *utbandi* tenancies to be *converted into ordinary raiyati holdings*, and the Act accepted such a principle.

Utbandi should have been declared illegal where land of good quality.

To effect this object all that is required is to *declare* that the custom of cultivation under the *utbandi* system shall *no longer be legal* and to lay down that the cultivator who now holds land under such a system shall have the ordinary *raiyati* right in it, so that if he is already a settled raiyat of the village, he shall have the right of occupancy, and, if not, he shall have the right of a non-occupancy raiyat therein. This should of course have been done in those cases where land has reached the same condition as ordinary *raiyati* lands. The sub-committee, however, in their report, did not propose to, and the Act does not, make any provision for prohibiting the said custom.

On the other hand, they both contemplate in their proposals the continuance thereof.

Provision for converting utbandi into raiyati rent.

They, however, adopt the round-about and circuitous method for effecting the same object by providing for "*the commutation of utbandi rents into ordinary raiyati rents* somewhat on the lines of sec. 40, Bengal Tenancy Act." They have laid down that "a uniform annual rent" should be fixed in the first instance in place of the varying rent payable in respect of the *utbandi* lands, and "when an *utbandi* rent has been converted into a uniform annual rent for any lands, such lands should cease to be deemed to be held under the custom *utbandi* and the *raiyat should hold them as an occupancy raiyat.*"

Rules for effecting the same.

They lay down elaborate rules for fixing uniform annual rent in respect of the *utbandi* lands.

Distinction between occupancy and non-occupancy holdings.

And in doing so they draw a *distinction between* those lands in which the raiyats have already acquired the right of *occupancy* and those in which they have *not yet done so.* In the first case they point out "there is no reason why any application for conversion should be refused." In such a case, under the present law, the raiyat acquiring the right of occupancy has the right to have the produce-rent (usually) payable by him commuted into money-rent under sec. 40. And under the Bill for amending the main Act, the under-raiyats (including those who are now described as *Bhag-chases**) are also proposed to be given the same right. There is therefore no reason for changing the law or for making any special provisions, as the sub-committee proposed and the Act does, "laying down the rules for the fixing of uniform annual rent in respect of *utbandi* lands."

Utbandi raiyat usually pays produce rent and not money rent.

It may be stated here that the *utbandi* raiyats are required very often to pay rent in kind, and in this respect they are like ordinary raiyats who hold land under the *Bhaoli* system. In the view of the Committee, however, the rent payable in respect of these lands is generally *money-rent.* They have stated "that *utbandi* rents are money rents and not the produce rents contemplated by sec. 40." We, however, fail to understand why the committee found that the rent is money rent and not produce rent.

Money rent payable by him lower.

Money rent, however, when payable by the *utbandi* raiyat is often lower than the rent payable by the ordinary raiyat in view of the fact that the *land* held by him is *usually of bad quality.* The improvement of the land, by his own labour, unaided by the landlord, entitles him equitably to claim a lower rent.

Utbandi and raiyati land placed on same footing re. enhancement general hardship on raiyat.

The Committee and the Act, however, place such land on a footing of equality with the *raiyati* land and lay down the same rules for enhancing or reducing its rent by applying to it the rules applying to ordinary occupancy holdings. *This will work hard upon the raiyat.*

Plots of different qualities treated alike.

In the second case, to save the landlords from having the worst lands thrown on his hands by the tenant making a selection only of the best lands he has cultivated during a cycle of cultivation they provide that application for the purpose must include all the lands cultivated by the raiyat "during the preceding period of six years." This may be advantageous to the landlord but will be extremely disadvantageous to the raiyat. There is no ground for compelling the raiyat to take lease of plots of bad qualities.

Premium to be paid to landlord.

To have the *utbandi* land converted into *raiyati* holding, the raiyat however, is required to *pay to the landlord a premium* equivalent to "a fixed multiple" (for the present three times) "of the rent payable in instalments not exceeding three." "As, however, the compulsory payment of premium might prevent the raiyat from applying for conversion," he may in lieu thereof pay an additional rent of 20 per cent.

For which there is no reason.

But as we have already stated, the landlord having no part in improving the land he has no right to claim the premium and the committee had no justification for making the proposal.

(Concluded).

* The Government have however, assured the public that the proposal regarding the *Bhag chases* will be dropped.

Correspondence.

HIGH COURT HOLIDAY LIST.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

DEAR SIR,

The list of holidays for Civil Courts in Bengal for the current year is a remarkable document. Retrenchment is the order of the day, and retrenchment in the matter of holidays seems to have been carried out with a vengeance. For several important religious festivals of the Hindus for which the Courts had been getting holidays, since perhaps the beginning of the British rule, they are to be closed no more, as if, by keeping them open on these days, the whole problem of financial crux is solved at once. It is a pity that in framing this year's list, little heed has been paid to the religious sentiments of the public. For instance, we are no longer to have a holiday for *Sivaratri*, though that is an occasion for observing total fast; those of us who have to perform the *Doljatra* had henceforth better be content with a day's holiday leaving the ceremony to take care of itself on the next day. Eclipses are to be deleted from the Hindu religious code and so on. One thing in particular seems to have been lost sight of altogether. Mofussil Courts are not so many offices consisting of a number of clerks merely; they are offices, no doubt, but something more. They have to deal with outside public and cannot possibly do any work without them. Yet one wonders how work can go on, if suitors cannot make their appearance at the sacrifice of their religious observances. We trust vigorous protests will come forth from all parts of the country, and memorials will be submitted for an immediate revision of the list so as to include festivals like *Sivaratri*, Bengali New Year, second day of *Dol*, *Rathajatra*, etc.

Yours faithfully,
JOGENDRA KUMAR NIYOGI,
Pleader, Manikganj.

2-2-24.

RESTITUTION APPLICATIONS WHETHER "MISCELLANEOUS CASES."

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

May I crave the hospitality of your columns and request you to insert the following few lines in your journal.

An application for restitution under sec. 144 of the C. P. Code is treated in this District as a miscellaneous (judicial) case. As such a case must needs require a judicial inquiry. It appears that in General Rules and Circular Orders of the Appellate Side of the High Court (Vol. I, pp. 245 to 247, Chap. X) there is what purports to be an exhaustive list of cases which should be included under the head "Miscellaneous (Judicial)" cases, but strangely enough applications under sec. 144, C. P. C., do not find place therein.

Clearly a separate suit is now *barred* by the express terms of sub-sec. (2) and an "application" for restitution is no longer one for *execution* of the Appellate decree. This section, therefore, having barred a separate suit and having simplified matters by omitting all reference to *execution* as was provided for in the old Code of 1882 (sec. 583) it seems clear that a decree cannot follow otherwise than upon the finding or a judicial determination which can hardly be arrived at unless the "application" is registered and numbered as miscellaneous case. Apparently, therefore, the rule-makers seem to have omitted to include cases under sec. 144 in the list referred to above and if such be the case the attention of the Hon'ble High Court should be drawn to it forthwith.

Yours truly,
HEMENDRA NATH DUTT, B. L.,
Pleader, Chittagong.

2-2-1924.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before SUHRAWARDY, J. CIVIL RULE NO. 948 OF 1923. DELARUDDI HALDAR and another, (Plaintiffs) Petitioners *v.* DEDARBUX MOLLA, (Defendant) Opposite Party. The 16th January 1924.

Provincial Small Cause Courts Act (IX of 1887), sec. 25—Revision—Civil Procedure Code of 1908, Or. 17, r. 1, sub-r. (1)—*Adjournment*

costs, order for immediate payment—Dismissal in default, if proper.

The Plaintiffs-Petitioners instituted a suit in the second Court of the Munsif at Alipore invested with jurisdiction of Court of Small Causes against the Opposite Party. Upon the Petitioners' application for adjournment on 25th June 1923, the Court directed them to pay down a certain sum of money to the Opposite Party as adjournment costs then and there: and on the Petitioners' failure to comply with the said order the learned Munsif rejected the Petitioners' application and dismissed the suit for default:

Held—The order dismissing the Petitioners' suit for default, upon his failure to pay down the adjournment costs then and there, at the time of the order for such adjournment without giving him sufficient opportunity to enable him to carry out the Court's order, was improper and ought not to have been made; the order of dismissal was therefore set aside and the rule made absolute.

Dhanipram v. *Murli Mahto*, (1909) 36 C. 566; 13 C. W. N. 535, followed.

Babu Horendra Nath Sarbadhikari for the Petitioners.

No one appeared for the Opposite Party.

H. D. C.

CIVIL REVISIONAL JURISDICTION. Before SUHRAWARDY AND PAGE, JJ. CIVIL RULE No. 809 OF 1923. F. D. BELLEW, Tenant (Petitioner) *v.* L. ELLTHE and another, Landlords (Opposite Party). The 22nd January 1924.

Civil Procedure Code (Act V of 1908), sec. 115—The Calcutta Rent Act (III of 1920, B. C.), sec. 15—Standard rent, fixation of—Tenant's application, if can be dealt with after his ejectment pending the application.

The Petitioner Bellew made an application in October 1922 to the Controller of Rent, Calcutta, under sec. 15 of the Calcutta Rent Act (III of 1920, B. C.) for standardisation of rent in respect of the premises occupied by him as the Opposite Party's tenant. The Petitioner was ejected from the premises in question in execution of a decree in or about the middle of June 1923. Then in July 1923 the Opposite Party applied to the Rent Controller, Calcutta for dismissal of the Petitioner's application made under sec. 15 which was then pending, on the ground that the relation of landlord and tenant had ceased to exist between the parties. The Controller of Rents, Calcutta acceded to the said application of the landlords, Opposite Party. The Petitioner then applied under sec. 115 of the Code of Civil Procedure for setting aside the Controller's said order:

Held—The Petitioner was entitled to proceed with his application under sec. 15 of the Calcutta Rent Act for fixation of standard rent although the relation of landlord and tenant had ceased to subsist between the parties. Rule made absolute.

Dr. Mohendra Nath Rai and *Babu Lolit Mohun Sanyal* for the Petitioner.

Babu Bepin Chandra Mallik for the Opposite Party.

H. D. C.

CIVIL APPELLATE JURISDICTION. Before RANKIN AND MOOKERJEE, JJ. APPEAL FROM APPELLATE DECREE No. 2365 OF 1921. RAMESH CHANDRA MITRA, Plaintiff, Appellant *v.* DAIBA CHARAN DAS and others, Defendants, Respondents. The 22nd January 1924.

Transfer of non-transferable occupancy holding—Sub-lease by transferee to raiyat—Abandonment—Repudiation—If landlord entitled to eject transferee.

The facts material to this report are as follows:—

Raj Mohan and Sonatan held the suit lands as occupancy raiyats under the Plaintiff. In execution of a money decree as well as a mortgage decree obtained against them the entire holding was sold and purchased by Defendant No. 1 Daiba Charan Das. Raj Mohan and Sonatan then took a sub-lease of the entire lands under the transferee, the Defendant No. 1, and continued to remain in possession of some culturable plots and homestead forming part of the lands of the tenancy. They no longer paid rent to the Plaintiff, though there was no proof of refusal by them to pay rent. Plaintiff did not recognise the auction-purchase of the Defendant No. 1.

Plaintiff sued the transferee, the Defendant No. 1 for *khas* possession of the holding. The raiyats Raj Mohan and Sonatan were not made parties.

The Munsif of Narail on the above facts relying upon *Dayamayee's* case (42 Cal. 172) and the case in 17 C. W. N. 1105 held that there was an abandonment, and gave the Plaintiff a decree for ejectment against the transferee. On appeal, the District Judge of Jessore relying upon the cases in 20 C. W. N. 610 and 24 C. W. N. 117 held that there was no abandonment, and dismissed the suit. Against the decision of the District Judge, Plaintiff preferred this second appeal:

Held—That upon the findings there was in law no abandonment or repudiation of the tenancy, and the landlord was not entitled to eject the transferee.

24 C. W. N. 117; 28 C. W. N. 300 *followed.* I. L. R. 33 Cal. 531; 9 C. W. N. 379 *not followed.*

Unless the landlord has a right to present possession he cannot maintain ejectment suit against a tenant's transferee, and the only remedy which the landlord can get against the transferee would be a declaration that the transferee has got no title to the land as against him.

Rai Surendra Chandra Sen Bahadur and *Babu Hemendra Chandra Sen* for the Appellant.

Babu Trailakyanath Ghosh for the Respondents.

H. C. S. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before WALMSLEY AND SUHRAWARDY, JJ. APPEAL FROM APPELLATE DECREE No. 2131 OF 1921. JOGNESWAR SIKDAR, Plaintiff, Appellant *v.* NIBARAN MANDAL and others, Defendants, Respondents. The 3rd January 1924.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 90, 92—Validity of sale, if can be questioned by way of defence in a suit for possession, when no application made under Or. 21, r. 90—Non-transferable occupancy holding, if liable to be sold in execution of money decree obtained by a person who is not the landlord.

The facts material to this report are as follows:—Plaintiff brought this suit in the Munsif's Court at Narail for recovery of possession of certain lands on declaration of his title thereto. Plaintiff based his title on auction-purchase of the lands in execution of a money decree against the Defendants. Defendants Nos. 1 and 2 contested the suit, and their defence, *inter alia*, was that Plaintiff acquired no title by his purchase and that processes of attachment and sale proclamation were not served, and they came to know of the auction sale for the first time after the institution of the present suit.

The Munsif dismissed the suit. On appeal by the Plaintiff, the Additional District Judge of Jessore affirmed that decision and held that the Plaintiff did not acquire any title by his auction-purchase in execution of the money decree and that the writs of attachment and sale proclamation were not served, and the lands were sold at an inadequate price.

Plaintiff thereupon preferred this second appeal, and it was contended on his behalf that Plaintiff acquired a good title by virtue of his auction-purchase of the non-transferable occupancy holding in execution of the money decree, and the case of *Kenaram Pal* v. *Golam Nabi Mandal*, I. L. R. 50 Cal. 508 was relied on, and it was further contended that the Defendants were not competent to challenge the sale in this suit inasmuch as they did not seek the remedy offered to them by Or. 21, r. 90:

Held—That the Plaintiff must succeed on both the grounds, and the appeal was allowed and the suit was decreed with costs in all the Courts.

The provisions of Or. 21, r. 92 preclude a judgment-debtor from asking a Court in such a suit as this to go into questions which affect nothing but the regularity of the sale. The penalty imposed on a negligent judgment-debtor is set out in the above rule and it is that the Court shall make an order confirming the sale and thereupon the sale shall become absolute. This amounts to a judicial determination that none of the objections exists on which the validity of the sale could have been questioned.

Rai Bahadur Surendra Chandra Sen and *Babu Hemendra Chandra Sen* (for *Babu Nanindra Chandra Sen*) for the Appellant.

Babu Tarakeswar Pal Chowdhry for the Respondents.

H. C. S. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before PANTON AND MOOKERJEE, JJ. S. A. No. 2415 OF 1921. KRISHNA CHANDRA SAHA and another, Defendants Nos. 1 and 2, Appellants *v.* LALIT MOHON PODDER and others, Plaintiffs-Defendants Nos. 3 and 4, Respondents. The 28th January 1924.

Lower Appellate Court's finding without evidence--Interference by High Court in second appeal.

The Plaintiff brought a suit against the Defendants for the partition by metes and bounds of homestead lands and houses other than buildings built, owned or possessed by respective parties. The Defendants Nos. 1 and 2 only appeared and filed written statements. The suit was decreed *ex parte* for the partition of the property by a Commissioner in terms of the prayer in the plaint. Both the Commissioner and the learned Munsif in his final judgment gave the Defendants Nos. 1 and 2 among other allotments a gully mentioned as B7 in the map of the Commissioner holding that the Defendant No. 3, the rival claimant of B7, had no documents to show that it was his The Lower Appellate Court gave the ground-floor gully to Defendants Nos. 1 and 2 and the upper-room upon the same to Defendant No. 3. In second appeal it was contended that the finding of the Lower Appellate Court was unsupported by any evidence or reason :

Held—That the Lower Appellate Court having disturbed the finding of the first Court without giving any reason, the case should be remanded.

Babus Gunada Charan Sen and *Satish Chandra Choudhry* for the Appellants.

Babus Gopal Chandra Das and *Bhuban Mohun Saha* for the Respondents.

S. C. C. *Appeal allowed; Case remanded.*

CRIMINAL REVISIONAL JURISDICTION. Before GREAVES AND CHOTZNER, JJ. CRIM. REV. No. 1023 OF 1923. GOBINDA CHANDRA ROY, Accused, Petitioner *v.* ABDUL RASHID, Complainant, Opposite Party. The 31st January 1924.

Indian Penal Code, secs. 482 and 486--Counterfeiting trade mark.

The complainant was the manufacturer of a washing soap called "Gandhi" Brand Soap. He charged the accused with having counterfeited his trade mark which was the word "Mahatma" at the top, the figure of Gandhi in the middle and the word "Gandhi" at the bottom. He alleged that he had exclusive right to that brand of soap. The accused the proprietor of the Indian Soap Company was the manufacturer of a washing soap called Gandhi Brand Soap. He had the figure of Gandhi in the middle and the word Gandhi at the bottom. On the reverse side of the soap the name of his firm appeared; whereas on the reverse side of the complainant's soap the following words appeared : "A. S. M. Eshak 100 Clive Street, Calcutta." The defence was that he was not guilty, that the complainant could not have any right to the said soaps, that there were at least 8 or 10 kinds of Gandhi Brand Soaps in the market :

Held—That the complainant having failed to substantiate his exclusive right to the soaps as required by sec. 478, I. P. C., the conviction could not stand.

Messrs. P. L. Roy, S. Roy and *Babu Satindra Nath Mukerji* for the Petitioner.

Mr. K. N. Chaudhuri and *Babus Probodh Kumar Das* and *Narendra Nath Mitter* for the Opposite Party.

S. C. C.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, FEBRUARY 25, 1924. [No. 15.

Contents.

NOTES.

Civil Justice Committee—Law's delays due to Courts being undermanned.

We have been asked by the Civil Justice Committee to offer our suggestions for the prevention of delays in the administration of civil justice. We must at the very outset ask the Committee not to miss in their detailed questionaire the real cause of law's delays. We can speak from personal knowledge that its chief cause, so far as it exists in the Presidency of Bengal, is that the Civil Courts in the Mofussil are undermanned. The Munsifs and the Subordinate Judges in the Districts are very hard-worked officers. It will be no exaggeration to say that they are simply sweated. There is no foundation for the charge that they come to the Courts late. On the contrary many of them are known to work till late hours in the evening. It is a well-known fact that the health of many Munsifs and Subordinate Judges breaks down in the prime of life and they are as a rule a short-lived class. Many members of the Provincial Judicial Service are known to work even after their health has broken down. If there is any congestion in their file, it is not because of any want of ability or slackness on their part but because the volume of work that each officer is expected to do is beyond human capacity to dispose of properly and expeditiously. It would, perhaps, be beyond the capacity of the Civil Justice Committee to enquire into the state of the files of Munsifs and Subordinate Judges in the Mofussil. We would therefore suggest to them that they should ask the High Courts and the Local Governments to enquire into the matter and if satisfied that the Courts are undermanned they should recommend that steps be taken for providing an adequate number of judicial officers to cope with the current work and arrears. If this is done we shall hear less of law's delays. There are, no doubt, some secondary causes that contribute to the delay in the disposal of contested and defended suits but we shall deal with this question separately. The fundamental question is, however, more financial than judicial.

Appropriation of judicial revenue for general purposes.

It is a well-known fact that the Government of Bengal prior to 1922 used to make a net profit of close upon a crore of rupees or more out of revenue derived from the Civil Courts: from court-fees and judicial stamps, about 90 lakhs and from process-fees about 18 lakhs, on an average. Since the enhancement of the rate of court-fees and judicial stamps, the net profit of the Local Government from this source must have increased to two crores or more while the expenditure on account of administration of civil justice in this Presidency has only increased by about 10 lakhs, which is chiefly due to some improvement in the pay and prospects of judicial and ministerial officers and not to any substantial increase in the number of such officers. H. E. the Viceroy who on assumption of his office announced that the watch-word of his administration in India would be to do "justice" all round, has not had his attention drawn to the great hardship that has been inflicted on the poor suitors for civil justice almost all over India, owing to the enhanced taxation on justice, the only exception being a favoured few who belong to the more prosperous class of litigants and resort to the Original Side of the High Courts in the Presidency towns for justice.

The Meston Settlement and its Effect.

The Local Governments are not to be blamed for this bleeding of the litigants and

sweating the judicial officers. For this the Meston Settlement of the apportionment of revenue between the Central and the Provincial Governments is largely responsible. The Local Governments have to appropriate almost the whole of the enormous surplus derived from the dispensation of tardy justice for meeting the ordinary charges of general administration. The Civil Justice Committee may very well invite H. E. the Viceroy's attention to this fact, for, it is the financial stringency of the Province that is standing in the way of the Local Government appointing an adequate number of judicial officers to cope with the current judicial work and preventing congestion and delay in the disposal of suits in the Mofussil in Bengal. As the scope of the Civil Justice Committee is to suggest the grant of relief to poor litigants, it will also be competent for them to draw the attention of Sir Basil Blackett, the Finance Member, who proposes shortly to engage in an enquiry for a more equitable readjustment of taxation, that the taxation on justice in this country is perhaps the most unjust and iniquitous.

Process-serving, delay in and abuses of.

Next to the Courts being undermanned, the present system of process-serving in Bengal is responsible for much hardship and delay in the disposal of suits in the Mofussil. The present system of service of processes by Civil Court peons is far from satisfactory. The principal drawbacks of the system are the following :—

(1) The peons have to travel long distances for serving processes in the interior of the district, where they are not well-acquainted with the people and often do as they are told by the identifier who accompanies them on behalf of the interested party.

(2) The service of the process, especially on a party who, it is alleged, cannot be found, is often unsatisfactory, and manipulation of service by an interested party is not uncommon.

(3) When the peon goes all by himself he usually exacts something from the person served. It is therefore not uncommon that for a consideration he may not serve the process properly or not at all and make a false return.

Suggested remedy of such abuses.

Delay in the service of the processes naturally causes delay in the disposal of suits. The remedy that we would suggest is that the Civil Court processes should be served by the joint agency of the Post Office and the President Panchayet of village unions. The processes may be sent to the Panchayet by registered post and as he knows the village people and may avail himself of the services of the village chowkidar, he may serve the processes much more satisfactorily and return the same by registered post to the Court. He is a much more responsible and respectable person than the Civil Court peon. When he is elected by the unions he will be still more responsible. Service by him would be much more satisfactory and less expensive. The Panchayet and chowkidars may be paid a small fees for such service. It would not increase the cost of litigation and it may result in saving of money and time. The process fees often leave a large surplus to the Local Government and there is scope for giving relief to litigants in cost of litigation as well.

Pleadings and legal training.

We shall next say a few words about pleadings, practice and procedure of Courts, which may to some extent be said to contribute to the delay in the disposal of suits in the Mofussil Courts. The pleadings in Mofussil Courts cannot be said to be all that may be desired. They are often prolix, especially the written statements, in which all possible and impossible objections and defences without a shadow of justification are pleaded. This we attribute to pleaders being enrolled in Courts without any previous training in the practice and procedure of the law Courts. As a remedy for this we would suggest that graduates in law should not be enrolled as legal practitioners before they have passed a public examination held either by the State or the High Court for testing their practical knowledge in drafting, conveyancing and in the practice and procedure to be followed in the framing and the conduct of the suit at its different stages. Before the candidates are allowed to appear in such examinations they should be required to serve a period of apprenticeship for two years as an articled clerk of a pleader or vakil of at least ten years' standing. This apprenticeship should not be nominal. The articled clerk should appear with the pleader in Court and a note of such appearance should be kept by the *peshkar* or Bench clerk. To entitle the candidate to ap-

pear at the examination he must produce a certificate from the District Judge that he has completed his period of apprenticeship and that during the period he has appeared in Court in a certain minimum number of suits and worked with the pleader with whom he is articled. If legal practitioners are enrolled after they have passed such qualifying examination, we shall get better trained lawyers and the pleadings, practice and procedure in the Mofussil Courts will considerably improve. The profession is now overcrowded and, we believe, such reasonable restrictions for securing efficiency and checking the indefinite growth of untrained lawyers will be welcomed by the public and lawyers as well. If the Munsifs are then recruited from amongst such trained lawyers after some practice in Court and some further test, the judiciary also will attain a higher degree of efficiency.

Supervision of the High Court.

It is a fact that even contested suits on the Original Side of the High Courts are much more quickly disposed of than similar suits in the Mofussil. Further, sales and execution proceedings in the High Courts are seldom attended with such trouble as are incidental to such proceedings in the Mofussil Court. This is due to the solicitors, counsel, and Court officers being well-acquainted with the proper way of framing suits and conducting them and Courts not countenancing frivolous objections. It is also largely due to precision in drafting, pleading and the regularity of practice and procedure followed on the Original Side at every stage of the suit and, let us add to the fact that on the Original Side, there is a sufficiency of Judges and a well-paid and well-trained ministerial staff. If the High Court Judges from the Original Side could make time to visit the districts, sit in the Courts and guide the judicial officers with regard to practice and procedure, a great deal of good work might be done in improving the administration of justice in the Mofussil. But for this we shall require more Judges of the High Court, and that again in the present state of our provincial finance we cannot afford. As for the present system of supervision by requiring the Civil Courts to submit periodical returns, it is open to serious objections. We have often commented upon them and need only say that it is neither fair to the officers or the suitors concerned nor conducive to the proper administration of justice. Direct supervision is always preferable to such indirect supervision.

Tinkering of the laws and procedure.

We would not advise the Committee to suggest any tinkering with the laws or procedure for accelerating the speed of justice and not its quality. The High Court has powers under the Code of Civil Procedure to frame or amend the Rules and Orders. Unfortunately the Rule Committees seldom meet and so far as we are aware, they have done nothing in this direction. Lawyers serving in it are expected to do honorary work and Judges to work after Court hours. Such work cannot be done unless one can devote his time and attention to it. This again would mean expense. We would leave it to the Legislatures and the High Courts in the Provinces to make the necessary changes in the practice and procedure after due deliberation.

Appeals.

We would on no account curtail the existing rights of appeal and power of revision. They serve to keep the lower judiciary up to the mark. Such curtailment may result in denial of justice in many cases and promote discontent. "It is not enough that justice should be done but people must feel that justice is being done." Appeals thus serve the purpose of safety valves against discontent and injustice done by officers working at a high pressure.

Law Reports and legal journals.

In connection with the question as to whether private reports are helpful or otherwise to the administration of justice, we would say from our experience extending over 27 years that they are of great assistance to the legal profession and the judiciary. For instance, the Privy Council and the High Court decisions which we report earlier than the Government Law Reports are not only helpful in the quick disposal of cases but prevent appeals which would otherwise have been preferred. The rent law cases which we report are found particularly useful in the Mofussil. Then we do not merely report the cases but comment on them, discuss them when necessary and suggest changes in the law and criticise legislation. This is alike helpful to the judiciary and the Legislature. Reports which are run on the

lines of the *English Law Journal* and the *English Law Times* in India should be encouraged and by no means discouraged.

Correspondence.

To

The Editor, "Calcutta Weekly Notes."

Sir,

With reference to the correspondence of Mr. Rajendra Nath Ghosh on sec. 16, Bengal Tenancy Act, published in the 28 Calcutta Weekly Notes at p. viii, I beg to submit for publication in your much esteemed journal the following observations.

Sec. 16, Bengal Tenancy Act, is ancillary to sec. 15 inasmuch as it enacts a penal provision of law to secure compliance with the provisions of sec. 15. The objects of this section are, as given in Messrs. Finucane and Amir Ali's Bengal Tenancy Act, 2nd Edition, p. 108, "to secure (1) to the landlord notice of the succession and tender of the landlord's fee and (2) to the Collector early and accurate information to enable him to keep up official registry of permanent tenures."

It is evident that secs. 15 and 16 of the Bengal Tenancy Act are enacted for the benefit of the Collector and the landlord and not of the tenant, though the tenant can, in a suit for rent, take shelter under these sections for the laches of the succeeding tenure-holder. Thus the questions raised by your correspondent are irrelevant. So long as the fact remains that the succeeding tenure-holder has not complied with the provisions of sec. 15, the Court will not allow him to recover by suit, distraint or other proceeding any rent payable to him as the holder of the tenure, either of its own motion or on the pleading of the tenant Defendant, whatever be the time of his attornment or whatever might have been the result of a previous suit or proceeding.

Yours truly,
Lalit Mohan Indra, B.L.,
Pleader.

Dated:
Krishnagar,
The 14th December 1923.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

Civil Appellate Jurisdiction. Before Walmsley and Mookerjee, JJ. M. A. No. 368 of 1922. MATHURAPUR ZEMINDARY CO., LD., Appellants *v.* BHASORAM MUNDUL and others, Respondents. The 14th February 1924.

Civil Procedure Code, Or. 21, r. 16—Assignee before decree, if assignee of decree by operation of law.

The Appellants were the assignees of one Mr. Henesey who had transferred his entire interest in his zemindary together with all sums due and to be due from the tenants as also other sums payable to him. At that time several rent suits were pending decision in the trial Court. No substitution was made or sought for by the Company in those suits and the same were allowed to proceed in the name of the last proprietor Mr. Henesey. Decrees were ultimately passed in favour of Mr. Henesey. Thereafter the Company filed execution petitions for executing the said decrees on their own behalf, on which the Respondents took various objections of which the following was the subject-matter of this appeal: whether the decrees obtained by Mr. Henesey could be put into execution by the Company as transferees without having the said decrees being transferred in their favour in writing, or, in other words, whether Or. 21, r. 16 was a bar to the application. The Trial Court overruled the objection and allowed the execution to proceed. On appeal the same was reversed. Hence the appeal. The learned vakil for Appellants contended that the Appellants were transferees by operation of law and so Or. 21, r. 16 was no bar to the application and relied upon 25 C. W. N. 863.

The Respondents contended that as between the parties to this case the question of transfer by operation of law could not arise:

Held—That the execution petition was barred under Or. 21, r. 16.

Messrs. N. N. Sen Gupta, Counsel and *Apurba Charan Mukherji, Vakil* for the Appellants.

Mr. Debendra Nath Bhattacherji for the Respondents.

S. C. C.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, MARCH 3, 1924. [No. 16.

Contents.

NOTES

Lord Olivier's Statement.

Lord Olivier's statement, while it shows considerable grasp of the facts which constitute the present political situation in India and of the causes responsible for it, has disappointed the vast majority of our countrymen in so far as it has failed to present a constructive programme for advancing the cause of free citizenship and representative institutions. As regards the Reforms, he has made it clear that he is not in a mood to amend them now and that the appointment of a Royal Commission or the calling of a Conference for that purpose is not to be thought of. It cannot be gainsaid that there is a considerable body of public opinion in favour of the appointment of a Royal Commission. The amendment of the Reforms is being called for not only by the Swarajists but by Moderates, Nationalists and Independents as well. We believe Lord Olivier has missed the first opportunity he had of ranging on the side of Government the forces of moderation by his refusal of a Royal Commission.

Lord Olivier appears to have been considerably exercised over the position of Indians in Kenya—a position of social and political inequality imposed upon them by the Colony and upheld by the authorities at Whitehall. He looks forward to an honourable solution and advises Indian settlers in Kenya meanwhile to bear their troubles in patience. That is all the Labour Government are prepared to do for the present.

Age of Consent Bill.

Dr. Gour's measure for the amendment of sec. 375 of the Indian Penal Code has re-opened the controversy over the age of consent which was settled in 1891. A good few of our readers will recall the heated controversy which followed the introduction of Sir Andrew Scoble's measure raising from ten to twelve the statutory age minimum for consummation of marriage. Dr. Gour's Bill proposes to raise the age from twelve to fourteen. A measure like the present long overdue should have been welcome universally, but the debate in the Assembly shows that there is a considerable feeling of opposition against it. Some appear to think that the Legislative Assembly, constituted as it is, is not the proper organ for passing a measure which affects vitally the religious and domestic life of the people. Others again opine that the proposed measure is far too much in advance of public opinion. There is a consensus of expert medical opinion based on vital statistics that the death rate among women and children is attributable in some measure to an early consummation of marriage and that the raising of the age from twelve to fourteen will have an immeasurably beneficial effect on India's womanhood and the children. We are aware of the existence of a strong body of opinion against the intended measure, but we should like to point out that it is one of the functions of our legislators to influence public opinion. The Bill has been referred to a strong and representative Select Committee. We hope their endeavours will not be fruitless.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Hilary sittings commenced on the 25th January, two Boards being constituted, one of which is hearing Canadian appeals and the other appeals from India.

The latter is presided over by LORD SHAW and sitting with him are LORD PHILLIMORE, LORD YOUNGER, SIR JOHN EDGE and LORD SALVESEN.

There are 19 Indian appeals in the list, 5 from Bombay, 4 from Madras and the rest more or less evenly divided among the other provinces.

January 25, 28. An appeal from Lower Burma was first heard, *Veerappa Chetty* v. *Arunachellam Chetty*, the only question for determination being whether or not a mortgage was void for want of consideration. Judgment was reserved.

Messrs. DeGruyther, K. C. and *Narasimham* appeared for the Appellants.

Messrs. Dunne, K. C. and *G. S. Sanders* for the Respondent.

The following judgments have been delivered, the appeal being allowed in each case.

Mt. Lajwanti v. *Safa Chand.*

Mt. Durga Devi v. *Shambu Nath.*

G. D. M.

29-1-24.

Correspondence.

LAW'S DELAY.

To

THE EDITOR, CALCUTTA WEEKLY NOTES.

SIR,

The Civil Justice Committee is busy in examining witnesses to find out the root cause of law's delays in our country. Some of the witnesses before the Committee have gone so far as to suggest in a way that judicial officers not forgetful of their old school-boy days play truants from their posts of duty and with a view to throw dust in the eyes of their superiors, make notes of their hours of attendance in their diaries, which, to use a very mild expression, are not very accurate. Some witnesses, on the other hand, attribute law's delays to the lawyers' inordinate love of lucre which prompts lawyers to take unnecessary adjournments of cases from day to day, judicial officers aiding and abetting them in the pursuit of such unlawful gain. There are others who trace delays to a conspiracy between ministerial officers and litigants in bringing about indiscriminate adjournments of cases to which judicial officers play the role of indifferent spectators. But as a matter of fact a real diagnosis of the situation is not to be found in any of these extreme views.

From my experience of the Mofussil Courts I venture to throw out the following suggestions which in my humble opinion may go a great way towards minimising law's delays.

(1) If we take a statistics of the amount of work that is actually done by a judicial officer during the year we see that he has to do much more than what is possible for a man to do. He works against time, paying little regard to his health with the result that he becomes a physical wreck in the prime of his life. There should be an estimate of the amount of work which it is possible for a judicial officer to do during the year properly and expeditiously and statistics should be prepared of the average number of cases of the Courts of each district and the number of judicial officers should be fixed in proportion to the amount of work in each district and the territorial jurisdiction of an officer should be fixed on that basis.

(2) The present system of recruitment of Munsifs is extremely defective and should be discontinued. There should be a competitive examination for the appointment of Munsifs. A pleader of at least five years' standing with some workable knowledge of law and procedure would be eligible to go in for such examination.

(3) A graduate in law should undergo practical training for two years as an articled clerk with a pleader or vakil of at least 12 years' standing before being enrolled as a pleader.

(4) The ministerial staff should be better trained and more generously paid.

(5) Services of processes should be made more effective by requiring the peons to have invariably the signatures and thumb-impressions of witnesses in the returns, and the aid of village panchayets and chowkidars should be sought for, as far as possible, who would also be required to put their signatures or finger-impressions in the returns, and the system of affidavits of services by identifiers should be put a stop to, as being useless for all practical purposes and tending to cause unnecessary delay in the disposal of cases.

(6) All prolixities in pleadings and frivolous pleas and objections should be strongly discouraged.

(7) Execution proceedings should be expedited by doing away with the necessity of service of notice for settling the terms of sale proclamation and by introducing the system of issuing simultaneously the writ of attachment and sale proclamation which should be served not only on the land in question but also on the judgment-debtor personally.

Yours truly,
GANGA CHARAN DUTTA, B.L.,
Pleader, Nawabgunj.

28-2-24.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

ORDINARY ORIGINAL CIVIL JURISDICTION. Before C. C. GHOSE, J. IN THE GOODS OF MARCUS ROBERT COX, deceased. The 25th January 1924.

Practice—Appointment of guardian for infant heir of deceased Christian before grant of Letters of Administration—Sec. 217 of the Indian Succession Act.

Difficulty has arisen owing to the absence of the word "minor" in sec. 217 of the Indian Succession Act. Cases are coming up, in which the deceased died without leaving a widow but has left minor children and the brothers or sisters of the deceased have applied for Letters of Administration. Under sec. 30 of the Succession Act, the estate, in such a case, goes to the children and under sec. 203, they alone are entitled to the grant. But being minors no grant can be issued to them.

In a case like this, if governed by the Probate and Administration Act, we issue grant to a person who applies and gets himself first appointed guardian of the infant children under sec. 33 of the Probate and Administration Act.

The corresponding section of the Indian Succession Act is sec. 217. But there the word "minor" does not occur. It may reasonably be assumed that this was an oversight on the part of the Legislature, for, one can think of no cogent reason for exclusion of the word from this section and for its inclusion in sec. 33 of the Probate and Administration Act.

It is submitted that sec. 225 of the Indian Succession Act would not apply to a case like the present but contemplates a case of emergency where there is a risk of the assets being dissipated and that sec. 217 should be availed of for purposes of a grant in this case by following the English procedure as laid down in 1 Will. Exors. 11th Edn., p. 392. The passage runs as follows:—"If the person appointed sole executor, or he to whom, in case of intestacy, the right to administration has devolved under the Statutes, be within age, a peculiar sort of administration must be granted, which is called an administration *durante minore aetate.* In the former case, it is obviously a species of administration *cum testamento annexo* . . . . In *Cartright's* case the intestate died leaving four grand-children, whereof one was of age, and the other three were minors. The case was argued before the two Chief Justices and the Chief Baron who granted it to the mother as guardian to the three, *durante minore aetate*, though it was strongly urged that she, that was of age, being capable ought to be preferred."

In Tristram and Coote's Probate Practice, 15th Edn., the following passages occur:—

"So also in the case of one or more residuary legatees or devisees, if all be under age, or in an intestacy, if all the next of kin be under age, the Court will make a grant to some person limited until one of the minors or infants attains the age of twenty-one years." (Page 145).

"The minors' and infants' next of kin, as before stated, if there be no testamentary or other lawful guardian, have the preferential right of assuming their guardianship, and minors are under a corresponding obligation to elect their next of kin for such purposes in preference to all others." (Page 149).

The parties, in many cases, refuse to go to the Administrator-General of Bengal because of the fees he charges and it would be a hardship if in the case of small estates, parties are compelled to go to him, when there are competent persons available to manage the estate during the minority of the heir.

Our r. 33, p. 420, provides that we should follow the English practice when our Acts or Rules do not provide for any special case arising in Probate and Administration matters.

So we have ample authority for adopting the English practice.

The petition in one of these matters is laid before your Lordship for your Lordship's ruling as to whether we should follow the same practice in a case coming under the Succession Act in which the heirs are minors, as we do in a case governed by sec. 33 of the Probate and Administration Act, as if the word "minor" had been inserted in sec. 217 of the former Act.

S. C. MITRA,
Registrar in Insolvency.

I agree with the view expressed herein.

C. C. Ghose,
25-1-24.

CIVIL APPELLATE JURISDICTION Before SUHRAWARDY AND CHOTZNER, JJ. S. A. No. 2364 OF 1922 (WITH RULE No. 31 OF 1921). WAFUZUDDIN PRAMANIK, Defendant, Appellant v. MAHAMUD BALAKI and others, Respondents. The 27th February 1924.

Bengal Tenancy Act, sec. 153—Suit for rent—What is amount of rent annually payable—Competency of second appeal.

The Plaintiff brought a suit for recovery of rent alleging that he and the *pro formâ* Defendants were jointly entitled to a 4 annas share. The suit was valued at Rs. 9-11 ans. out of which half was said to be due to the Plaintiff and the *pro formâ* Defendants jointly and out of which the Plaintiff claimed that he was entitled to a half-share. The defence was (1) that the collection of rent for the 4 annas share was joint with another person who had a 13 gandas share and (2) that the Plaintiff had other brothers who were co-owners with the Plaintiff and as such the Plaintiff was not entitled to sue without joining his brothers. During the pendency of the suit the *pro formâ* Defendants filed an application to be joined as co-Plaintiffs and full court-fee for the 4 annas share was paid.

The learned Munsif who was specially empowered under sec. 153, Bengal Tenancy Act, gave effect to both these contentions of the Defendants and dismissed the suit accordingly; and the application of the *pro formâ* Defendants was refused.

Against this decision the Plaintiff alone preferred an appeal by making the principal Defendant and the *pro formâ* Defendants Respondents.

The lower Appellate Court decreed the appeal and the suit holding on both the points in favour of the Plaintiff. The principal Defendants preferred a second appeal and also obtained a Rule under sec. 115, C. P. C., as it was thought that there was some doubt as to the competency of the second appeal. In the memorandum of second appeal and the application under sec. 115 the Plaintiff and *pro formâ* Defendants were made parties. But as there was no proper service upon some of the *pro formâ* Defendants they were not proceeded against, as it was thought that they were not necessary parties.

On behalf of the Respondents two preliminary objections were taken, (1) that no second appeal lay, and (2) that the *pro formâ* Defendants not having been proceeded against the appeal and the Rule, were both incompetent for defect of parties :

Held—(1) That a question as to the amount of rent annually payable was not involved in the case, and therefore the suit being valued at less than Rs. 50 no appeal lay to the Subordinate Judge, (2) that although no appeal lay to the Subordinate Judge a second appeal lay to the High Court, (3) that the appeal was not incompetent for defect of parties as the Plaintiff was the sole Plaintiff-Appellant in the lower Appellate Court (17 Cal. 489 F. B. and 34 C. L. J. 569 distinguished). The appeal was allowed and Rule discharged.

Rai Surendra Chandra Sen Bahadur and *Babu Satis Chandra Chowdhury* for the Appellant.

Babus Mahendra Nath Roy and *Monmatha Nath Roy* for the Respondents.

S. C. C.

THE

Calcutta Weekly Notes

Vol. XXVIII.] MONDAY, MARCH 10, 1924. [No. 17.

Contents.

NOTES

The Berars.

The vexed question of the Berars has come up again. As our readers are aware, the Nizam is pressing for the restoration of the province to him alleging that his father was "rushed" into signing the "assignment in perpetuity," and that he had no right to do it at all. It will be outside the scope of our journal to launch into a discussion as to the circumstances of the transfer of the Berars to the Government of India. But we take this opportunity to point out that the question is not merely a question between the two Governments. The wishes of the people should be consulted before any decision is arrived at. The province should not be regarded as a mere *patrimonium* either of the Government of India or of the Nizam, but as a community of individuals who have got something to say as to how and by whom they should like to be governed. The Allies at the Peace Conference proceeded to break up old kingdoms and constitute new ones; and the procedure they followed was the Referendum which showed a scrupulous regard for the principle that the opinion of the majority of the people is one of the primary considerations to be kept in view in the decision of all questions relating to cession or transfer of territory from one sovereignty to another.

Protection of Minorities.

As the result of the Peace Treaties, quite a number of new independent states have come into existence. They were practically created by the Allies and in recognising them, the latter have imposed on them certain obligations with regard to minorities. The Allies in constituting new states proceeded on the principle of nationality. But the application of this principle led to its violation in many cases and "something had to be done for the violated minorities both in the interests of the sacred doctrine itself and in order to impart something of stability to the new settlement." This is the origin of what are known as the Minority Treaties which have definitely imposed obligations on certain states, *e.g.*, Poland, Czecho-Slovakia, Jugo-Slavia and many others, to protect the fundamental rights of their respective racial or linguistic or religious minorities. Thus, to give one example, Poland has agreed with the Allies that "she will assure full and complete protection of life and liberty to all inhabitants without distinction of birth, nationality, language, race or religion" and that "all inhabitants shall be entitled to the exercise, whether public or private, of any creed, religion or belief whose practices are not inconsistent with public order or public morals."

The Minority Treaties are no doubt in theory, at any rate, an infraction of the independence of the states concerned. The latter accepted the obligations imposed by them only when they found that the Allies were not prepared to recognise them otherwise, and we are afraid that they will do their utmost to nullify them at the earliest opportunity. It cannot be gainsaid, however, that the Allies were actuated by the best of motives and that in many of the states, such limitations, as they sought to impose on national sovereignty, are an absolute necessity.

Law's Delays.

In one of our previous issues, we discussed some of the causes which are responsible for

the delay in the administration of civil justice and suggested a few remedies. We pointed out that there was some laxity in the drafting of pleadings by our lawyer friends in the Mofussil and that the Mofussil Courts are, generally speaking, more dilatory in the despatch of cases than Courts in the Presidency towns. No doubt the dilatory habits of the suitors in the Mofussil are to some extent responsible for the dilatory procedure in the Mofussil Courts. But if the Courts and the lawyers in the Mofussil observe the business-like ways of the judges, attorneys and counsel on the Original Side of the High Court and the Vakils on the Appellate Side, matters would soon be quite different. We are surprised to find that some practitioners in the Mofussil believe that complicated questions of law seldom come up before the Original Side. If they watched for a few days how expeditiously complicated commercial suits, involving questions of contract, bills of exchange, company law, mortgage suits, suits relating to easements, testamentary and intestate succession, matrimonial and other suits are disposed of, it would be a lesson to them in law and procedure and also with regard to examination and cross-examination of witnesses over which very little time is wasted.

ADVOCACY v. HONESTY.

Boswell asked Doctor Johnson whether he did not think "that the practice of the law in some degree hurts the nice feeling of honesty." To whom the doctor replied: "Why no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a Judge." Boswell: "But what do you think of supporting a cause which you know to be bad?" Johnson: "Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion." Boswell: "But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?" Johnson: "Why no, sir, everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet."

The Seven Lamps of Advocacy.
By E. A. PARRY.

DOES OR. IX, C. P. C., APPLY TO EXECUTION PROCEEDINGS?

BY G. SWAMINATHAN, B.A., B.L., VAKIL.
Tiruvalur (S. India).

An attempt is made in this article to examine with reference to the chief decided cases the applicability of Or. IX, C. P. C., to proceedings in execution.

If at all Or. IX should apply to applications under Or. XXI, it should be by virtue of sec. 141, C. P. C., which runs thus:—

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all *proceedings* in any Court of Civil Jurisdiction."

Does the term "proceedings" in the section include execution applications?

Let us refer to the history of the section. The first para. of sec. 647 of the Code of 1882 corresponded to the present sec. 141, C. P. C. It ran thus:—

"The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction other than suits and appeals."

Under this section, the Calcutta High Court decided that sec. 647 did not apply to execution proceedings (1) while the Allahabad High

(1) I. L. R. 18 Cal. 685.

Court held that it did (1). Then an explanation was added by an Act of 1892:—

"This section does not apply to applications for the execution of decrees, which are proceedings in suits."

In this state of the authorities, the Privy Council had to consider the question in *Thakur Prasad* v. *Fakir Ullah* (2). It is necessary to examine this decision at some length, for, some High Courts in India seem to think that an authoritative pronouncement has been made on the subject. The facts of the case are important. The Appellant (decree-holder) put in an application for execution on 20th August 1885. On 5th January 1886, his pleader represented to the Court that his application might be struck off the file for the time being; whereupon the Court passed an order that the petition was dismissed "*for default.*" The decree-holder put in a second application on 24th August 1888, to which the judgment-debtor objected saying that, as the decree-holder's prior application had been dismissed, he was debarred by sec. 373 read with sec. 647 of the old Code from making a fresh application on the very same decree. The Subordinate Judge construed the order of dismissal in the light of the circumstances mentioned above and held that permission to bring a fresh application later on ought to be inferred as having been given to the decree-holder and that therefore sec. 373 was no bar. The High Court differed from the Subordinate Judge on the question of construction of the order and held that the order should be construed as it stood and felt bound by the decision in *Sarju Prasad and another* v. *Sita Ram* (1), to uphold the judgment-debtor's contention. The decree-holder having appealed to the Privy Council, Lord Hobhouse, delivering the judgment of the Judicial Committee, observed:—

"Their Lordships have only to say that they think the Subordinate Judge right in reciting the whole of the record of 5th January 1886 which embodied the Pleader's statement in order to get at the true meaning of the order."

(*To be continued.*)

(1) I. L. R. 10 All. 71.
(2) I. L. R. 17 All. 106.

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

At page vii of the current volume of your esteemed journal Babu Rajendra Nath Ghosh. B.L., pleader, has raised several questions with reference to sec. 16 of the Bengal Tenancy Act. The points are certainly of common occurrence in our Courts and I beg to offer my way of their solution for favour of your publication. The points raised are: (1) Can the objection under the section be raised by the tenant who has taken settlement from the tenure-holder after the succession has opened out? (2) Can the objection be raised in a subsequent suit if it had already been raised in a previous suit but was negatived owing to the landlord's compliance with the provisions of the law or not given effect to on account of the waiver on the part of the tenant in the suit? I deal with the objections in the order stated.

Sec. 16 occurs in Chap. III of the Act headed "tenure-holders" under a sub-head "other incidents of the tenures." The whole chapter deals with the rights and liabilities of tenure-holders as such and the only solitary instance in which any reference is made to the persons holding under them is to be found in this section. The reference is not by way of dilating upon the incidents of the holdings of such persons but by way of imposing a disability upon the tenure-holders themselves under certain contingencies. Read in this light, the meaning of the section becomes clear. It does not matter when or under what circumstances the tenure-holder did let out his land, the disability is always there. He must comply with the provisions of the law or he is debarred from realising rent from his tenant. Sec. 15 of the Act is a reminiscence of the old idea which casts a duty on a person succeeding to a tenure to get his name recorded in the office of his landlord on payment of the suitable *nazarana*. I need not recount the old history of the subject here but it would suffice to point out how this idea is maintained in the Patni Regulation. The bar set up by the section under review was enacted for the benefit of the landlord of the tenure-holder to ensure prompt realisation of the "landlord's fees" and the recording of the name of the succeeding tenure-holder. This consideration would, I submit, make my reading of the section sufficiently clear.

The second question raised is, in my humble opinion, involved, as to part of it, in the principles of *res judicata* applicable to rent suits. If there had been a finding in the former suit that the landlord had complied with the provisions of the law I do not see any intelligible principle under which the tenant can be permitted to raise the same question over again in the subsequent suit. The question of "waiver," however, requires some consideration. If in the former suit the Court distinctly left the question open I do not see any bar to its re-agitation in the subsequent suit. The tenure-holder suffered such a finding to be recorded in the former suit and he cannot reasonably complain if he be involved in the same consideration again in the subsequent suit. But if in the former suit the finding had only been to the effect that the objection had been waived without any further reservation, the case stands on a different footing. The question, however, becomes simplified if we now turn to the section itself for the solution. The section, as it appears, casts an imperative duty on the Court. As soon as it is apprised of the fact that there had been a succession by way of inheritance it must hold its hands till the provisions of the law have been complied with. It can be satisfied that it had been so complied with from the finding in the former suit to that effect. But if there be no such clear finding, I do not see how the Court can be asked to negative the objection from the mere fact that the tenant chose on the former occasion not to press it. The section, as I have shown above, was not enacted for the benefit of the tenant but to impose a disability on the tenure-holder. The section does not confer any right on the tenant which he is at liberty to waive or relinquish. The conduct of the tenant in the suit is beside the point except as a rule of evidence. He can either admit or not that the provisions have been complied with. In the former case no further proof is necessary. But in the latter, I do not see how the tenure-holder can escape the penalty in the section except by showing that he has done what the law requires him to do. The waiving of the objection lies not with the tenant. It, if possible, could only have been done by the landlord of the tenure-holder, whose interest alone the section is intended to safeguard. I can waive my own privilege but it is absurd to speak of my waiving the privilege of a third person. In my humble opinion, the tenure-holder has got to show that he has complied with the provisions of the law although in the previous suit the tenant waived the objection and the Court did not find then that the tenure-holder had done what the law required him to do.

Yours truly,

NARANATH MUKERJI,

Munsif,

Magura, District Jessore.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before WALMSLEY, J. CIVIL RULE No. 711 OF 1923. KALACHAND DE, Decree-holder, Petitioner *v.* RAM PROSAD and another, Opposite Party. The 22nd January 1924.

Provident fund deposit in Railway Company, if attachable in execution—Civil Procedure Code (1908), sec. 115.

The Petitioner, in execution of a money decree obtained against the Opposite Party No. 1, applied to the Munsif of Chittagong, the Court executing the decree, for the attachment of the provident fund deposit lying to the credit of his judgment-debtor, the Opposite Party No. 1, in the hands of his employers, the Assam Bengal Railway Company, the Opposite Party No. 2, when he ceased to be the servant of the Railway Company, the Opposite Party No. 2.

The learned Munsif having rejected his said application on the 6th March 1923 on the objection of the Railway Company, the Opposite Party No. 2, on the ground that the said deposit could not be attached under their provident fund rules the Petitioner obtained a rule:

Held—The provident fund deposit lying to the credit of the Opposite Party No. 1 in the hands of the Railway Company the Opposite Party No. 2, was not attachable under Or. 21, r. 48 or any provision of the Code in execution of a decree against the former. *Secretary of State* v. *Raj Kumar Mukherjea*, (1922) 27 C. W. N. 472, *followed.*

Babu Asita Ranjan Ghose, for the Petitioner.

Mr. Langford James and *Babu Ambika Pada Chaudhuri* for the Opposite Party No. 2.

H. D. C. *Rule discharged.*

THE END

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY. MARCH 17, 1924. [No. 18.

Contents.

NOTES

The Rent Act.

The Calcutta Rent (Amendment) Act of 1924, recently passed by the Bengal Legislative Council, is an instance of hurried legislation and as such requires immediate revision. The principle of control is now universally accepted in this country as well as in England. It is justified on the ground that landowners enjoy a monopoly. There is always overcrowding in cities like Calcutta and the land being limited, it is idle to suppose that the rule of supply and demand can establish fair relations between the landlord and the tenant. The demand is always on the increase and the supply can never compete with it. Temporary causes, such as excessive trade depression, may bring about an apparent equilibrium between supply and demand, but in a growing city such equilibrium will be disturbed in no time.

It has been said that it is only recently that such Acts have been passed and that also on account of the abnormal conditions due to the war. But it is a misfortune that the legislature did not interfere earlier. The tenants suffered, but the legislature perhaps because of the predominance of the landlord element in it or of the novelty of the question never relieved them. The evil that existed from before became so glaring during the war that control of rents became a matter of absolute necessity. But the control must be reasonable. It must proceed on economic lines. It must go to the extent of preventing the enjoyment of monopoly rights by landlords and no further. There could be no question of favouring one section of the people at the expense of the other. The landlords are not criminals. They have done nothing wrong by investing their money in building and so providing accommodation for others. Legislation must not deprive them of their normal profits and must not discourage future building operations. Unfortunately the present legislation indicates that the motive was to punish the greedy landlords. If the landlords are greedy, punish them by all means, but let the punishment fit the crime. And let it not recoil on those who inflict it.

The new Act is to remain in force for three years. This is necessary to establish stability. Tenants would not like to go to Court unless they feel sure that they would be able to enjoy the fruits of their labour. Ordinarily it takes about 4 or 5 months to get the decision of the Rent Controller. It takes another 6 months if there is an application for revision. So the better part of the year is taken up in getting the remedy, and he must be given some breathing time to enjoy it. The dearth of cases before the Rent Controller and the general desire on the part of the tenant not to take the shelter of the Court, are due to the pronouncement of the late minister that the Act would not remain in force after 31st March 1924.

The Act does not apply to premises the rent of which exceeded Rs. 250 per month or Rs. 3,000 per annum on 1st November 1918. One wonders what led the legislature to limit the operation of the Act in this way. If the landlords are profiteers, surely the landlords of big houses are big profiteers. Perhaps it has been assumed that with regard to houses of higher rents there is no scarcity and fair and equitable rent could be secured by the supply and demand for such houses. But this is not so. The Report of the Housing Committee does not warrant such a conclusion. Besides, many curious results will follow and there will be no inducement to build small houses. What is to happen if the premises are first let

after 1st November 1918? Suppose a tenant pays Rs. 450 in respect of a house consisting of two flats, the standard rents of which are Rs. 250 and Rs. 200 and the tenant is occupying the lower flat and has sublet the upper flat. Now the tenant not being protected by the Act may be called upon to pay Rs. 550 or to vacate. If the tenant vacates the premises, the tenant of the upper flat is to vacate for he is a sub-tenant and as such not entitled to protection. If the tenant pays Rs. 550, he cannot increase the rent of the upper flat which is standardised and he will have to pay Rs. 300 for the lower flat. And generally if the tenant is not protected, all his sub-tenants have a precarious existence irrespective of the rent they are paying. This of course could be remedied by extending the definition of tenant so as to include sub-tenant and this should be done immediately.

Perhaps the most unjust character of the Act is shown where it does not allow any increase in the rent over the standard rent as defined in the principal Act. Suppose the rent of a house in November 1918 was Rs. 100. Under the Act, the landlord cannot get anything more than Rs. 110 up to the month of March 1927, *i.e.*, an increase of 10 per cent. in 9 years. What about the amount spent in repairs, the increase in tax and depreciation? The landlords must have normal profits, and what was normal profit in 1920 cannot be so in 1927 when prices have gone up uniformly. If the landlord had invested the money in mortgage, he would have easily got a return of 12 per cent. with compound interest without impairing his security in any way.

Equality before the Law.

The decision of the Supreme Court of the Transval in the "colour bar" appeal is not only of grave importance to South Africa, but also has a more general bearing. The question before the Court was the validity of a Regulation purporting to be made by the Executive under the Mines, Works and Machinery Act, 1922. The Regulation provides that:

The operation of, or attendance on, machinery shall be in charge of a competent shiftsman, and in the Transval and Orange Free State Provinces such shiftsman shall be a white man. The Supreme Court have declared that this provision is *ultra vires* inasmuch as neither in the enabling Act nor anywhere else is there any lawful authority for discriminating between white and black. Two points call for notice. The first is that the decision has been given by the Court of a country where the colour problem is exceedingly serious, and, therefore, it forms a notable testimony to the impartiality of British justice. . . The other point is that once more a Court of Law has called the Executive to account for straining an enabling statute. In this country, the judgment of the Court of Appeal in the *Art O'Brien* case is still fresh in the public memory. It is a sound rule of our law that where any disability is to be imposed on any individual or class of individuals, it must be imposed by the express words of a statute, or by necessary implication. Enabling statutes may be a necessary evil, but at least the Courts can keep a jealous eye on regulations purporting to be made under them. Of course, as Lord Shaw pointed out in his memorable dissenting judgment in *Zadig's* case, once the right of the Executive to set aside or suspend the basic principles of the law is admitted, the dispensing power may be exercised in ways by no means welcome to those who first invoked it. . . . . . .

Law Journal.

DOES OR. IX, C. P. C., APPLY TO EXECUTION PROCEEDINGS?

BY G. SWAMINATHAN, B.A., B.L., VAKIL. *Tiruvalur (S. India).*

(*Continued from p.* lxxiv.)

Thus on the facts they agreed with the Subordinate Judge and might have allowed the appeal without going into the question of law raised in the case. But his Lordship went on:—

"But they do not further examine that question; because their decision must be rested on the more general ground that the ruling in *Sarju Prasad* v. *Sitaram* (1) is erroneous. . . Their Lordships think that the proceedings spoken of in sec. 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth and do not include executions . . . . But having regard to the controversies which have arisen and the difference of opinion between the various High Courts, their Lordships have

(1) I. L. R. 10 All. 71.

thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code."

It will thus be seen that though it was unnecessary for their Lordships to have gone into the question of law especially when on the facts they could have allowed the appeal, their opinion regarding the decision in *Sarju Prasad* v. *Sita Ram* (1) is certainly not an *obiter dictum*. *Thakur Prasad* v. *Fakir Ullah* (2) does certainly overrule *Sarju Prasad* v. *Sita Ram* (1). The effect of the latter decision has been stated thus: "That sec. 373 is properly applicable to execution proceedings . . . . and that a decree-holder who is not desirous of proceeding with an application for execution is in the same position as a Plaintiff who desires to withdraw from that suit." So this Privy Council case lays down only the two following propositions and nothing more, *viz.*, that sec. 373 is not applicable to execution proceedings and that execution proceedings do not come within the purview of sec. 647, C. P. C. The reason why their Lordships hold that "proceedings" in sec. 647, C. P. C., excludes execution proceedings would appear to be twofold: (1) The execution chapter is long and self-contained; (2) The Civil Procedure Code and the Limitation Act would appear to contemplate successive and concurrent execution applications. We may perhaps add one more reason. The marginal note, "Miscellaneous proceedings" taken with the history of the section, would appear to indicate that the legislature intended sec. 141 to apply only to those proceedings indicated by their Lordships of the Judicial Committee, such as guardianship, probate, etc.

(*To be continued.*)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The following is the record of business at the Privy Council.

January 31st, February 1st.—*Nabi Bakhsh* v. *Ahmed Khan* (Lahore). This was a suit by collaterals for possession of an estate. The parties are Mekans and governed by the Punjab Customary Law. The High Court decided that in fact the "Chundwand" rule had been observed in this particular family. For the Appellants (*Ex parte*) *Messrs. Montgomery, K. C.* and *Abdul Majid* contended that the Pagwand rule of succession was applicable. Judgment was reserved.

(1) I. L. R. 10 All. 71.
(2) I. L. R. 17 All. 106.

February 1st.—*Ramabai* v. *Harnabai* (Bombay) raised a question whether a leper was disqualified from inheriting under the Hindu law. The lower Courts found concurrently that the leprosy was not of a kind to debar inheritance and their decisions were confirmed by the Privy Council.

Mr. Narasimham for the Appellant.

Messrs. DeGruyther, K. C. and *Parikh* for the Respondent.

January 29th, February 4th and 5th.—*Durga Devi* v. *Shambu Nath* (Lahore).

Messrs. L. DeGruyther, K. C. and *Parikh* appeared for the Appellants, while *Sir Geo. Lowndes, K. C.* and *Mr. E. B. Raikes* appeared for the Respondents.

It raised a question as to the validity of an adoption by a Kashmiri Brahman of a boy of 17 after the performance of the latter's "upanayana." There was a further question of limitation. Judgment was reserved.

February 1st.—*Marwadi Ramjivan Nevatia* v. *Bhikaji & Co.* (Bombay) concerned a mercantile contract for longcloth. The Appellants as buyers claimed to reject certain of the bales tendered by the Respondents. There was a clerical mistake in the contract as to the numbers put on the cloth by the mill. The trial Judge held that the goods tendered were not the contract goods. His decision was reversed by the High Court. The appeal was dismissed.

Messrs. Dunne, K. C. and *M. R. Jardine* for the Appellants.

Sir Geo. Lowndes, K. C. and *Mr. E. B. Raikes* for the Respondents.

February 5th.—*Judawan Prosad* v. *Shatruhan Prasad* (C. P.) related to the validity of an adoption which the Judicial Commissioners, reversing the trial Judge, held to be proven. The appeal was dismissed. *Mr. Kenworthy Brown* for the Appellant and *Mr. E. B. Raikes* for the Respondent.

February 7th, 8th and 11th.—*Kalyanadappabin Iyanna Desai* v. *Chanbasappabin Dadappa Desai* (Bombay) arose out of a suit for the recovery of watan lands. The main question in

the appeal was whether Art. 118 or Art. 144 of the Limitation Act applied. Judgment was reserved.

Mr. E. B. Raikes for the Appellant.

Mr. W. Wallach for the Respondent.

February 12th.—*Sahu Ram Kumar* v. *Muhammad Yaqut* (Allahabad) related to the construction of a building contract.

Messrs. DeGruyther, K. C. and *Parikh* for the Appellant.

Messrs. Dunne, K. C. and *Wallach* for the Respondent.

LORD SHAW delivered the judgment of the Board (LORDS BLANESBURGH* and SALVESEN), dismissing the appeal.

February 12th.—*Nasrat Ali* v. *Gunlam Sarwar* (Oudh). This appeal was dismissed on the preliminary point that as there were concurrent findings of fact no appeal lay to His Majesty in Council.

Messrs. DeGruyther, K. C. and *Dube* for the Appellants.

Messrs. Dunne, K. C. and *E. B. Raikes* for the Respondents.

February 14th and 15th.—*Mahomed Rahmitulla Haji Joosab* v. *Esmail Allarakhia* (Bombay). In this appeal money was paid into Court by a mortgagee to comply with a conditional decree obtained by his mortgagor, whereby, on the latter paying to the present Appellant certain sums, the mortgagor should become entitled to property at Kurla. The present Respondent was also a transferee of the mortgagor's interest and contended that he was entitled to the benefit of the payment into Court. The Appellant alleged that the Respondent was not a representative under sec. 47 of the Civil Procedure Code, and that the payment into Court having been withdrawn by the payer the condition in the decree had not been satisfied. Judgment was reserved.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellant.

Messrs. A. M. Dunne, K. C. and *G. Douglas McNair* for the Respondent.

February 15th.—*Malraju Venkata Rama Krishna Rao Garu* v. *Koppuravanvi Sriramulu* (Madras). This was a suit to recover possession of property, the defence pleading that the suit is barred by limitation. The suit properties had been alienated by a Hindu widow and there was conflicting evidence as to the date of her death. The High Court held that the Plaintiffs had failed to discharge the onus of showing that the suit was brought in time and dismissed it. The Plaintiffs appealed to the Privy Council. Appeal dismissed.

Mr. Narasimham for the Appellant.

Mr. Parikh for the Respondents.

February 18th and 19th.—*Seth Hukum Chand* v. *Raja Ram Bahadur Singh* (Patna). The Appellants as representatives of the Digambari sect of Jains brought this suit against the zemindar of Palganj for specific performance of a contract for the lease of Paresh Nath Hill. The trial Judge held that the contract was a complete one, the High Court on the other hand was of opinion that the intention was that the contract should not be complete until an agreement embodying it should have been signed. The contesting Respondent represents the Sitambari community who later received a conveyance of the hill from the Raja of Nowagarh and the statutory manager of the Palganj Estate and was then brought on the record as a Respondent to the present appeal. At the close of the Appellant's argument the Board stated that they would consider the advice that they would tender to His Majesty and at present did not call upon the Respondents' counsel for an argument.

Messrs. Upjohn, K. C., Dunne, K. C. and *Kenworthy Brown* for the Appellants.

Messrs. DeGruyther, K. C., Sir G. Lowndes, K. C. and *Dubé* for the Respondents.

The Board which had consisted of LORDS SHAW, BLANESBURGH, SALVESEN and MR. AMEER ALI was strengthened by the addition of SIR LAWRENCE JENKINS who also sat on the hearing of the following case.

Secretary of State v. *Roy J. N. Chowdhury* (Bengal). This was a suit to cancel the assessment on certain alluvial lands.

The argument on behalf of the Appellant is proceeding.

Messrs. Dunne, K. C. and *K. Brown* for the Appellant.

Messrs. DeGruyther, K. C. and *Dubé* for the Respondent.

G. D. M.

* Lord Blanesburgh is the title which has been assumed by Younger, J.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, MARCH 24, 1924. [No. 19.

Contents.

NOTES.

Law's Delay and the Civil Justice Committee.

The very meagre reports of the proceedings before the Civil Justice Committee which are appearing in the press leave one in doubt as to whether the Committee is being materially assisted in tracing to their roots the causes and influences which are operating to clog the administration of civil justice in British India. So far as it is possible to form any idea of the drift of the evidence which is being given before the Committee, most witnesses appear to be more ready to put forward remedies than to search for causes, and when they are questioned about causes, the answers take the familiar form of laying the blame on somebody else. Pleader witnesses are apt to lay the blame on judicial officers, their unbusinesslike habits, habitual shirking of duties, want of proper training, incapacity to exercise supervision over their staffs and so on, whilst legal practitioners are charged with protracting litigation for entirely personal ends and the ministerial staff is charged on all hands with being corrupt, the serving peons coming in for the largest share of obloquy.

We do not wish to discourage the idea of improving the method of recruitment of Munsifs and giving them preliminary training in judicial work. But we are decidedly of opinion that there is nothing seriously wanting in the capacity and calibre of the present personnel of the service, so far at any rate as concerns Bengal. Similarly the idea that pleaders as a body are selfishly obstructive must be entirely put aside for individual members of the bar who show this tendency can certainly be effectively controlled by judicial officers who are not altogether weak and incompetent. The root causes of the delay and obstruction which retard business in the Civil Courts lie elsewhere than in the personal factor whether in the Judge or in the legal practitioner. They are, we firmly believe, inherent in the present system. Having given the matter our closest study, we consider it our duty to point out some of these causes which, we are convinced, are part and parcel of the present system. Unless these causes are removed, any change aimed merely at speeding up the trial of cases, *e.g.*, by docking a notice here or shortening the procedure there or making that compulsory which in the interest of fair trial should be left to the discretion of the Court to be exercised with reference to the special facts of each case, will so far from bringing any relief aggravate the evils of the existing system.

Though the causes appear to be many, upon closer analysis they really resolve themselves into one and this is that Civil Courts, at any rate in this Province, are grievously undermanned as regards the number of judicial officers employed. From the administration reports it appears that the volume of litigation is steadily increasing, but not only has there been no increase in the number of judicial officers commensurate with this progressive expansion of work, but latterly from motives of false economy leave vacancies even have not been regularly filled up, so that officers on duty have been required not only to tackle as they best may without extrinsic assistance the increase of work which the general increase in the volume of litigation has put on them but also the work of officers on leave. From 1917 to 1920, the receipts from civil litigation in successive years have been Rs. 1,47,56,574, Rs. 1,49,02,371, Rs. 1,66,84,507 and Rs. 1,68,61,146, showing an increase of nearly 20 lacs in four years—a sure index of the rapid increase of judicial business. The general desire for retrenchment of expenditure by

Government is no doubt largely responsible for this state of things. On the other hand, the High Court has not relaxed its demand that the judicial officers under its control must justify their existence by the quantity of work they may 'turn out' within a given time. When the number of officers is more than sufficient, or even 'just sufficient, to cope with the amount of work they have to do, the quantitative test may work well enough for the purpose of speeding up the slow or the indolent. But when the work is in quantity obviously beyond the capacity of the number of workmen employed, the system becomes from the point of view of the employer pure and simple slave-driving, and must from the point of view of the employee appear to justify the sacrifice of quality to quantity, and when it concerns the exercise of judicial functions, place a premium upon hasty and unconscientious work, which is just what deprives it of all value intrinsically and in the eyes of the public. From the point of view of the public it becomes a serious menace to law and order; for the more hasty a Judge is the more does litigation become a game of chance, a gamble which satisfies neither party, as hasty work necessarily involves larger interference in appeal which not only adds to the uncertainty of the issue but involves greater delay and expenditure in the long run to the parties; and if this should be the condition of things, not in a Court here or a Court there but in all the Courts in a Province acting under the selfsame impulse of grinding out results by the hour or the minute, it will not be long before the public will lose all faith in the quality of the justice they may expect from these Courts. The litigants have now to pay considerably enhanced court-fees for what in the circumstances is bound to be poorer service, and this because the Government needs money, upon which the proper manning and staffing of the Civil Courts should be a first charge, for purposes which have no relation whatever to civil litigation. What good can possibly be expected from improvements in the methods of recruitment and training of judicial officers, if the system remains what it is?

Our description of the present system as tending to slave-driving is, we wish to emphasise, not at all a fanciful one. It is not unusual for a judicial officer to be praised for the quality of his work which he is assured is above the average and for being a hardworking and conscientious officer, at the same time that he is told that he is slow and cannot expect the usual promotion unless he shows a larger out-turn. What again, we ask, is to be said of a system which compels a District Judge to circularise when a new arrangement for removing congestion in a certain kind of work is about to be taken up that serious consequences will follow to the officers concerned unless the figures of disposal during a stated period should prove satisfactory to the High Court?

That too many adjournments are granted in pending cases is a general complaint. Some witnesses sought airily to explain it away on the ground that the pleaders have an interest in getting these adjournments because it means more to them in the way of fees and also that senior pleaders having work in too many Courts take repeated adjournments so as to be able to attend to work spread in a number of Courts, and suggestions have actually been thrown out that the remedy lay in doing away with the concentration of too many Courts within the same area. The diagnosis equally with the remedy proposed so obviously savours of quackery that we have no fear that the Civil Justice Committee will be led away by it. The fact of the matter is, and this has been pointed out by several witnesses, that there being more work and more cases than a Court can possibly cope with, more cases than can be taken up are habitually listed for the day. The Court and the pleaders as well as the parties all know that the majority of them will have to be adjourned. Complaints have been made that the parties do not bring witnesses and are otherwise not ready on the day fixed for hearing. Bringing up witnesses and getting ready for the hearing mean expenditure and unless one is sure that the case will be taken up on a particular day, one does not like to throw away money, even if there was enough money all round to throw away in this useless manner, not to speak of the loss and harassment caused to the witnesses. It has been stated that the judicial officers themselves do not look into these matters of adjournments which are arranged by the parties and the Court's *peshkars* between them. The officers who insist on personally looking into this work of

unavoidable adjournments lose more time for real work and necessarily make a poorer show statistically than the officers who do not—and it is statistical results upon which their promotion depends. So in more ways than one does the present system of extracting more work quantitatively from officers than they can humanly perform lead to delay and slackness of supervision tending to corruption amongst the ministerial staff, and general demoralisation which affects judicial officers, legal practitioners, the ministerial staff and the litigant public alike. This aspect of the matter is so important, that it will need more detailed examination, and this we propose to do in subsequent issues.

One of the questions in the questionaire is "Has the multiplication of law reports interfered with speedy justice?" We have been assured by many judicial officers that they cannot afford time to read either text-books or reports and very few reported decisions are in fact seen to figure in the judgments of Mofussil Courts which come up for consideration in revision or appeal before the superior Courts.

DOES OR. IX, C. P. C., APPLY TO EXECUTION PROCEEDINGS?

By G. Swaminathan, B.A., B.L., Vakil. *Tiruvalur (S. India).*

(*Continued from p.* lxxix.)

The next question that arises for consideration is what is meant by execution proceedings. Do all applications put in under Or. XXI constitute execution proceedings?

Let us take an application under Or. XXI, r. 90. Is it a proceeding in execution? Does Or. IX apply to such a proceeding? A Special Bench of the Patna High Court consisting of Atkinson, Coutts and Manuk, JJ. has unanimously held in *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (1) that Or. IX, r. 9 does *not* apply to a proceeding under Or. XXI, r. 90. The authorities for and against the proposition are collected in the judgment. But unhappily they are not discussed, and the reasons for the decision are not given. This decision purports to follow the following cases: *Thakur Prasad* v. *Fakir Ullah* (2), *Asin Mandal* v. *Raj Mohan Das* (3), *Haricharan Ghosh* v. *Manmath Nath Sen* (1), *Balasubramania Chetty* v. *Swarnammal* (2), *Bharat Chandra Nath* v. *Iasin Sarkar* (3) and *Krishna Chandra Pal* v. *Protap Chandra Pal* (4).

(1) 4 Pat. L. J. 135.
(2) I. L. R. 17 All. 106.
(3) 18 C. L. J. 582.

We have seen that *Thakur Prasad* v. *Fakir Ullah* (5) does not define what is meant by execution proceeding. *Krishna Chandra Pal* v. *Protap* (4) is a decision of the Calcutta High Court in 1906 when the explanation added by the Act of 1892 was in the Civil Procedure Code. *Balasubramania Chetty* v. *Swarnammal* (2) deals with the applicability of Or. II, r. 2 to an application under Or. XXI, rr. 98 and 99. *Bharat Chandra Nath* v. *Iasin Sarkar* (3) does not deal with an application under Or. XXI, r. 90 but with an objection preferred by the judgment-debtor to an execution application. *Asin Mandal* v. *Raj Mohan Das* (6) and *Haricharan Ghosh* v. *Manmath Nath Sen* (1) have been expressly referred to in *Deljan Nichaa Bibee* v. *Hemanta Kumar Ray* (7) which is a case on all fours with *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (8) but decided contra.

Their Lordships Chatterjea and Chapman, JJ., observe (7):—

"An application for setting aside a sale under sec. 47 and Or. 21, r. 90 is not an application for execution. It is a miscellaneous proceeding in which the auction-purchaser is the principal interested party. I do not think that a proceeding of this kind is excluded from the purview of sec. 141, C. P. C."

They distinguish *Asin Mandal* v. *Raj Mohan* (6) and *Haricharan Ghosh* v. *Manmath Nath Sen* (1) in the following manner:—

"Both these rulings are careful in stating that *all* the provisions of Or. IX are not applicable. Some of the provisions may therefore apply and the judgment of the learned Chief Justice in *Haricharan Ghosh* v. *Manmath Nath Sen* (1) (which deals with an application under Or. XXI, r. 100) contains a clear indication that the interests of justice must have an important bearing in the matter. 'It is not as though there was any necessity in the interests of justice that the provision of r. 13 of Or. IX should be applicable to proceedings

(1) I. L. R. 41 Cal. 1.
(2) I. L. R. 38 Mad. 199.
(3) 21 C. W. N. 769.
(4) 3 C. L. J. 276.
(5) I. L. R. 17 All. 106.
(6) 18 C. L. J. 582
(7) 19 C. W. N. 758.
(8) 4 Pat. L. J. 135.

in execution, because the order is not conclusive, but is subject to the right of the person aggrieved to bring a suit.' In the present case *the order is conclusive, there is no regular suit.*"

See Or. XXI, r. 92 (3):—

"No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

Deljan Nichaa Bibee v. *Hemanta Kumar Ray* (1) is followed by another Division Bench in *Bhuban Behary Nag Mazumdar* v. *Dhirendra Nath Banerjee* (2). Under the circumstances the Full Bench decision in *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (3) is not of much value. And it is no wonder that Das, J. of the Patna High Court, has recently (4) thought it fit to express "I consider that the decision in *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (3) needs re-examination."

With regard to Or. XXI, r. 100, the Patna High Court has held consistently in a series of cases (5) that Or. XXI, r. 100 is not an application in execution proceedings, but is an original matter in the nature of a suit inasmuch as it is a proceeding instituted by one who is not bound by the decree for the release of property attached in execution of the decree and is in the nature of a summary suit and that therefore Or. IX did apply. It is on this ground chiefly that Das, J., distinguishes in *Sheo Nandan Chaudhury* v. *Debi Lal Chaudhury* (4), the decision in *Haricharan Ghosh* v. *Manmath Nath Sen* (6).

Yet another aspect of the case is presented to us by the remarks of their Lordships of the Madras High Court at p. 475 in *Subbiah Naicker* v. *Ramanathan Chettia* (7).

"Orders in execution which come under sec. 47, C. P. C. are decrees as defined in sec. 2, C. P. C. and hence *ex parte* orders passed in execution are *ex parte* decrees and Or. IX. r. 13 provides *generally* for the setting aside of *ex parte* decrees and not only for the setting aside of *ex parte* decrees which are not also orders passed under sec. 47 in execution proceedings."

(To be continued.)

(1) 19 C W. N. 758.
(2) 20 C W. N. 1208.
(3) 4 Pat. L. J. 185
(4) 2 Pat 372 at p. 378
(5) 3 Pat L. J 250; 2 Pat. 249; 2 Pat. 372.
(6) I. L. R. 41 Cal. 1
(7) I. L. R 37 Mad 462.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

February 21st, 22nd and 26th.—The hearing was continued before LORDS SHAW, BLANESBURGH, SALVESEN, MR. AMEER ALI and SIR L. JENKINS of the appeal of *The Secretary of State* v. *Roy J. N. Chowdhury* (Bengal). The Government contend that there has been an accretion to the Appellant's lands in the Sunderbans which is liable to assessment. The Respondent contends that the survey maps are inaccurate and do not conform with the provisions of the Act under which the survey was held. Judgment was reserved.

Messrs. Dunne, K. C. and *Kenworthy Brown* for the Secretary of State.

Messrs. DeGruyther, K. C. and *Dubé* for the Respondents.

February 25th and 26th.—*Kodothambu Nair* v. *Secretary of State* (Madras). This appeal relates to certain "*Kumri*" lands in South Kanara. The Appellant as Karnavan or managing member of a Nayar Tarwad brought the suit against Government for a declaration of his right to hold the lands and for an injunction and other relief. In 1905 after survey operations, Government offered a rough patta to the Appellant in which the plaint "*Kumris*" were excluded. The suit was brought in 1913. Government contend that it is barred by limitation. The Respondents, on the other hand say that after 1905 there were negotiations with Government as to the property in the lands and that limitation did not run till 1911 when Government finally decided on the exclusion.

There is also a question of adverse possession.

The argument for the Appellant is not yet concluded.

Messrs. DeGruyther, K. C. and *Narasimham* for the Appellants.

Messrs. Dunne, K. C. and *Kenworthy Brown* for the Respondents.

The following judgments have been delivered.

February 22nd.—*Nabi Bakhsh* v. *Ahmad Khan* (Lahore). Appeal dismissed.

February 26th.—*Mt. Durga Devi* v. *Shambu Nath* (Lahore). Appeal dismissed.

G. D. M.

THE

Calcutta Weekly Notes

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Contents.

NOTES

Law's delay and the Civil Justice Committee.

We explained in our last issue how the increase of judicial work in the province has made it impossible for the number of judicial officers now employed to cope with the same, and how this circumstance coupled with the insistence on the test of quantity of work got through, irrespective of its quality or merit, must inevitably lead to deterioration in the quality of the work performed, and how in particular it swells up the cause list and leads to the ordering of that list from day to day being left to the ministerial staff, unless the judicial officer happens to be so conscientious that he is prepared to waste a good deal of his time in arranging the list himself at the sacrifice of his own prospects of promotion. The lack of supervision over the ministerial staff manifests itself not merely in the Judges in the Mofussil leaving to their Peshkars the ordering of the day's work other than the cases which are going to be taken up and heard; the District Judge who is supposed and expected to exercise supervision over the work of subordinate judicial officers cannot really find sufficient time to devote to this work and has to rely for this purpose mainly on his Sheristadar.

Now it never was contemplated by the High Court or any other authority that the District Judge's Sheristadar should supervise the work of Subordinate Judges and Munsifs, either *de jure* or *de facto*, and the result is in the highest degree prejudicial to the *morale* of the subordinate judicial service. Again the District Judge is *de jure* in charge of all matters of administration relating to the *nazarat*, record-room, copying department, etc. *In fact* he cannot look into these matters as effectively as the nature of this work demands without trenching upon his own judicial work. On the other hand, to relieve the District Judge of what judicial work he does in order that he may attend more completely to these matters of administrative business would be impracticable and expensive. We would suggest that the entire administrative work in each District be made over to a Subordinate Judge or a senior Munsif, and as the statistical test cannot in the very nature of things be altogether put aside, we would suggest further that the officer so employed should be required to note in his diary the time devoted to administrative work so that the same may be counted as work in the monthly statements.

That such a change is likely to have the best of effects in purging the administrative side of judicial business in the Mofussil of slackness and corruption has been demonstrated by an experiment recently tried in one of the districts. A member of the subordinate judiciary being placed in charge of the *nazarat* found unaccountable delays in the issue and service of processes. He naturally inferred that not habitual sloth but corruption and private arrangements between parties and peons and other officers for a consideration were the causes of the holding over of the processes and he hit upon the plan of distributing processes to peons *by lottery* on the day following that on which they were filed. There was great commotion in the *nazarat* and vigorous protests and representations were made to the District Judge who, however, fortunately refused, in this instance, to be led by his Sheristadar. The new scheme is working admirably and we see no reason why the experiment should not be given a wider trial, since nothing but good can come out of it.

We have had reported to us several instances of old appeals having to be adjourned on the day of hearing because the record had not arrived from the record-room. How can this happen unless one supposes that supervision, so far as the record-room is concerned, does not exist and the matter is left entirely to the sweet will and pleasure of the men in charge? Such incidents would, we believe, be

things of the past if a Subordinate Judge or a senior Munsif were placed in charge of the administrative work under conditions outlined above.

We are convinced that the High Court does not, and in the existing circumstances cannot, exercise proper supervision over the work of the subordinate judiciary. The Judge in charge cannot possibly devote much time to this work, and we mean no disrespect when we say that the Registrar has ordinarily not sufficient experience to perform this work satisfactorily. The work in consequence is really left to clerks who have neither the capacity nor the experience needed for it. The excessive exaggeration of the disposal test, to the disregard of every consideration of quality or merit, is, we believe, in a great measure due to this mere secretariat supervision which is the only kind of supervision which exists. It is very desirable, we think, that the English Department should requisition the services of a Subordinate Judge or an experienced Munsif to assist it in supervising and appraising the work of judicial officers in the Mofussil. Such an officer should be appointed a Deputy or Assistant Registrar in the English Department and in order that he may not lose touch with conditions in the Mofussil, the tenure of his office should be reasonably short, so that another officer with up-to-date Mofussil experience may replace him at the end of his term.

The services of such an officer would be available for other purposes also if the High Court should choose to utilise them. Take the Rules and Circular Orders which the High Court frames for the regulation of judicial work in the Mofussil. The High Court no doubt does its best after trying to procure all possible information from the proper quarters in framing these regulations. But through want of intimate personal knowledge of affairs in the Mofussil the Rules often fail to come up to requirements and sometimes in trying to remove one kind of difficulties create others. The services of a judicial officer with first-hand experience of Mofussil conditions would be immensely helpful in framing and shaping the Rules and Circular Orders. In another issue we shall try to furnish practical demonstration of the beneficial effect that is likely to follow in this direction from associating a Subordinate Judge or Munsif in the work of the English Department.

Journal of Comparative Legislation.

The Journal of Comparative Legislation and International Law, for February, contains many interesting articles and notes. This issue opens with an article on "Ireland's money claim against Great Britain." Then follows an article on "The Legislative Council of New Zealand." It is interesting to note that New Zealand has the status of a self-governing Dominion, with a House of Representatives elected by universal suffrage, every adult male and female being entitled to a vote while there still exists a nominated Legislative Council, which exercises the functions of a senate or revising chamber. The House of Representatives deals mostly with questions of finance, administration, etc., but the Legislative Council does a good deal of spade work in legislation through its Statute Law Revision Committee. In 1914 a statute was passed for reconstituting the Legislative Council on an electoral basis but up to now no effect has been given to it by the House of Representatives. The Governor has the power to nominate the members of the Legislative Council but in practice he does so on the recommendation of the ministers who are responsible to the House of Representatives. This shows how an imperfect constitution may be made to work on thoroughly democratic lines. New Zealand is so jealous of her own autonomy that she refused to join the Australian Commonwealth and she is now considered as one of the most economically developed and politically progressive members amongst self-governing British Dominions.

The article on the constitution of Egypt by Mr. Norman Bentwich will also be found very interesting and instructive by Indian readers. Egyptian constitution has been framed not exactly on the model of the British constitution; a good deal of the conceptions of continental constitutions, notably French and Ottoman, have been embodied in it. The first section declares that "Egypt is a sovereign state, free and independent. Its right of sovereignty are indivisible and inalienable. Its Government is an hereditary monarchy with representative institutions." The Chamber of Deputies is to consist of members, not below the age of thirty, elected by universal male suffrage. The senate is to consist of men of learning and high distinction not below the age of 40, of whom 2/5ths are to be nominated by the King and 3/5ths to be elected by universal suffrage. The ministers need not be

members of either House but are to be wholly responsible to the Chamber of Deputies. The King's power of veto and emergency legislation exists but constitutional limitations on both have been provided by conferring powers on the Egyptian Parliament to override them. The constitution safeguards the rights and liberties of the Egyptian subjects very jealously.

Amongst the other articles of interest, the one on "Custom in Punjab" by N. H. Prenter, I.C.S., shows, how order has been evolved out of chaos. Prof. Keith in his article on "Imperial Constitutional Law", points out that the last Imperial Conference has left the claims of the self-governing Dominions to conclude treaties and agreements with other sovereign states to where it was. The validity of what are called "non-treaty agreements" has been recognised with the safeguard that if by any such proposed agreements, the interests of any other parts of the Empire are likely to be affected, they are to be consulted. Amongst the Notes some important Indian topics such as "the creation of an Indian Bar," "the Place of Hindu Law in Comparative Jurisprudence," find place. The present issue of the Journal is an eminently readable one.

DOES OR. IX, C. P. C., APPLY TO EXECUTION PROCEEDINGS?

BY G. SWAMINATHAN, B.A., B.L., VAKIL. *Tiruvalur (S. India).*

(*Continued from p.* lxxxiv.)

This decision distinguishes the observation of Mookerjee, J., in *Sreepaty Charan Chowdhury* v. *Shamaldhone* (1) that Or. IX does not apply to execution proceedings on the ground that it is mere *obiter*, but unhappily relies on *Krishna Chandra* v. *Protap Chandra* (2) which as we have pointed out already is a decision under sec. 647 when the explanation was clear. However the reasoning of their Lordships is convincing and *Subbiah Naicker* v. *Ramanathan Chettiar* (3) is certainly authority for applying r. 13 of Or. IX to orders under the execution chapter which will have the force of decree by virtue of sec. 2, C. P. C.

The Lahore High Court has got out of the difficulty by calling in aid sec. 151, C. P. C. In *Bholu* v. *Ram Lal* (1), Shadi Lal, C. J., delivering the judgment of the Court, observes:

"We are of the opinion that the procedure relating to suits is not applicable for execution . . . . . There is, however, nothing in the Code to restrict the inherent power of the Court to pass such orders as may be necessary for the ends of justice . . . . . It was only in the exercise of this inherent power that the Court could dismiss for default an application for execution. Now if the Court has an inherent power to pass an order of dismissal, there is absolutely no reason why it should not possess a similar power to set aside the dismissal if the ends of justice render it necessary to do so. . . . We see no reason in principle for holding that the mere circumstance that an alternative remedy may be open to the decree-holder should prevent the Court from exercising its inherent jurisdiction if the circumstances of the case require its exercise," as for example, if the second application is barred by limitation. Unhappily the facts of the case are not reported.

We may reconcile the various decisions examined above thus:—

1. The term "proceedings" in sec. 141, C. P. C., excludes execution proceedings and as such, 2. the provisions of Or. IX cannot apply to execution applications. 3. But applications under Or. XXI, r. 100 and the like partake more of the nature of miscellaneous proceedings than of execution proceedings and so the provisions of Or. IX will apply to such proceedings. 4. In cases where by force of sec. 2, C. P. C., orders under sec. 47 are decrees, r. 13 alone of Or. IX will apply. 5. The guiding principle in all cases is the meting out of justice, to see if the party in default has still open to him any remedy by way of suit or otherwise. 6. If the alternative remedy is barred by limitation, sec. 151, C. P. C. is to be resorted to, to give him relief.

(*Concluded.*)

Correspondence.

CONSTRUCTION OF SECS. 15 AND 16 OF THE BENGAL TENANCY ACT.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

Your esteemed correspondent at page vii of the current volume raised two main ques-

(1) 15 C. L. J. 123.
(2) 3 C. L. J. 276.
(3) I. L. R. 37 Mad. 462.

(1) 2 Lah 66.

tions relating to construction of sec. 16 of the Bengal Tenancy Act. Both these questions have now been ably answered by my learned brother of the Bengal Service at page lxxv of the same volume.

So far as Bihar is concerned where the Hindus are governed by the Mitakshara law, another question which frequently crops up before the Mofussil Courts and is pleaded as a bar in rent suits, is the meaning of the word "succession" as applicable to the Mitakshara joint family. In other words, does sec. 16 apply to a tenure in which there was accession to the interests of the surviving members of a joint Mitakshara family caused by the death of an individual member?

It is plain that in a joint Mitakshara family, if one member dies, there is only accession to the interest of the surviving members and there is no succession of the interest from the deceased member to the surviving members. See Golap Ch. Sastri's Hindu Law, 4th Ed., page 249.

The word "succession" was interpreted by Ameer Ali, J., in I. L. R. 23 Cal. 912 with reference to the Succession Certificate Act (VII of 1889) and by Brett and Coxe, JJ., in I. L. R. 34 Cal. 929 with reference to the Succession (Property Protection) Act (XIX of 1841), and it was ruled therein that those Acts were not applicable to Hindus governed by Mitakshara law on the ground that the word "succession" did not include survivorship

In sec. 16 of the Bengal Tenancy Act, the word used is "succession" and there seems to be no reason why this word would have a different significance. It is difficult to imagine that the Legislature meant to exclude this section from operation in Bihar in cases of families governed by Mitakshara law; and it is possible that the word "succession" was loosely used as succession both by survivorship as well as by inheritance. But as pointed out in I. L. R. 34 Cal. 929 at page 932, the term does not, in any sense of the language, include survivorship. The following observations of their Lordships of the Full Bench in 22 C. W. N. 1 at page 41 may be relevant:—

"There is no presumption, however, that general words are not used in a general sense. The presumption is the other way. The general rule for the construction of statutes is that the Legislature means what it says. The words best declare the intention." Hence, according to my opinion, the word "succession" as used in secs. 15 and 16 of the Bengal Tenancy Act should have the same significance as in Hindu law.

I do not find any ruling directly in point cited in any of the well-known commentaries of the Bengal Tenancy Act. In *Narain* v. *Gajo*, 2 Pat. L. J. 701, the point arose before the lower Courts but did not arise before their Lordships and hence there was no occasion for their Lordships' decision. The facts, however, are interesting and may be stated. One Debi Prasad held a certain land on an *Istamrari Mokarari* tenure and, on his death it "passed" by survivorship to his sons who omitted to have their names registered under sec. 15 of the Bengal Tenancy Act and who instituted rent suits. The tenants in their written statements at first objected that the suits would not lie, so long as secs. 15 and 16 were not complied with, but the objection was not seriously pressed in the Court of first instance and decrees were obtained inspite of it. During the pendency of appeal to the District Court, the sons of the tenure-holder complied with the aforesaid sections but the learned Judge of the District Court held that the suits were barred by sec. 16 and allowed the appeals of the tenants. Their Lordships, Sharfuddin and Roe, JJ., applied the principle enunciated in the Full Bench decision in I. L. R. 23 Cal. 87 and ruled that the Plaintiffs having complied with the aforesaid provisions of the Bengal Tenancy Act, pending appeal, were entitled to recover the rents sued for. Thus, it is clear that there was no actual decision on the point whether tenure-holders who were entitled to the tenure by right of survivorship were debarred from recovering rents without complying with the aforesaid section.

As the point is of great importance to the proprietors of estates, it may well be discussed by you or any of your esteemed correspondents in the columns of your valuable journal.

Yours truly,
KHETTRA NATH SINGH,
Munsif.

Jamui,
District Monghyr,
The 15th March 1924.

THE

Calcutta Weekly Notes.

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Contents.

NOTES

Editorial Notes—

REPORTS (See Index.)

Sir Thomas Richardson, Kt.

Sir Thomas Richardson, who has for many years been on the Bench of the Calcutta High Court, carries with him the best wishes of all branches of the legal profession and the ministerial staff of the Court. He is a member of the Indian Civil Service. After having served as a Magistrate and a District and Sessions Judge, he came to the High Court. His connection with the Court has been more intimate than of many of his brother civilian Judges. He like the late Sir Thoby Prinsep was for many years the Registrar on the Appellate Side of the High Court. He also acquired considerable administrative experience as an Under-Secretary in the Judicial Department and later on as the Legal Remembrancer to the Government of Bengal. In the course of his service he studied for and got called to the Bar. On the Bench he has been uniformly courteous to all, and his patience, regard for justice and sound knowledge of law have won for him the golden opinion of all. That the Calcutta Bar entertained him at a dinner last Friday testifies to the high regard in which he has been held by the members of the Bar. We wish him health, peace and happiness amongst his own people at home at the close of a long and meritorious career in India extending over 37 years.

The Finance Bill, its rejection and certification.

The Viceroy and Governor-General has this year certified the Finance Bill for reasons very different from those that he pleaded in justification of certifying the provision in the Finance Bill for the doubling of the salt-tax last year. The Legislative Assembly last year thought that enhancement of salt duty was both unnecessary and inadvisable. Those who opposed the measure did so on the ground that it was possible to balance the budget by retrenchment and that the deficit was more apparent than real. They maintained that no tax is to be imposed or enhanced without the assent of the Assembly, that the power of certification was meant to be exercised by the Viceroy as an extraordinary or emergency measure and that His Excellency was not entitled to impose any taxation by certification. This view received considerable support from constitutional lawyers both in this country and in England. If once such limitations were imposed by convention, the voice of the Assembly would have been supreme with regard to such matters. But we apprehend that the action of the Assembly this year in throwing out the Finance Bill altogether without any discussion might result in a set back instead of a progressive advance of the Indian constitution towards Dominion Status.

We are of opinion also that the Legislative Assembly was ill-advised in rejecting *in toto* the demand for grants in respect of customs, income-tax, salt and opium. The customs form the largest source of Government of India's revenue; income-tax comes next. Salt and opium are also important sources of revenue. Although we believe that these last two sources of revenue will have to disappear in course of time, yet they cannot be got rid of without making adequate provision for replacing them from other sources or by the retrenchment of military and other expenditure. But we must say that the refusal of the demand for grant for customs and income-tax even by way of protest was hardly justifiable. If the vote were given effect to by the Viceroy and Governor-General, the effect would be that the customs and income-tax staff would have to be abolished and the offices closed and the Government of India would be left without any resources for carrying on the administration or paying for the defences of India.

The *Swarajists* surely did not desire to bring about such a result. Their vote being meant merely as a protest, evidently they relied upon the Viceroy's power of certification in adopting the course they did. But we are afraid they did not realize the disservice they have thus done to the cause of constitutional progress in India. They have furnished a weapon in the hands of those who are opposed to India's constitutional progress. They will say that such drastic action on the part of the party of progress in India shows that the day is yet far off when members of the Indian Legislature would develop a sense of responsibility and that the power of certification should in no way be curtailed or interfered with by Parliament. The arbitrary manner in which some of the most essential demands for grants were rejected by the Bengal Legislative Council, would also justify their restoration by the Governor of Bengal by certification and the same plea will be put forward for the retention of such power by the Provincial Executive as well. Thus the net gain of the *Swarajist* policy in the Council has been very doubtful and if it leads on to the setting back of the hands of the clock, it will be very unfortunate.

We have been asked by some, if there is any special provision in the Government of India Act for the Governor-General in Council to frame and introduce a Finance Bill in the Assembly. There is none. But none is needed, for the Finance Bill is just like any other Bill or proposed measure of legislation. It is a well-established rule of the British constitution that no proposal for the appropriation or the raising of any revenue can be made, except by the Crown. This was intended to prevent members of Parliament indulging in extravagance with regard to public revenue for private ends. The rule has served as a safeguard against such possible abuses of public funds for over two centuries. Sec. 67A (2) of the Government of India Act embodies the same provision and provides that no proposal for appropriation of revenue can be made except by the Governor-General, who represents the Crown in India. The same section in cls. (5) and (6) provides that the demands for grants, except in respect of certain reserved heads, should be submitted to the Assembly and may be reduced or disallowed by the vote of the Assembly. According to Parliamentary practice the Assembly can curtail but not increase expenditure under any head. It is the privilege of the Crown to propose any increase and the Assembly, like Parliament, can only assent, reduce or disallow it. The Council of State cannot discuss or vote upon any demand for grants.

At the presentation of the Budget, leave is sought by the Government for the introduction of a Finance Bill in the Assembly. After demands for grants are finally voted upon by the Assembly, the Finance member moves that the Finance Bill be taken into consideration for the imposition, renewal or reduction of the necessary taxation for meeting the expenditure for the coming year. Some taxes like the income tax, certain custom tariffs, duty on salt, postal rates, etc., are only imposed by legislation for a year. Unless these are renewed annually by legislation, the bulk of the Imperial revenue cannot be lawfully collected. The Assembly would be quite justified in amending the Finance Bill by the reduction or disallowance of certain items of taxation which they consider excessive or objectionable. But after having sanctioned the bulk of the expenditure, with the exception of some arbitrary refusals already mentioned, they were not justified in throwing out the Finance Bill without consideration, resulting in the wholesale disallowance of taxation. In acting as they did, they furnished a justification for the retention of the extraordinary powers of the Viceroy to sanction expenditure arbitrarily disallowed and to impose taxation and legislation by certification under secs. 67A and 67B of the Government of India Act. It is, however, a bitter irony of fate that the Viceroy, who in utter disregard of reason and very likely acting under the mandate from Whitehall, doubled the duty on salt last year, had, this year, to eat the humble pie in his unenviable seclusion, and restore the salt duty to its former figure, unasked and unsolicited, by the same process of certification by which he had enhanced it. The *Swarajists* may be unreasonable but the Government of India in their dealings with reasonable people had hardly ever been less unreasonable. Those who sow the wind must expect to reap the whirl-wind. We hope both the Government and the *Swarajists* will now benefit by their mutual indiscretion and the world will continue to be governed by sound common sense.

Law's Delay and the Civil Justice Committee.

We explained in our last issue the circumstances inherent in the existing system which make the exercise of supervision over the ministerial staff in the Mofussil an impossibility, and this necessarily leads to delay and corruption. As regards supervision of the judicial work of Judges in the Mofussil, what there is of it is vicious in principle and demoralising. As a remedy we suggested that in each District a Subordinate Judge or a Senior Munsif be charged with the duty of keeping the ministerial staff up to the mark and that a member of the judicial service of the same grade be associated in the work of the English Department in the High Court to assist the Judge in charge to examine the judicial work of Judges in the Mofussil and in the proper drafting of Rules and Circular Orders.

That there is room for improvement in the method of drafting the Rules and Circular Orders and that this can be best secured by appointing a member of the Subordinate Judiciary as an Assistant or Deputy Registrar in the English Department, we now proceed to show by reference to concrete instances. Take as one instance r. 53, Ch. X, p. 255, of Vol. I of the High Court's Rules and Circular Orders, according to which it is expected that all rent suits should be disposed of within three months. Now the large bulk of these suits are filed on one day, the day which is known as the *tamadi* day. It is not owing to perversity that landlords wait till the last day to institute these suits. The agricultural tenants are as a class not very affluent and, in the majority of cases, they fall into arrears because they cannot pay and suits are not instituted before the *tamadi* day, in the expectation that the tenants will anyhow scrape up the amount before that day, and thus relieve the landlord of the necessity of incurring the cost of instituting suits which merely save the claims from being time-barred, the chances of recovery by judicial process remaining as remote as ever. The position does not generally improve by getting decrees, and the landlords, but for the law and the Circular Orders which compel them to be diligent, would prefer to give a fairly long tether to the tenants so as to give them a chance of paying up amicably, for to press the legal remedy to its limits often means throwing away good money after bad. The result is a sudden accumulation of work in the *Sherista* of the landlord and in those of the pleaders who have to file these suits, near the *tamadi* day, with the inevitable consequence that the filings are often unaccompanied by a proper number of copies of plaints and written processes, and court-fees and process fees in many cases fall short of the required amounts —all which defects it takes time to detect and remedy. To throw cases out on the ground merely of such defective compliance with the technical requirements of law and practice would be harsh as well as unjust. Where these requirements have been complied with, the service of summonses may fail for various reasons, and then again the Defendant who has been served may, even when he has no defence, ask for time to put in written statements if only to gain time and time has to be given. The result is that for months after the *tamadi* day, a hundred to a hundred and fifty of these cases may figure on a Munsif's daily list and very few cases are ready to be taken up in sufficient time to enable the Courts to comply with the Circular Order. Attending to these cases which are on the list because one or other of the preliminary conditions have not been complied with, wastes the Court's time and gives the ministerial staff just the opportunity they want and should not have to arrange the daily list for the Court.

It has been suggested that no Plaintiff should be given more than 15 days' time from the date of filing to put in deficit court-fees. We are as a rule averse to the discretion of Courts in these or other matters being cut down by rigid rules, but in this instance we think a general rule (which it will be open to Courts to depart from in very special circumstances) may very well be enforced, in the public interest. It has been suggested further that no rent suit should be registered unless the deficit court-fees, the processes, the process fees and copies of plaints have been filed, and that the age of the case for the purposes of the Circular Order should run from the proposed date of registration of the plaint after all the above conditions have been fulfilled and not from the date of filing the plaint or payment of the deficit court-fees, as the case may be, as at present. This it is expected, will materially reduce the crowding of the daily list with derelict cases which merely delay and obstruct the proper work of the Judges and thus indirectly deprive the minis-

terial staff of the opportunity they now enjoy of arranging matters with the parties to the detriment of the orderly administration of justice.

Then again if rent suits must be disposed of quickly, why instead of imposing an artificial time limit of three months should not the Munsifs be allowed to fix a special day for the disposal of rent suits as they are allowed to do in regard to Small Cause Court cases and Miscellaneous cases? What has been stated above makes it perfectly clear that hundreds of rent suits appearing for months on the daily list day after day must hamper other judicial work without materially expediting the trial of these suits. The special difficulties which attend these suits, specially after the *tamadi* day, cannot be attended to incidentally in each case as it comes up, but can be satisfactorily dealt with only if exclusive attention is given to these groups of cases and this requires that they should have a special day allotted to them. We would suggest therefore that in the note to r. 51 of Chap. I of the High Court Rules and Circular Orders, the words "rent suits" be added after the words "Small Cause Court cases," so that rent suits may be taken up by themselves and may not have to be taken up nominally every day only to be adjourned to make room for other suits.

These are but two instances of defective drafting of High Court Rules and Circular Orders due to want of acquaintance with local conditions. If the services of a Subordinate Judge or Senior Munsif were available in the English Department, not only these but very many other defects would be brought to the notice of the Judges and the necessary improvements effected without delay and without long correspondence and consultation with local officials, which in the long run fail to be quite effective.

Notes of Cases.

In the case of *Gibson* v. *Reach*, [1924] 1 K. B. 294, the owner of a house sub-let to a spectator for one week a window which commanded a view of the street along which certain processions passed along with the use of the room for £5 as rent. It was held that the window and room were a "place of entertainment" and the owner was the proprietor of the entertainment and was liable to pay the entertainment duty under the Finance Act of 1922.

"Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." The application of this principle is strikingly shown in the case of *The King* v. *Sussex Justices*, [1923] 1 K. B. 256. In that case there was a collision between a motor vehicle belonging to M and one belonging to W. M was prosecuted before the Justices for dangerous driving. At the conclusion of the evidence the justices retired to consider their decision, and their acting clerk who was a member of the firm of solicitors who were acting for W in a claim for damages against M for injuries received in the collision, retired with them in case they should desire to be advised on any point of law. The Justices convicted M and it was stated on affidavit that they came to that conclusion without consulting the acting clerk. The conviction was set aside as it was held to be improper for the acting clerk, having regard to his firm's relation to the case, to be present with the Justices when they were considering their decision.

In the case of *Havana Cigar and Tobacco Factories, Ltd.* v. *Oddenino*, [1924] 1 Ch. 179, there was a dispute as to whether the words "Corona Cigar" meant a particular brand of cigar manufactured by the Plaintiff Company or a cigar of a particular shape and size. The Court on the evidence held the words to be ambiguous in meaning and granted an injunction restraining the Defendant, his servants and agents from selling or supplying a cigar not of the "Corona" brand, unless it was first ascertained that the customer did not require a cigar of the "Corona" and no other brand, or unless it was made clear to him by word of mouth or otherwise that the cigar supplied was of a brand other than the Plaintiff's brand.

M. N. K.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, APRIL 14, 1924. [No. 22.

Contents.

NOTES

Ministers' Salary.

Now that the Bengal Legislative Council has disallowed any sum for the Ministers' Salary the question may arise in case the Ministers continue in office what salary, if any, they are entitled to. Sec. 52 of the Government of India Act, 1919, which deals with the appointment and salaries of ministers is as follows:—

"The Governor of a Governor's province may, by notification, appoint Ministers, not being members of his Executive Council or other officials, to administer transferred subjects, and any Minister so appointed *shall hold office during his pleasure.*

There may be paid to any Minister so appointed in any province the same salary as is payable to a member of the Executive Council in that province, unless a *smaller salary* is provided by vote of the Legislative Council of the province."

Now the Bengal Legislative Council has not voted a smaller salary and therefore it may be argued that the Governor is free to pay the ministers the same salary as is payable to a member of the Executive Council. The vote of no salary does not amount to a vote for smaller salary. It may amount to a vote of want of confidence but that is quite a different matter. If the minister remains in office without resigning inspite of this vote of censure or whatever it may amount to, no smaller salary having been voted, it may be argued that under this section the Governor would be justified in paying the minister the salary of a member of the Executive Council.

But sec. 72D creates a difficulty. Under that section the salaries of ministers have got to be submitted to the vote of the Council in the form of demands for grants and the Council may assent, or refuse its assent, to a demand, or may reduce the amount, etc. So it seems that the power given under sec. 52 must be controlled by sec. 72D. Now under sec. 72D if the amount is not voted, the Local Government, in case of a demand relating to a reserved subject, upon the certificate of the Governor that the expenditure is essential to the discharge of his responsibility, may allow the expenditure. Under sec. 72D (*b*) the Governor shall have power in cases of emergency to authorise such expenditure as may be in his opinion necessary for the safety or tranquillity of the province, or for the carrying on of any department. It seems that to justify payment of salaries to the ministers, after what has happened in the Bengal Legislative Council, the conditions of this sub-section should be satisfied. It is for the Governor to say whether any necessity has arisen as laid down in this sub-section and there is no appeal from his decision. Now, if the ministers are willing to continue without any salary there is no need to take the aid of this sub-section. If they threaten to resign then two courses may be open, *viz.*, either to pay them the salaries to which they are entitled under the combined operation of sec. 52 and sec. 72D (*b*) or to allow them to resign and nominate new ministers and put their salaries to vote again. The latter course is preferable if the disallowance of salary could be taken as indicating want of confidence in the present ministers. The possibility of managing the transferred departments without the aid of ministers should also be considered. It seems that sec. 72D, sub-sec. (*b*), should be taken advantage of only in exceptional cases and it is difficult to see how the present condition would justify recourse to it. Surely the safety and tran-

quillity of the province have not been threatened and the departments could be carried on with the grants already voted.

Law's Delay and the Civil Justice Committee.

In previous issues we tried to show how the present system of supervision over the work of the Judges in the Mofussil, in seeking to get more work out of them than they can possibly dispose of, so far from securing that end, really obstructs and hampers business, needlessly piling up the cause list with cases and leading in the result to slackness of supervision over the ministerial staff and consequent corruption and general demoralisation in the judicial administration. Not the least deplorable feature of the present system is the part which, as previously alluded to, the Judge's *sheristadar* is enabled to play in deciding the fates of Subordinate Judges and Munsifs in the matter of their promotion and preferment. It is the *sheristadar* at whose suggestions cases are transferred from one Court to another; it is he who attends on the District Judge at the examination of the files and the records and prepares the statistics of disposal and puts them up before the District Judge. In the performance of either of these functions there is considerable scope for conferring favours and influencing the opinion of the District Judge in favour of or against a particular officer. Thus, to take the first mentioned function, *viz.*, the distribution of cases. In the District of Bengal, one or other of two tests of efficiency has been known to prevail. In appraising the work of Subordinate Judicial Officers, some District Judges go by the number of contested cases disposed of: others by the number of witnesses examined in such cases. A Subordinate Judicial Officer has only to get into the good books of the *sheristadar* to have the largest number of cases possessing the desired characteristic passed to his file. The *sheristadar* may thus make it impossible for a particular Judge to make a good statistical show as against another. Incidentally it may be mentioned that in a district where the number of witnesses examined is the determining factor, a Judge who is more knowing than his colleagues may seek to equalise his record with theirs or even excel them by pressing the parties to examine more witnesses than is necessary. This currying of favour with the *sheristadar* by highly placed judicial officers and these sordid devices to produce a brave show statistically to avoid being left behind in the race are as degrading as they are reprehensible; but human nature being what it is, how can one hope to do away with them unless one strikes the evils at their very root?

The files and records are kept by clerks, but the Judges are expected to see that they are properly kept. As we have explained clearly this supervision over the work of the clerks cannot, owing to the pressure under which the subordinate judiciary has to work, be anything near complete and perfect, and it is always possible to pick holes and to charge the shortcomings to the inadequacy of the Judge's supervision. Now a *sheristadar* who has made up his mind to favour Judge A at the expense of Judge B has only to draw the pointed attention of the District Judge to specific defects in Judge A's files overlooking similar or worse ones in B's. The statistics of disposal themselves admit, as all statistics do, of varied interpretations. As a result of the distribution of cases it may be possible (without the officers in question having any control over the matter) to get something like the following results:—

Court.	Rent suit.	Money suit.	Title suit.	Total.	Witnesses.
1	15	3	5	23	90
2	5	1	8	14	60
3	10	5	6	21	80

Now Court No. 1 has disposed of the largest number of contested suits with the largest number of witnesses, but the number of title suits disposed of by him is the fewest. The *sheristadar* has only to draw pointed attention to the large number of disposals and witnesses if his object be to cry up Court No. 1. On the other hand it is just as easy to belittle his work by pointing to the small number of title suits disposed of by him. The probabilities are that all three officers have been equally diligent and expeditious, but who is to be declared the prize-boy may nevertheless depend upon hints and suggestions plausibly and tactfully thrown out by the *sheristadar*. The report which the Judge prepares (without of course consulting or discussing matters with the officers concerned) with the doubtful assistance he gets from the *sheristadar* is in due course sent to the High Court. It is this "confidential" report which finally determines the future prospects of the members of the subordinate judicial service.

To point to the evils of a system in operation is however an easier task than to suggest effective remedies. But as we have said the evils pointed out far from being negligible are in point of fact undermining the *morale* of the subordinate judiciary. Some remedy must be found for it. The statistical test cannot be dispensed with altogether. The quality test too, if it merely means the extent to which the judgments of a Court are affirmed or reversed in appeal, has its dangers. Some Judges cultivate the habit of writing appeal-proof judgments to perfection. Besides reversal of a trial Court's judgments on facts is often no conclusive test of its worthlessness. Again a Judge who keeps his files in meticulous order is not necessarily a good Judge. We would be very suspicious of the Judge who paid too much attention to externals. For the generality of cases, we would suggest that no reports adverse to a Judge should be made or recorded, nor should any such report be allowed to interfere with the normal course of his promotion without giving him first full opportunity to meet the charges made against him in the report.

But this by itself will not suffice when it is a question of giving special promotions, for instance when selection is to be made for promoting Subordinate Judges to District and Sessions Judgeships. This should never be done upon a comparison only of the confidential reports from District Judges. The number of officers amongst whom the selection has to be made being not large, it should be possible to call for and examine some of their files in the English Department. It is here that the assistance of a member of the subordinate judiciary, who may be appointed a Deputy or Assistant Registrar in that Department, may prove invaluable. But we are of opinion that the time has come when this examination of the work of selected officers for promotion to District Judgeships should no longer remain a matter of merely departmental interest and inquiry. We would suggest the constitution of a Board, consisting of the Judge in charge of the English Department and the senior Vakil Judge (these being expected to be most conversant with judicial business in the Mofussil), a representative of the subordinate judiciary (the officer who, as we have suggested, should be appointed a Deputy or Assistant Registrar in the English Department) and two outsiders. These latter should be lawyers of standing and experience who command public confidence. Their presence will act as a wholesome corrective to the wholly departmental view which the other members may not unnaturally take of the matter. At present there is no means by which outside criticism, the fresh outlook of interested and observant outsiders and the point of view of the outside public can be brought to bear upon the manner in which judicial business is conducted in the Mofussil. The choice of the proposed lawyer members of the Board remaining with the High Court there is absolutely no reason for apprehending that any but responsible men will be selected to work on it. If our scheme for the appointment of such a Board be adopted it will have the healthiest effect upon the *morale* of the subordinate judiciary, who would seek to qualify for promotion by sound and conscientious work and not through the grace and favour of the *sheristadar* or even of the District Judge; and if, besides, every officer against whom an unfavourable report has been made be given an opportunity to show that it is not justified, we believe the backstairs manipulations of the *sheristadar* and the evils attendant thereon will be things of the past. Those in authority have no idea of the bitterness with which self-respecting members of the subordinate judicial service resent the prevailing *sheristadar*-rule in the service. Many of the best officers prefer to suffer permanent eclipse in the matter of promotion and preferment, rather than pay court to half-educated and not always well-mannered members of the ministerial staff, who have the ear of the District Judges, but who would be far better employed in looking after the subordinate staff and to the convenience of the litigant public and in seeing that the processes of the Court are enforced and executed with promptitude and despatch and without corruption and without the levy of those unauthorised tolls which make litigation so near a nightmare to all except those who resort to it as a profession.

PRESUMPTION IN CASE OF PROPERTY PURCHASED IN NAME OF FEMALE MEMBER OF DAYABHAGA JOINT FAMILY.

BY RADHAROMON MUKERJEE, VAKIL, BERHAMPORE.

Introduction.

The question which I propose to discuss in this article is whether there is any presump-

tion that a property standing in the name of a female who is a member of a joint family governed by the Dayabhaga School of Hindu law, belongs to the family, and is not her *stridhana* property.

The necessity for such a discussion arises from the two recent decisions of the Calcutta High Court, *Pratap* v. *Sarat*, 25 C. W. N. 544 : s. c. 33 C. L. J. 202 (1920) and *Bhubanmohini* v. *Kumudbala*, 28 C. W. N. 131 (1923)—which lend support to the conclusion that the property should be *presumed to be a stridhana* property of the female, and not the joint property of the family.

Presumption of joint property in Hindu family.

As the normal state of a Hindu family is one of jointness in mess, worship and estate, the presumption is that all property, including acquisitions made by a joint member, is joint family property. And this is *not rebutted by* merely shewing that it is purchased *in the name of that member*. The same rule applies equally to a joint family governed by the Dayabhaga as to one governed by the Mitakshara.

Its foundation in case of Mitakshara family—Co-parcenership.

The foundation of such a presumption in the case of a family governed by the Mitakshara has been well-stated by the Madras High Court in an early case, *Narayana* v. *Krishna*, I. L. R. 8 Mad. 214 (1884) :—"When a family lives in co-parcenery, the presumption which exists in the case of male members, arises *from the circumstance that they are co-parceners.*" In other words, it is only in the case of the *male co-parceners* that the presumption arises. Hence, there is no presumption where the disputed property stands in the name of a *non-coparcener*, whether male or female.

In case of Dayabhaga family—Co-ownership.

Co-parcenership, however, implies such *co-ownership* in the family property as arises *by birth*. In the case of the members of a family governed by the Dayabhaga, there is no right by birth, although there is *co-ownership* in the family property, which accrues to its members upon the death of their common ancestor. And it is on the basis rather of co-ownership than of co-parcenership, that the presumption can apply to the members of such a family. This is the view taken by the Calcutta High Court in the case cited below.

Illustrative case of family of father and sons—Distinction between Mitakshara and Dayabhaga.

Thus, in the case of a *Mitakshara* family, a son is a co-parcener with the father, and any property acquired in the name of either is presumed to be the joint property of both. In the case where the *Dayabhaga* applies, the father and his sons cannot form members of a joint family. There is really *no joint family during the father's life-time*, as the sons do not acquire any interest in the family property by birth, and are not co-parceners with the father in respect of it. Hence, in such a family, there is *no joint ownership between the father and the sons as there is between the sons themselves upon the death of their father.* And the ordinary presumption applicable to the case of a joint family does not apply to the case of the former, though it does to the case of the latter. Hence, it was held by the Calcutta High Court in the case, *Sarada* v. *Mahananda*, I. L. R. 31 Cal. 448 (1904), [the head-note of which is incorrect. (See *Ram* v. *Kusum*, 4 C. L. J. 56, also *Pratap* v. *Sarat*, above), though followed in *Govind* v. *Radha*, I. L. R. 31 All. 477 (1909)]—that if a property stand in the name of one of the brothers during the life-time of the father, the burden of proof rests on those who assert that it in reality belonged to the father.

Different view of Privy Council.

Their Lordships of the Judicial Committee of the Privy Council, however, in the case, *Parbati* v. *Baikuntha*, 19 C. L. J. 129 : s. c. 18 C. W. N. 428 P. C. (1913), did not choose to accept that view of the matter. In that case, three *brothers* admittedly formed a joint family governed by the Dayabhaga law, and *the disputed property was purchased in the name of the youngest of them, during the life-time of the father.* It was contended that as *the conveyance stood in his name* the Court ought to presume that it was his self-acquired property. Their Lordships held that, in the absence of any evidence that he had any separate funds, or that the property in dispute was purchased with money belonging to him, the presumption is clear and decisive that it was acquired by the father in the name of the son and not the self-acquired property of that son. In other words, it was the joint property of all the brothers.

Possession no test.

It may be pointed out here that in the Calcutta case referred to above it appears that the

disputed property was "in the *exclusive possession*" *of the brother* "from a long time anterior to the death of the father." But this fact was not regarded by their Lordships to be of any weight or to be worth any consideration at all in deciding the question of presumption. For it has been laid down in *Taruk* v. *Jogeshwar*, 11 B. L. R. 193 (1893), that "if *one of the members* of the family is found to be *in possession* of any property, the presumption would be, *not* that he was in possession of it *as separate property* acquired by him, *but as a member of the joint family*."

Membership joint family, basis of presumption.

Thus, *membership of the joint family is the essential condition* for raising the presumption, and not co-parcenership, nor co-ownership, nor even possession of the property.

It does not arise in case of stranger.

Hence in the case of one, however, who is not a member of, but is a *stranger* to, the family, the foundation of the presumption does not exist, and any property standing in his name must be *presumed to be his own exclusive property*. So, it has been held by the Calcutta High Court in an early case governed by the Dayabhaga, *Dossee Monee* v. *Ram Chand*, 7 W. R. 249 (1867), *per* Shumboonath Pundit, J., that the presumption of Hindu law (as to jointness in property) cannot apply to a case "where a property is claimed through a *son-in-law*, who appears only to have *lived in the house of his father-in-law*, and *not to be*" (*a member*) "*of joint family, and*" (had no *interest in its*) "*funds* in any legal sense of the term." But if it is claimed through his wife (a daughter of the family), and if it be "established that the family were still joint, or at least joint up to the time of its acquisition," the *onus* is thrown on him who claims a separate purchase.

Difference in interest of members does not affect presumption.

Membership of a family implies certain rights the most important of which are the co-parcenership or co-ownership in the family property, maintenance out of its income, and residence in the family dwelling house. Of all persons living together in the *family*, some have *no right to* the joint property of the family but only the right to reside in the family and to be maintained out of its income that is in a limited sense the *right of possession* only. But as pointed out by Justice Dwarka Nath Mitter in the Calcutta High Court in the case, *Chunder Nath* v. *Kristo Komul*, 15 W. R. 357 (1871):—"*No difference in the nature of the interest possessed by the different members can affect the presumption* with which we have to deal." Thus, where a property stands in the name of a member of a family, who is a *co-parcener* or a co-owner, the presumption is that it is a *joint* property of the family: where the property stands in the name of a member who is *not a co-parcener* or a co-owner *the presumption is still the same.*

Joint property only of those who are co-owners.

Hence, a property standing in the name of a member of a joint family, co-parcener or non-co-parcener, being presumably a joint property of the family, it is a joint property of those members who have joint right to the family property, that is to say, who are co-owners or co-parceners in respect of it. Those members of the family, therefore, who have no such right or interest in the family property can claim none in the property acquired or held in their name, merely because they are members of the family in the comprehensive sense explained above.

Others are presumed to be Benamdars of family.

In their cases a different presumption arises, namely, that they are *the benamdars of the joint family*, and that they hold it or it was acquired or held in their names for the benefit of the joint family. I have sufficiently discussed the matters in my book on '*The Law of Benami*,' pp. 91-92.

Presumption in case of purchase in name of Mitakshara female.

In the light of the above principles let us consider the question which we propose to discuss. In a family governed by the Mitakshara, as their Lordships of the Madras High Court stated in the case already referred to:—"The ladies are *not* in an undivided family *co-parceners*." *Nor* can they be *co-owners*. Hence, the very foundation of the presumption of jointness in property is wanting in their case. There is the further ground stated by their Lordships, *viz.*, "whatever property they acquire by inheritance and gift is their *separate property*." and there is no reason why any property which they otherwise acquire should not be considered their *stridhana*. As explained by the Calcutta High Court in the case, *Dakhina* v. *Jagadishwar*—2 C. W. N. 197 (1897):—"The Court held that there was no presumption that property standing in the name of a female mem-

ber of a joint family was joint property, because *she could hold property of her own* and the presumption from co-parcenership did not arise as she was *not a "co-parcener."* As pointed out by their Lordships :—"There is not, so far as we are aware, any case in which it has been held that when property stands in the name of a female member of a Hindu family, it is to be presumed that it is the common property of the family, nor is there any ground on which such presumption could be founded." It may, therefore, be broadly stated that in no case governed by the Mitakshara the presumption can arise where the property in dispute stands in the name of a female member of a joint family.

Presumption in case of purchase in name of Dayabhaga female where she is co-owner.

In a family governed by the Dayabhaga, however, the *females may*, under certain circumstances, *be co-owners.* Thus, the mother, the wife, or the daughter inherits the share in the joint property of a male member of the family to whom she is so related, on his death, although when he is himself alive all of them are merely entitled to maintenance out of the family property and in some cases residence in the family dwelling house. In the former case, she becomes a co-owner in the family property along with the other surviving male members of the family, though she may ordinarily have a *limited interest* lasting only during her own life. Her position is practically similar to that of a male co-parcener of a Mitakshara family. And any property standing in her name may reasonably be presumed to be a joint family property. (1)

Where she is not so.

Where, however, *she is not a co-owner*, the basis of the presumption which exists in the case of a Mitakshara male co-parcener or a Dayabhaga co-owner, male or female, does not exist (1).

Still member of family.

But in her case there is the other fact which should be taken into consideration, but which is often ignored or overlooked, *viz.*, that *she is still a member of the joint family*, which may raise the same presumption in her case as well. This was pointed out by Justice Dwarka Nath Mitter of the Calcutta High Court "one of the greatest masters of Hindu law who have ever administered justice in this country" [*Nobin* v. *Dokhabala*, I. L. R. 10 Cal. 686 (1884)] in an early case *Chunder Nath* v. *Kristo Komul*, 15 W. R. 357 (1871). In that case, the property in dispute was purchased *in the name of a female* at a time when she and her minor son were living together with the Plaintiff and his sister-in-law as members of a joint family. It was argued that the presumption of joint acquisition arising from the circumstance of a Hindu family being joint and undivided is not applicable to this case, inasmuch as the party in whose name the disputed property was purchased, was a *female*, and *as such had no proprietary right in the family estate* while her son was alive, who was the heir-at-law of her deceased husband.

Opinion of Dwarka Nath Mitter, J.

In reply to this argument his Lordship pointed out :—"That (*she*) *was one of the members of the joint undivided family* is beyond all questions; and although her interest in the family estate was not of a proprietary character, there can be no doubt whatever that she was *entitled to be*, and was in point of fact, *maintained* at the time in question *out of the proceeds of that estate*. The wives and mothers of the members of a joint undivided Hindu family, *so long as they continue to live in the family and are supported out of its income*, are just as much members of that family as their husbands and sons; and as *unity of possession* is one of the essential characteristics of a joint undivided Hindu family, *no difference in the nature of the interests possessed by the different members thereof can affect the presumption with which we have to deal.*" "The circumstances of the case," in his Lordship's opinion, "are sufficient to raise the presumption that the property was purchased with the common funds of the joint family and for the benefit of all its members;" and "the *presumption of joint acquisition cannot be rebutted by the mere fact that her name was used in making the purchase.*" And referring to the decision of the Judicial Committee of the Privy Council relied on in support of the contrary view, [*Jowala Buksh* v. *Dharum Singh*, 10 M. I. A. 511 (529) (1866)]—which his Lordship distinguished on several grounds, with which we are now not directly concerned, his Lordship pointed out the following passage in that very decision : "That the lady in her own time was the sole recorded proprietor of the *talooks in ordinary case might be a circumstance of little moment*, (even in a *Mitakshara* family with which they were

(1) *Vide* Author's "*The Law of Benami*," New Ed. 94-95.

dealing) because it has been ruled and is consistent with reason that one member of a joint Hindu family may be so recorded on behalf of the family."—which, in his opinion, "conclusively shewed" that "in their Lordships' (of the Judicial Committee) opinion the mere fact of the registration of (her) name in the Collector's books *would not have*, under ordinary circumstances, *afforded any presumption whatever of her independent right* and exclusive possession."

Followed in later case.

This view has been accepted by a later decision of the Calcutta High Court, *Nobin* v. *Dakhobala*, I. L. R. 10 Cal. 686 (1881), where the question argued was "whether property acquired in the name of a Hindu lady, a member of a joint family, is presumably joint property or not." The property in this case was found *standing in the names of* two ladies, members of a joint Hindu family, and *widows of deceased members* of that family. Their Lordships following the decision of Mitter, J., quoted above, distinguishing the case, *Chowdrain* v. *Tarini*, 11 C. L. R. 41 : s. c. I. L. R. 8 Cal. 545 (1882), which, it was argued, was in conflict with it, and pointing out that "we are not aware that view has ever been questioned until now," laid down that "a *wife, a member of a joint Hindu family*, is, as regards the property held in her name, in the same position as her husband with respect to property acquired in his name, and *subject to the same presumption in favour of the joint family.*" Thus, in a *Dayabhaga* family, any property standing in the name of a *female* member of the family who is, however, *not a co-owner* of the family property is also to be *presumed* to be a *joint property* of the family.

Joint property only of co-owners, male or female.

It is, therefore, joint property *of those members male or female*, who have joint right to the family property, in other words, who are *co-owners* in respect of it. And those in whose name it stands having no such right or interest in the family property can claim none in it.

(*To be continued.*)

LONDON NOTES.

(From our Correspondent.)

The arguments were concluded in *Kadoth Ambu Nair* v. *Secretary of State* (Madras) on February 29th and judgment was reserved.

The Board did not sit again until March 6th, when *Sir G. Lowndes, K. C.* and *Mr. E. B. Raikes* obtained special leave to appeal to the Privy Council in the case of *Hari Kumar Dey* v. *H. V. Low & Co.* (Bengal).

An appeal from Madras, *Raja Br. Narasingerji Gajanagerji* v. *Raja Pannganti Parthasaradhi Rayanim Garu*, was heard on March 6th, 7th and 10th by a Board composed of Lords Atkinson, Blanesburgh and Shaw, Sir John Edge and Mr. Ameer Ali.

The main question for decision was as to whether a transaction embodied in two documents was an absolute sale with an agreement to reconvey, or was in fact a mortgage. Judgment was reserved.

Messrs. Clauson, K. C. and *Narasimham* for the Appellants.

Messrs. Upjohn, K. C. and *Kenworthy Brown* for the Respondent.

The Board did not sit on March 11th and 12th but constituted as before, they are now (March 13th) hearing arguments in *Sri Raja V. V. S. Jagapati Br. Garu* v. *Sri Poosapati Venkatapati Raja Garu* (Madras). The question for determination is whether the Appellant is entitled to recover from a trust fund certain monies advanced to the Respondents to enable them to prosecute a claim to the Vizianagram estates. The Respondents contend that owing to the failure of the Appellant to supply the money they were forced to a compromise in the proceeds of which the Appellant is precluded from sharing owing to his breach of contract. The appeal is part heard.

Messrs. Upjohn, K. C., DeGruyther, K. C. and *Narasimham* for the Appellant.

Mr. K. Brown for the Respondents.

The following judgments were delivered on March 13th, *Md. Rahimtulla* v. *Esmail Allarakhia* (Bombay). The appeal was dismissed.

Kalyandappa Bin Ayappa Derai v. *Chabasappa Derai* (Bombay). The appeal was allowed.

G. D. M.

13-3-24.

Review.

-COMMENTARIES ON THE CODE OF CRIMINAL PROCEDURE (ACT V OF 1898) as modified up to 1st September 1923. *By P. Ramanathan Aiyar, Vakil, Trichinopoly, Madras.*

Of all the new editions of the Code of Criminal Procedure that we have received, this is the most copiously annotated. The scale on which the annotation proceeds has up to now enabled the author to bring out only the first volume which covers only 250 sections. As considerable changes have been made in most of the important sections, the text of the old sections, when very largely altered, have been set out in extenso as prefatory to the annotations. We also find there large extracts not only from the report of the Select and the Joint Committees but also from speeches in the Legislative Assembly. The annotations are of the usual style, giving references to the case-law and setting out the points of decision with reference to the important elements of each section. Where the law has been changed to remove conflict between the interpretations by different Courts, such reference will be found useful. But where the law has been changed independently of such conflict, it remains to be seen how far the old cases would be found useful. It is in the working of the Code that doubts and difficulties will arise and a new crop of case-law will gradually evolve out of such process. The labour that has been bestowed by the author in the work under review is deserving of the highest praise. The work when completed will prove a very valuable book of reference. The annotations on 250 sections cover nearly 1000 pages.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before GREAVES and DUVAL, JJ. CR. REV. No. 87 OF 1924. JABBAR ALI and another, Accused, Petitioner *v.* EMPEROR. The 10th March 1924.

Criminal Procedure Code, secs. 235 and 239—Mis-joinder of Charges.

This was a Rule granted on the 29th of January 1924 against the conviction and sentence on appeal, passed by the Additional District Magistrate of Mymensingh, confirming the conviction but reducing the sentence passed by N. G. Ray, Deputy Magistrate of Netrokona, under secs. 457, 380, I. P. C., on the Petitioners.

The facts of the case are briefly as follows :—On the early morning of 11th July 1923 there was a burglary in the house of one Lalit Topedar of village Bangla within the P. S. Netrokona, District Mymensingh. The same night two other thefts with house-breaking were alleged to have been committed, one in the same village of Bangla and the other in a different village Durgasram. No thief was caught in the act. Subsequently Jabbar Ali and Montaz were arrested and put to stand their trial under secs. 380 and 457 of the I. P. C. The trial Court found them guilty under both the sections and convicted them under both which was confirmed by the Appellate Court.

It was urged, that the joint trial of the two persons Jabbar Ali and Montaz, upon the facts stated above, was bad in law, being vitiated by mis-joinder of charges inasmuch as the three thefts as aforesaid, each complete by itself, could not be regarded as one transaction and hence sec. 239, Cr. P. C., as it stood before the new amendment would not apply. In support of this proposition a decision reported in 10 C. W. N. 32 was cited:

Held—That the trial was vitiated by the misjoinder of charges. Sec. 235 did not apply as the three burglaries were three completed acts and as such they were three separate transactions. The conviction and the sentence were set aside.

The Rule was made absolute.

Babu Radha Benode Pal with *Babu Bhupendra Kishore Basu* appeared in support of the Rule.

No one appeared on behalf of the Crown to show cause.

S. C. C.

THE

Calcutta Weekly Notes

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Contents.

NOTES

Civil Justice.

We publish in another column a letter containing a number of suggestions on the topics now occupying the attention of the Civil Justice Committee. Coming, as they do, from a member of the Subordinate Judicial Service, the suggestions deserve careful consideration. But it has to be premised that they are our correspondent's individual opinions and on many points they are not the opinions of the large majority of his colleagues in the service, so far as we have been able to ascertain, nor do we see our way to agree with all of them.

For instance, his proposal that all rent-suits should be assigned to one Court is not, in view of the large number of rent-suits, a practical proposition. This proposal, if accepted, will lead to greater delay in disposing of such suits. Besides, to be confined exclusively to one class of work is not good for the Judge himself, though this objection may be got over by not allowing a Judge to occupy himself with this kind of work only, for, say, more than a year. The real objection is that the number of such cases will compel a distribution of such work amongst a number of officers and concentration of such work in one or two Courts will afford no real relief either to the Courts or to the litigant public. At any rate the scheme we have suggested, *viz.*, of appointing special days for rent-suits, should be given a fair trial before any scheme of concentration of all rent-suits in one Court is taken up, even for experiment. If it is to be taken up at all, we would prefer that the two schemes be tried in different districts so that the results of both may admit of rational comparison.

We do not agree with our correspondent in the matter of a wider extension of summary methods of trial specially in rent-suits. Summary methods of trial do not satisfy the litigants and the very fact that in our correspondent's view the decisions in such suits should not be allowed to operate as *res judicata*, shows that he himself is not unapprehensive of the greater risks of miscarriage of justice attending on such trials. The fact of the matter is that the public do not share the confidence which the Judges themselves naturally have in their own infallibility, and our own experience of the way in which small causes are disposed of, whether in the city or in the mofussil, rather dispose us to agree with the point of view of the public than of the Judges themselves.

As regards the enhancement of the jurisdiction of the Munsifs, we are unable to see how this can relieve congestion or speed up work. If Munsifs were officers who had more time than work and more time than they knew what to do with, the suggestion would have practical value. But things being what they are, it has none. We have no doubt that a senior Munsif can manage judicial business as efficiently as a junior Subordinate Judge, the one being a Subordinate Judge and the other a Munsif depending on the accident of the former having entered the service somewhat earlier than the latter. Can you, we ask, in fairness, put a Sub-Judge's work on a Munsif, without offering him a Sub-Judge's pay? As it is, the percentage of Sub-Judges in Bengal is already low compared with that of other provinces. We have not heard of any suggestion for abolishing the Sub-Judge's grade altogether from motives of economy and reducing them to the rank of Munsifs. But that is exactly the direction to which the logic of the proposal will be found to point on close examination.

Our correspondent would like to see the

very method of composing civil disputes as crystallised in the Code fundamentally altered, and we can assure him that he is by no means alone in holding this opinion. We ourselves have had misgivings on the point, but pending the discovery of a more satisfactory method, all one can hope to do is to improve the existing system wherever possible, and that is the task upon which the Civil Justice Committee is, we believe, engaged at the present moment. Of the several methods of deciding disputes hitherto tried, divination is now out of question. The choice lies between fighting with sticks and (taking the existing method at its worst) chicanery. The latter is at any rate more allied to law and order than the former, and one has to be careful, in suggesting changes, to see that people are not thrown back upon the argument of the sticks. It is a large subject, larger perhaps than our correspondent has realised. It is certainly not one which can be usefully discussed without collecting data regarding methods obtaining and being tried in other countries, in and outside the British Empire, not omitting Bolshevik Russia.

PRESUMPTION IN CASE OF PROPERTY PURCHASED IN NAME OF FEMALE MEMBER OF DAYABHAGA JOINT FAMILY.

By Radharomon Mukerjee, Vakil, Berhampore.

(*Continued from p.* xcix.)

Females presumed to be benamdars of joint family.

In their cases, as we have already stated, and as against them another and a different presumption arises, namely, that they are *mere benamdars of the joint family* for whose benefit the property is allowed to stand in their names. As observed by Justice Dwarka Nath Mitter in the same case :—" So far as the ordinary and usual course of things is concerned, the practice of making benami purchases in the names of female members of the joint undivided Hindu families is just as much rife in this country as that of making such purchases in the names of the male members, and the *presumption against separate acquisition* is no less strong in the former case than in the latter." With reference to this matter, however, their Lordships of the Madras High Court observed in the same case from which we have already quoted :—" Although it is not unusual for property to be transferred in the name of a female member to protect it from the creditors of the male members, or to place it beyond the risk of extravagance on the part of the male members, *such dealings* are exceptional and can *afford no ground for a general presumption.*"

Radical divergence of views—their grounds explained.

It may be pointed out that the opinion of the Calcutta High Court is based not merely on the prevailing practice of making purchases or holding properties in the names of the female members as in the names of the male members, but also upon the fact that, owing to the females living in the family and being supported out of its income like the male members, both of them thus have "*unity of possession*" *in the joint property* of the family, and are *equally members of the joint family.* With the Madras High Court, however, the prevailing practice of keeping the properties in the names of the female members carries no weight, as also the fact that the females are as much members of the family as the males. And further, the view expressed by the Madras High Court is based upon the *distinction between the rights of* those members of a joint family who are *co-parceners and* those who are *not so.* But, according to the Calcutta High Court, "*no difference in the nature of the interests possessed by the different members thereof can affect the presumption*" *of joint acquisition,* which *arises from the* mere fact that the *lady* lives in the family and is maintained out of its income, and is only in that sense a *member of the family.* Thus, according to the Madras High Court, in a Mitakshara family, the presumption is based on the fact of co-parcenership, while according to the Calcutta High Court in a Dayabhaga family, it is founded on the mere fact of union or living together in the family and maintained by it. Hence, there is a radical divergence of views between the two High Courts on this point. (*Vide* Author's "*The Law of Benami,*" pp. 92-95).

Above cases not considered in recent decisions.

It was unfortunate that the decisions of the Calcutta High Court and of the Judicial Committee of the Privy Council quoted above were not cited at the Bar, nor otherwise brought to the notice of their Lordships, on both the occasions of the hearing of the two cases re-

cently decided and referred to at the beginning of this article.

Contrary view taken—ground or authority in support.

In the first of these cases, *Protap* v. *Sarat*, 33 C. L. J. 201: s. c. 25 C. W. N. 544 (1920), where the disputed property stood *in the name of a daughter-in-law* of a family, that learned and erudite Judge of the Calcutta High Court, Sir Asutosh Mookerjee, held quite the contrary view that it was "erroneous" to presume that "because a property stands in the name of a *daughter-in-law*, she is not the *beneficial owner*." His Lordship has not been pleased to give us any new or additional grounds, except the general ground, nor has he quoted any direct authority, except the Madras case, both of which we have already discussed. In the other case—*Bhubanmohini* v. *Kumudbala*, 28 C. W. N. 131 (1923), in which several brothers along with their mother formed a joint family, and the disputed properties stood *in the name of the mother*, their Lordships (of whom Justice Sir Asutosh Mookerjee was one) observe:—"We may usefully recall that, as pointed out by the Judicial Committee more than once, there is *no presumption* that a property standing in the name of a Hindu female, who is a member of a joint Hindu family, *belongs to the joint family*, and is *not her stridhan property*. . . . . . ." And their Lordships have further been pleased to point out:—"The same principle will be found *recognised and applied by all the other High Courts*," and then follows a list of the decisions in which this has been done.

Distinction between cases of joint family and where there is none.

But before discussing these decisions it is necessary to bear in mind that there is a distinction between the case we are considering now, namely, where there is a *joint family and a property* is *acquired in the name of a female* who is related to a male member of such a family, and a case where there is no *joint family*, but a male person lives separately from his other relations, and a *property* is *acquired in the name of* one of his *female* relations. This distinction has been pointed out by their Lordships of the Calcutta High Court in the cases of *Nobin* v. *Dakhabala*, I. L. R. 10 Cal. 686 (1884) and *Dakhina* v. *Jugadishwar*, 2 C. W. N. 197 (1897). As observed by their Lordships in the 28 C. W. N. case:—"We cannot overlook that there are numerous instances of cases in the reports where purchases in the name of female members have led to controversies—*whether* the *acquisition* was *for the benefit of the lady or of the person who found the money*." Even when it is proved that though the property stands in the name of a female, the *purchase-money* was *advanced by her male relation* with whom she lives, the claim is often made that it is *really a case of gift* to her whereby she has acquired an *absolute proprietary interest* in the property. But that will depend upon the intention of the person paying the price, the onus of proving which lies on the party setting up such a claim. The real controversy, however, arises when *no evidence as to the source of purchase-money* is forthcoming. Then the matter will depend upon the question whether *property purchased in wife's name is not presumed to be husband's but wife's property*; from *the mere fact that the property stands in her name the presumption arises that she* being the ostensible owner, is also the *real owner of the property*. The most typical instance of such a case is where the property is acquired in the name of the wife. In the absence of any evidence shewing that the husband supplied the funds with which the property was purchased, the fact that the purchase was made in the name of the wife *does not lead to the presumption* that the *property belonged to the husband and not to the wife*. Even where there is evidence that the husband furnished the purchase-money, the presumption in English law is that the purchase was made by way of "*advancement*" to her, while according to Indian law, the presumption is that it is a case of *benami* purchase. I have fully discussed the matter in my book on "*The Law of Benami*," pp. 86-89.

Cases cited do not support the view taken.

This question was dealt with in some of the *cases cited* in the last of the recent decisions of the Calcutta High Court—*Bhubanmohini* v. *Kumudbala*, 28 C. W. N. 131 (1923), in support of the proposition that a property standing in the name of a female member of a joint family should be presumed to be her *stridhana* property, for which they *are no authority*. This will appear clear to any one who takes the trouble of going through them. On the other hand, they support the view that *as between the husband*, or a person claiming through him, *and the wife*, *the presumption* is that a property standing in the name of the wife *belongs to her and not to her husband*.

Chowdrain v. *Tarini*, *8 Cal. 545.*

Thus in the case of *Chowdrain* v. *Tarini*, I. L. R. 8 Cal. 545 (1882) [which was *reversed on the facts* by their Lordships of the Judicial Committee in *Dharani Kanta* v. *Krishto Kamini*, I. L. R. 13 Cal. 181 (1886), but the view of law taken in it still holds good—*vide* Mayne's Hindu Law and Usage, 9th Ed., 630, Woodroffe's "The Law of Evidence, 7th Ed., 661"]—their Lordships expressed their unwillingness "to accept the bare proposition that, in the absence of any evidence to shew the source from which the purchase-money was derived, there was a presumption that *property purchased in the name of a Hindu wife* is the property of her husband, and acquired with his money," and pointed out—"In our opinion there was *no presumption one way or the other*, and that the burden of proof in each particular case must depend upon the pleadings and the position of parties as Plaintiffs or Defendants." In other words, the mere fact of the property being acquired in the name of the wife is no presumptive evidence of the property being the property of the husband.

Nobin v. *Dakhabala*, *10 Cal. 686.*

This was explained to be the law applicable to a case where the question arose as *between a husband* (or a purchaser at a sale in execution against the husband) *and the wife*, and not to the case we are now discussing, in a later Calcutta case—*Nobin* v. *Dakhabala*, I. L. R. 10 Cal. 686 (1884). This case is already sufficiently discussed.

Ran Bejai v. *Inderpal*—*26 Cal. 871 P. C* : s. c. *4 C. W. N. 1 P. C.*

Hence their Lordships of the Privy Council in the case of *Ran Bejai* v. *Inderpal*—I. L. R. 26 Cal. 871 : s. c. 4 C. W. N. 1 P. C. (1899)—held that the mere fact that the *widow* of a rich husband, who had died possessed of considerable property, was *found after his death, in possession of a property* of the acquisition of which no account was given, raises no presumption that it belonged originally to her husband.

Thakro v. *Gunga Parsad*—*10 All. 197 P. C.*

The same principle was held to apply to case in which it does *not* appear that there was any *ancestral property* of the family, and the disputed *property* was, during the life-time of the husband and on the eve of his second marriage, *mutated in the name of the wife*. In a suit by the son claiming the property as the heir to his father, it was held that the allegation that it belonged to his father's estate and that the mother's name was only used *benami* by the father, it was held that the property was given to the wife for her own benefit. It is thus clear that under the peculiar facts of the case the presumption did not arise. *Thakro* v. *Gunga Parsad*—I. L. R. 10 All. 197 P. C. (1887).

Narasumma v. *Srinivasa*—33 Mad. 112.

In the case of *Narasumma* v. *Srinivasa*—I L. R. 33 Mad. 112 (1909)—the wife had mortgaged a certain property *in her own right*, which was claimed by the son as belonging to the father. Their Lordships of the Madras High Court relying upon the Privy Council decision in *Ran Bejai* v. *Inderpal*—I. L. R. 26 Cal. 871 P. C. held that there was no presumption of law that the property found in the widow's possession was originally that of her husband, and placed upon the son the onus of proving that the property had vested in the father through whom he claimed it.

Motivahoo v. *Purshotam*—29 Bom. 306.

In the case of *Motivahoo* v. *Purshotam*—I. L. R. 29 Bom. 306, a Hindu *widow* had brought a suit against the executor of her husband's Will for a declaration that she was the sole owner of a house which was *purchased in her name* but was subsequently otherwise disposed of by her husband in his Will. Their Lordships of the Bombay High Court held "a purchase by a husband in the name of his wife did not raise any presumption of a gift to the wife or an advancement for her benefit." It thus appears that in this decision the Bombay High Court goes against the view that a property standing in the name of a Hindu female (wife in this case) should be presumed to be her separate *stridhana* property.

Ram Narain v. *Muhammad*—26 Cal. 227 P. C.—3 C. W. N. 113 P. C.

Of the other cases cited by their Lordships in the 28 C. W. N. case, that of *Ram Narain* v. *Muhammad*—I. L. R. 26 Cal. 227 : s. c. 3 C. W. N. 113 P. C. (1898)—is *not at all to the point*. For, there the purchase that was questioned had been made, *not* in the *name of a female*, but in the name of a male, stranger to the family.

Nityamani v. *Lakhan*—*43 Cal. 660* : s. c. *20 C. W. N. 522.*

In *Nityamani* v. *Lakhan*—I. L. R. 43 Cal. 660 : s. c. 20 C. W. N. 522—24 C. L. J. 1 P. C. (1916) where the question raised was whether a property *purchased in the name of a lady*

was taken by her as its absolute owner, or as a mere *benamdar for her husband*, their Lordships of the Judicial Committee, finding that "at this distance of time it was hardly likely that evidence would be forthcoming on either side to establish or rebut conclusively" "the fact of the source whence the consideration came," on a consideration of all the circumstances of the case, held that it was a *benami* purchase. Here it appears that the *onus could not be thrown on party who claimed* that *the wife* was a *benamdar for the husband* to whom the property belonged, inasmuch as it was impossible for him to discharge it at that distance of time.

Mahammad v. *Bharat—23 C. W. N. 321 P. C.*

In *Mahammad* v. *Bharat*—23 C. W. N. 321 P. C. (1918)—where in execution of a mortgage decree the mortgaged property was *purchased in the name of the mortgagor's wife*, their Lordships of the Privy Council placed upon the party who claimed that the purchase was *benami*, the onus of proving the fact, overruling the decision of the Allahabad High Court in *Bharut* v. *Mahammad*, 31 Ind. Cas. 586, which had placed on the wife, or the person claiming through her, the burden of proving that she had any private means, and held (the onus not having been apparently discharged) that the purchase was a *benami* transaction.

Basor v. *Leakat—23 C. W. N. 841 P. C.*

In *Basor* v. *Leakat*—23 C. W. N. 841 P. C. (1919)—a Mahamadan purchased certain *property in the name of his wife*, who, on his death, granted a *mukurari* to his heirs, who, in their turn, mortgaged the *mukurari*. The mortgagee purchased the property in execution of his decree, and sued for possession. Their Lordships, without going into the question of onus, held, upon the evidence, that the wife's purchase was *benami*. This analysis of the decisions cited in the two recent cases. 25 C. W. N. 544 : s. c. 33 C. L. J. 201 and 28 C. W. N. 131—shew that the decisions of the Privy Council did not support the proposition; and the only decision which directly supports it, is the case, *Narayana* v. *Krishna*, I. L. R. 8 Mad. 214, which we have already discussed. It remains only to point out that that was a case of a *joint family governed by the Mitakshara* law, which, as we all know, unlike the *Dayabhaga* law, is extremely loath to recognise the personal property of individual members of the joint family. That this was the ground of decision in that case will appear clear from the following remarks of Sankaran Nair, J., in *Balamba* v. *Krishna*, 37 Mad. 483 (1913):—

"In the Madras Presidency, at any rate, there is an increasing disposition to make provision for the benefit of a person's wife and children, including daughters as against his joint family, to whom his property would survive at his death, or as against his male heirs." And "*accordingly*" it was so held in that case. The Calcutta High Court also observed with reference to that case in *Dakhina* v. *Jagadishwar*, 2 C. W. N. 197 (1897): "The case . . . *went much further in the opposite direction* than it is necessary to go . . . (where) there is *no question of a joint family*," and, held that "there is no presumption of law that a property acquired by a Hindu widow after her husband's death forms part of her husband's estate." It thus appears that their Lordships drew a distinction between a joint and a separated family, and did not fully approve of the opinion of the Madras High Court even though the family was joint and she was no coparcener.

Conclusions.

The conclusions which we reach as the result of the above discussions may be summarised as follows:—

(1) That there is, so far as we are aware, no decision of the Privy Council in support of the broad proposition that "there is no presumption that a property standing in the name of a Hindu *female*, who is a *member of a joint Hindu family*, belongs to the joint family, and is not her *stridhana* property," or, at least those of them cited in 28 C. W. N. case do not support such a proposition.

(2) That according to the previous decisions of the Calcutta High Court, the presumption in such a case is that it *belongs to the joint family*, and therefore those members of it who are co-owners in respect of the family property, have joint right in it.

(3) That if the person in whose name the property stands be a *female* and a *co-owner* in respect of the family property the presumption is as stated in (2) above. If she is *not a co-owner*, and yet a member of the joint family, in the sense that she lives in the family and is maintained by it, then the presumption is that she is a *mere benamdar* of the joint family and as such has no right to the property.

(4) That if there is *no joint family*, the

presumption is that *she*, being the ostensible owner of the property, is its *real owner*, in other words, that it is her *stridhana* property.

(5) That the above propositions apply only to a case in Bengal, at least where the parties are governed by the *Dayabhaga:*

(6) That where the parties are governed by the Mitakshara, the case in 8 Mad. 214 is still the leading authority, according to which there is no presumption that it belongs to the joint family, but there is the contrary presumption that it is her *stridhana.*

(7) That in this respect there is divergence of views between the Calcutta and the Madras High Courts, and that there is no reason to apply the law laid down in the Madras case to a case in Bengal. That the other High Courts do not go against the Calcutta decisions, nor do they favour the Madras view.

(*Concluded.*)

LONDON NOTES.

(From our Correspondent.)

The Judicial Committee finished their list last week and reserved judgment in the appeal of the *Midnapur Zemindary Co., Ltd.* v. *Kumar Naresh Narayan Roy* (Bengal).

The following criminal petitions were dismissed :—*Manzur Husain* v. *King-Emperor* and *Mal Singh* v. *King-Emperor*. *Mr. Dubé* appeared for the applicant in the former petition. In the latter the applicant was represented by *Mr. Eastwood*. *Mr. Kenworthy Brown* appeared for the Crown in each case.

A Board has been constituted for the hearing of two Indian appeals which have been placed in a supplementary list for April 1st. At the conclusion of these appeals which are both to be argued *ex parte* the Court will rise and will probably sit again on May 1st.

G. D. M.

26-3-24.

Correspondence.

CIVIL JUSTICE.

To

The Editor, "Calcutta Weekly Notes."

Sir,

Your critical remarks on the Administration of Civil Justice form illuminating and refreshing reading and encourage me, with a due sense of my own limitations, to pursue the subject a little further.

To start with, it is reasonably expected that something may be gained by simplification of procedure. To use the post interchangeably with, and as supplementary to the ordinary machinery for the service of some of the processes (as is being actually done by Judicial Officers on their own initiative); to link up administratively the Union Board as the outer bureau of the Civil Court for receiving and answering inquiries; to simplify the procedure for the representation of minors by making the appointment of the guardian *ad litem* follow the service of the usual notices by peon and post, supported, if necessary, by an inquiry of the Union Board; to permit Munsifs and Sub-Judges to appoint their own commissioners of local investigation, and so forth, are among the obvious suggestions on this head. The present long-drawn scheme of process-service for compelling the attendance of witnesses, often availed of or permitted as a means to keep the pot boiling, may be cut down to a summons and a penalty notice by post when our Civil Courts are in a position to observe a stricter time-table than in the present conditions of business they are able to do.

In the next place, improved rules and methods of business may help us to tackle with the heavy seasonal mass institutions more efficiently than now. Your suggestion to set apart one day in the week exclusively for rent suits is good, but I would carry it further by a more thorough-going division and re-adjustment of duties whenever practicable. It is worth considering whether rent files may not with advantage be concentrated in one Court; also, when the strength of the staff permits it, whether an officer may not be appointed, for whole or part time, to discharge the functions of a Registrar, and take in hand the preparatory stage of proceedings in all classes of suits, leaving the rest to work unhampered at the lists of ripe cases according to the prescribed time-tables.

A word or two upon re-adjustment of juris-

dictions and regarding the service may come in appropriately here. There is no reason for instance why in such areas at least where more than six years have elapsed since the final publication of the record-of-rights, rent suits up to certain fixed values should not be tried by the summary method, subject to the important qualification that judgments in these suits shall not be *res judicata* on questions of title to land. It would be advisible to give enlarged general jurisdiction to Munsifs on a graduated scale up to Rs. 5,000 at least, to be balanced by an extension of Small Cause Court powers up to Rs. 500 in the case of Munsifs, and at least Rs. 1,000 in the case of Sub-Judges. The Presidency Small Cause Court has jurisdiction up to Rs. 2,000 and there is no reason why the Provincial Judiciary should not have half as much. The present strength and efficiency of the Sub-Divisional Bars make it inexpedient that all important Civil business should be concentrated at the head-quarters, with all the trouble, expense and delay that it necessarily means to the litigant public. It is not good, moreover, that 80 per cent. of the services should be condemned to a limited range of work for the best part of their lives, to their almost inevitable moral stagnancy, and necessary economic loss to the State. The existing scale of jurisdictions was virtually fixed over sixty years ago, and the price of land having gone up four times, at least, and the value of the rupee having gone down proportionately since then, even to maintain the same scale now for Munsifs, it has got to be quadrupled in terms of its present money value. I know your susceptibilities, sir, on the questions of rights of appeal and summary powers, but, on these points, with the greatest respect, I should beg leave to differ.

The undue partiality for figures in estimating judicial work is another weakness in the present system. The approved principle of appraisement is something like this—25 contested suits, good; 20, fair; 15, not satisfactory. Very easy arithmetic this but it holds the field, because it is so easy. Seldom is an attempt made to get at the facts behind the figures, or take the figures in their proper curves, and in relation to what goes before and after. This means a certain perversion of judicial standards and values. Figures are abstractions, and to be helpful in their concrete applications, not one but several sets of figures have to be used in mutual check, and co-ordination. Besides, I would deprecate the application of any elaborate calculus of judicial work for departmental purposes, even if it were possible to devise one free from all just objection. Nothing is really so little amenable to inquisitional scrutiny of this type, nothing suffers so much by it. When a certain file has been known to afford sufficient occupation for one man year in year out, I would put him in charge of it, and leave him to manage it the best he can, and would not interfere with him so long as he gives public satisfaction at his post, and keeps to the time-tables prescribed by the High Court, irrespective of his out-turns from month to month. It is the High Court (and on the point I should like to lay the greatest stress) which should set the pace of work, and then the Judge, the pleader, and the litigant may be all expected to fall into step together, and the personal equation of the situation will be reduced to a minimum. It is a pity that as the legislature is inclined to trust to the inherent discretion of the Judge the more and more, the cry should be raised in certain quarters for drawing the bonds of departmental surveillance and control all the tighter.

But the main problem after all is how to temper civil justice with the right kind of social and moral seasoning. Our Civil Procedure Code is cast in the mould of the principle (to employ a variant of a well-known philosophical adage) that strife is the father of justice, and in its anxiety to make the conditions of the fight perfectly equal opens the door wide to any extent of litigiousness and pettifogging, and abuse of the processes of Court. The effect of this in a society that used to be ruled mainly, and is still inclined to go, by precept and authority, has been to a considerable extent of a disintegrating and corrosive character: it has greatly weakened some of our fundamental virtues, while bringing some of our latent temperamental weaknesses very much to the surface. Perhaps to begin with this could not be helped. But it is time to apply the needful corrective, by allying the moral and recuperative forces of society more firmly with the Court of law. We have to see that the oath be not treated as a polite formula for concealing the truth, pleadings an art of equivocation and denial, the law-suit a respectable dissipation or fashionable folly and the Court itself a permanent focus of irritation round which the forces of village faction may always rally anew. Your suggestion for

improved training in the theory and art of pleadings is good, but I would deprecate the introduction of a highly specialised, and, therefore, expensive agency for that purpose in the moffussil. I think the type of men who are employed as our pleaders' clerks at present contain material out of which, by suitable forms of training and tests as provided by the Bar Council of the future a class of vernacular conveyancers and draftsmen may be recruited good enough to answer all our ordinary needs. But after all it is a matter of detail. The real reform will consist in enlarging the bounds of arbitration, and bend the individual will to the mandate of the social conscience. It is not the place to go very closely into this matter here; it will be presumptuous in me even to try it. Suffice it to say that the evolution of a comprehensive act of arbitration, and its synthesis with the Civil Procedure Code, is one of the most important tasks which faces the legislature of the future. It is not inconceivable that subject to necessary safe-guards and limitations it may be competent to the Court of the future to refer certain cases to arbitration even when all the parties do not agree. An inducement to arbitration may be offered in the shape of a partial remission of the court-fee. It is matter for serious thought (herein again respectfully deferring to your views) how far the existing rights of appeal may not, in a select class of cases (*e.g.*, those relating to custom and usage and rights founded thereon, or arising out of certain kinds of tort), be surrendered with advantage for a trial with assessors preferably chosen from the Bar, whose verdict, subject to all just reservations, will be final on matters of fact. All that and much else in the same line has to be seriously thought over by all who wish well of the country and its administration of civil justice in the future.

With one or two remarks I should close. When Mr. B. Chakraverty in deposing before the Civil Justice Committee said that Munsif and Sub-Judge were in the habit of dawdling away their time in chambers, or Mr. Akhil Chandra Dutta questioned their capacity to take down depositions in English they either failed to take account of the actualities of the situation, or committed the two common error of facile generalisation, which even great minds are not always able to avoid. Nothing would please the service better if Mr. Chakraverty could really secure the, to them all too easy, hours of 11 to 4-30 with half an hour for recess in between. Again Mr. Dutta while he hit a real weakness of the present system, the employment of a foreign medium as the Court language, was undoubtedly mistaken in supposing that the handicap on judicial officers in having to record depositions in English was any greater than the handicap on pleaders—(I mean no offence) to argue in that tongue.

It is not by nagging criticisms like this that the prospects of reform are likely to be advanced. It must not be forgotten that the Provincial Judiciary and the Bar have between them built up on the whole a sound tradition of civil justice—patient, labourious, pains-taking and remarkably pure. Let us beware how by hasty word or impatient judgment, we cripple our mutual usefulness, or in our desire for surface smartness impair that public confidence which makes the Civil Court one of the most trusted departments of the State. Let us all pull together, making allowances for each other's limitations, and the limitations of the situation, so that the future of civil justice in the country may be bright, and yet brighter.

Yours faithfully,
RASBIHARI MOOKERJEE,
Munsif.

CHIKANDI,
14th April 1924.

THE

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Contents.

NOTES

The Report of the Bar Committee

The Indian Bar Committee, although they have not recommended the abolition of the dual system or the dual agency as asked for by the vakils, have gone a long way to meet what has been with the latter a long-standing grievance. Their recommendations are practically the same as was suggested by us in these columns for the enrolment of vakils as advocates. If their recommendations are given effect to either by legislation or by rules framed by the High Courts, the present disability of the vakil Bar to practise on the Original Side of the High Court would practically disappear. The Committee have made the following specific proposals :—

(1) that vakils of not less than ten years' standing shall be entitled to be admitted at once to practise on the original side;

(2) that vakils of less than five years' standing shall similarly be entitled to be admitted after they have read for one year with an advocate, approved by the Court, practising on the original side. During that year they should be allowed to plead, but not to act, on the appellate side or in the subordinate courts;

(3) that vakils of less than five years' standing shall similarly be entitled to be admitted on the same terms and subject to the same restrictions, but shall in addition pass an examination, to be prescribed by the Court, in commercial law and practice on the original side;

(4) that the rules for the admission of vakils shall provide that a Bachelor of Laws who wishes to practise on the original side of the High Court as well as on the appellate side shall, after passing the examination for the degree of Bachelor of Laws, read for one year with an advocate or attorney, approved by the Court, practising on the original side, and pass an examination, to be prescribed by the Court, in commercial law and the practice on that side. A vakil admitted on these terms should be entitled to practise on the original side in accordance with this scheme;

(5) that the name of a vakil admitted to practise on the original side shall be entered on a special list. A vakil should be entitled at any time to have his name removed from that list, but a name once removed should not be restored to the list;

(6) that as regards practice on the original side, vakils and others entitled to practise on that side shall all be subject to the same rules;

(7) that vakils whose names are on the special list shall be subject to the same restriction as barristers when practising on the appellate side or in the subordinate courts;

(8) that proposals (1) to (3) shall remain in force for seven years from the date when the scheme comes into force, that proposals (4) to (6) shall remain in force for seven years or until they are modified whichever is the longer period, but that proposal (7) shall remain in force for seven years and shall then cease to have effect unless the High Court, if there is no Bar Council, or the Provincial Bar Council with the approval of the High Court otherwise determines.

The Bar is naturally apprehensive that if these proposals materialise, their interests will suffer very largely owing to the number of practitioners on the Original Side increasing suddenly and out of all proportion to the amount of work which is available there. For ourselves we do not believe that a large number of vakil practitioners will avail themselves of the privilege of appearing on the Original Side. A few seniors and juniors among them will, but not many. Vakils having a fairly good practice on the Appellate Side will not consider it safe to give up their privilege to act and plead on the off chance that they may build up a more lucrative practice on the Original Side. Direct contact with the client which the rules of their profession allow will not be sacrificed lightly.

The Bar Committee have recommended that their proposals with regard to vakils should apply equally to attorneys with this difference that no attorney should be required to pass a further examination, and, that those of less than ten years' standing should be required, instead of reading with an advocate, to abstain from acting in any Court for one year. We do not think that the Committee were well-

advised in dropping the condition as to reading with an advocate in the case of attorneys of less than ten years' standing. In our opinion, an attorney who wants to be an advocate should, beside abstaining from acting in Court for one year, give up his interest in his firm and read for one year with an advocate. Unless he gives up his interest in his firm, mere abstention from acting in Court will not prevent him from carrying on in the office the work of an attorney during the period of his probation.

The Bar Committee have decided to recommend that on the Original Side an advocate should have the option of appearing and pleading only (in which case he would do so on the instructions of an attorney) or of appearing, pleading and acting in the same manner as vakils now do, but that he should not be entitled to do both. They have proposed accordingly that if any advocate wishes to act on the Original Side, he should give an undertaking not to appear and plead on the instructions of an attorney. We think that this proposal is equitable and will go a long way to help the junior barrister, provided he is given the liberty to give up acting and to resume his original right of appearing and pleading on the instructions of an attorney. Resumption of the original status has been recommended in the case of vakils and attorneys and there is no reason why it should be denied to barristers.

THE EGYPTIAN CONSTITUTION.

(a) *The old order of things.*

Nominally a dependent on Turkey, between 1879 and 1883 Egypt was under the dual control of France and Great Britain. In the latter year, however, Great Britain intervened after Arabi Pasha's rebellion, and since then practically governed the country until 1923. The British occupation, at first regarded as temporary, by force of circumstances and through Egypt's misfortune, became firmly established, and the predominant position of Great Britain was formally recognised by France by the Anglo-French Agreement of the 8th of April 1904. The French, German and other Governments also asserted to very considerable modifications in the international arrangements established in Egypt for the protection of foreign land-holders, the modifications being embodied in a Khedivial Decree annexed to the agreement. The British Government in its turn gave an assurance to those Powers that their commerce with Egypt should enjoy most-favoured-nation treatment for thirty years.

There was a British Agent at Cairo, who had a seat in the Council of Ministers, in which, with the Khedive rested the real legislative authority. There were, however, provincial councils for local affairs. In July 1913 the previously existing General Assembly and Legislative Council were amalgamated into one, termed the Legislative Assembly. This body consisted of 89 members, of whom 66 were elected and the rest nominated by the Khedive on the advice of the British Agent. The whole system of representation was at the same time improved by the introduction of elections in two degrees, with one elector-delegate for every 50 inhabitants. In the event of a minimum representation not being secured at the elections, an Organic Law required the Government to secure such representation. The Legislative Assembly was given a certain power of initiative which was not possessed by its predecessors, but certain matters were reserved from the Assembly, such as the service of the Civil List, and all questions concerning foreign Powers and the relations of Egypt with them.

The judicial system was somewhat complex, the Consular Courts trying cases of crime brought against foreigners, and civil cases between foreigners of the same nationality, while the native Egyptian Courts were occupied with civil actions between Egyptians and crimes by them. There were also Courts of religious law for Mahomedans. Mixed tribunals which were instituted in 1875, dealt with civil actions between persons of different nationalities, or between Egyptians and foreigners, and to some extent with criminal offences of foreigners. They were set up for a period of five years and renewed periodically for periods of five years. The chief religion is that of Islam, Moslems numbering over 10,000,000, but there are about 8,00,000 Christians, of whom over 7,00,000 are Copts with the Patriarch of Alexandria at their head. In 1917 about 7 per cent. of the population over 7 years of age could read and write; the remainder were illiterate, though progress was being steadily made. In 1906 the Supreme Council of Education was reconstituted and a department of Agriculture and Technical Education established, and in 1910 local education, apart from the many Government Coptic and

Moslem schools that there were, was handed over to the Provincial Councils.

(b) *The new order of things.*

From the old to the new order of things which was promulgated by a royal rescript on the 19th of April 1923 as the constitution for the "kingdom" of Egypt and establishing a constitutional monarchy therein has never been witnessed in the history of any country except those which have passed through the catastrophe and disaster of a revolution. The organic law of Egypt of 1883 was modified by several subsequent enactments, the most important of which was that of 1913 which brought into being a new Legislative Council with powers wider than the previous legislature ever possessed. This Council held its first session in 1914. The great European war following close upon its heels prevented it from becoming an effective body and in fact from holding any further sessions. Negotiations for the framing of a reformed constitution were kept up ever since and about the time of the famous announcement of Mr. Montagu in 1917 regarding Indian Reforms the Egyptian demand as voiced by the greatest Egyptian of the day, Zaglul Pasha, for freedom and independence grew in volume, firmness and resoluteness.

(c) *The Rights of Man.*

By the first clause of the instrument of the constitution Egypt is declared to be a Sovereign State, free and independent. Its sovereignty is recognised to be *indivisible* and *inalienable* and its Government to be a hereditary monarchy with representative institutions. The most important of the clauses, however, in the instrument of the constitution is that which declares the *Rights of Man*, rights of the Egyptian people. It lays down that "nobody may be arrested or put in prison, except in accordance with the prescriptions of the law, and that domicile is inviolable, except that a search may be carried out in the cases prescribed by law, that correspondence is secret, except in cases prescribed by law, that press is free within the limits traced by the law of the land, that preventive censorship is forbidden, that right of teaching is free, provided that the teaching is not contrary to public order, and that the right of association is unfettered subject to the control of the ordinary law of the country." It must not be supposed that there are any special laws for the control of these fundamental Rights of Man. The constitution further provides that all Egyptians are to be regarded equal in the eyes of law and that they shall enjoy civil and political rights irrespective of race, language or religion. To public functions of the kingdom, Egyptian nationals alone are admitted, foreigners being taken in only in exceptional cases and on sufferance. It may be of interest to us here to know that the number of foreigners in the service of the Egyptian Administration, *notwithstanding the fact that millions of European monies are invested on the soil and the industries of the kingdom,* is being *rapidly* reduced with a general provision under the constitution enabling all foreign officials who desire to retire from the service, to do so on special terms of compensation. Advantage no doubt has been taken of this provision by a small minority of foreign officials in Egypt mostly by those who have nearly earned their pension, even though the amenities of official life are not half as agreeable as they are in India.

(d) *The Petition of Right.*

All Egyptians and citizens of the Kingdom have an inherent right to petition public authorities in the case of expulsion from Egyptian territory or of imposition of a penalty of general confiscation of property, or interference with the liberty of one's conscience which is held absolute. One of the cardinal principles of the constitution is the provision for compulsory elementary education for children of both sexes. It is to be free in all public "*muktabs*" or infant schools.

(e) *The source of Governmental authority.*

There is a special chapter (Chap. 3) in the Egyptian constitution which deals with the distribution of the powers of the State. It lays down as a fixed principle that all powers of the State emanate from the nation and eventually leads the sovereign authority into the hands of the king who must act with and not apart from the people, a principle held by jurists all over the world to be the fundamental basis of constitutional monarchy. The conversion of Egypt from absolute to constitutional monarchy is the latest example in political science of how constitutions shape themselves when made, not granted!

(f) *The Legislative Power.*

The Legislative power of the Kingdom is vested in the king acting with the Senate and the Chamber of Deputies, exception being made in the case of emergent legislation authorised by the king by Decree during an interregnum between two sessions of Parlia-

ment so that immediately upon the meeting of the next session of Parliament, and in such a case it has been enjoined that an extraordinary session shall immediately be convoked, the legislation by decree shall be submitted for approval. If approved it finds its place upon the Statute Book, if rejected it stands spent-out and ceases to have the force of law.

(g) *The Executive Power.*

King Fuad is recognised to be the supreme head of the State. It is in the name of the king that all laws of the realm, which must, to have their force, be sanctioned by him, are promulgated. There is a power of veto residing in the king but it is restricted to such narrow limits that it is surprising to know that he is powerless for a Bill voted by Parliament but not approved by him may upon his request within one month be re-examined by the legislature and passed again by a majority of two-thirds in each Chamber. It then acquires the right to be recognised as law and must be promulgated. Should it fail to obtain the requisite majority it may be brought up again in a subsequent session of Parliament when the normal rule of the simple majority will be sufficient for its acceptance by the king who otherwise exercises all executive powers *together with the Council of Ministers.*

(h) *The King.*

When so advised by his Ministers the king may dissolve the Chamber of Deputies or the lower Chamber and may also adjourn not beyond a month a session of Parliament. A repetition of adjournment of Parliament in the same session is not permissible without the consent of both Chambers. An extraordinary session of Parliament under circumstances such as we have seen before or when necessity has arisen for the declaration of martial law or as the French call it *etat de siege*, or when an absolute majority of either Chamber requires him by vote to call it, is convoked by the king who as in every other monarchy is the fountain head of all titles and ranks. That is not all. The king is responsible for the organisation of all public services. A point of great constitutional importance is to be noted here and that is that as the king has got the power to declare martial law when necessary it is incumbent upon him to immediately bring such declaration to the notice of Parliament for them to maintain or cancel it even if he should have to convene an extraordinary session of it for such purpose.

Of the military forces of the Kingdom the king is the supreme commander. Except an offensive war which can neither be commenced nor carried on by him without the consent of Parliament all wars are begun, as peace terminated and treaties concluded, by him but not so as to enter into any alliance offensive or defensive, or into preferential commercial relations or into such a pact as might involve the modification of the territory of the State or a devolution of its sovereign rights, or a modification of a charge on the public treasury, or any infringement of public or private rights of Egyptian citizens. All these lie exclusively within the sphere of activity of Parliament.

The Ministers through whom the king exercises his powers are appointed and dismissed by him. Though the throne of Egypt is secured to the heirs in the dynasty of Mahomed Ali, the succession to it is regulated by a rescript of April 1922 and by a procedure which must receive the sanction of Parliament. Into its details we need not enter beyond mentioning the fact that failure on the part of a successor to the throne to take the constitutional oath involves a forfeiture thereof and entitles the Ministers as a Council to exercise the constitutional powers vested in the king.

(i) *The Ministers.*

At the head of the administrative services placed the Council of Ministers from which a foreigners and members of the royal famil are excluded. The Council which is a cabin acts on the principle of joint responsibility of Ministers some one or other of them alon with their President must be held accountabl for every act of the king in connection with affairs of State. Unlike any other country the world the Egyptian Ministers may or may not be in either Chamber of Parliament, an if they are not their right of free access either Chamber and to address it wheneve they deem it necessary is fully recognised the constitution. A vote of want of confiden in the Ministry can be moved in the low Chamber only which alone by a majority two-thirds may decide to impeach a minister f any offence committed in the exercise of l functions. An alternative mode of bringi a minister accused of mal-administration mal-practice to book, is prescribed by requi ing him to take his trial, after the Fren fashion, before a special Court of Justice com posed of 16 members—8 including the Pres dent being judges of the highest native Cou and 8 senators drawn by lot—who must

divided in the proportion of not less than 3 to 1 for a conviction under the Penal Code of Egypt.

(j) *The Parliament.*

The Parliament is composed of two Chambers. one upper, being the Senate, and the lower, called the Chamber of Deputies.

The Senate :—The Senate is composed of elected and nominated members in the proportion of three-fifths and two-fifths respectively. The elected members are returned from among ministers, diplomatic representatives, Presidents and members of the Court of Appeal or Tribunal of equal rank, general attorneys of the State, heads of the order of Advocates, officials of the rank of Director General or higher, whether active or retired, the higher ranks of the Moslem Ulema, ex-Deputies of Parliament, who have been members of two legislatures, owners of property paying an annual tax of £ E 150 or persons having an annual income of not less than £ E 1,500 and concerned in financial, commercial or industrial enterprises or following one of the liberal callings, by the three Mudirias or provinces or Governorates of Alexandria, Cairo, and the Canal Zone on the basis of a member to every 1,80,000 inhabitants or a fraction thereof representing not less than half that number. A senator holds office for ten years, half their number being renewed every five years. The President of the Senate is nominated by the King but the Vice-Presidents are elected by the members for a term of two years only.

The Chamber of Deputies :—Entirely an elected Chamber on an universal *male* suffrage basis; the Chamber of Deputies is the more important of the two Houses of Parliament. Members are returned by the three Governorates, each 60,000 inhabitants or a fraction of their number representing not less than half having the right to return one Deputy who must be at least thirty years old and is entitled to hold office for five years irrespective of the mandate of his electors. The Chamber elects its own President and Vice-Presidents. It is the duty of the King to summon the meeting of Parliament in the month of November each year for an ordinary session extending over at least six months. In default the Parliament, the two Chambers of which must sit simultaneously whether in ordinary or extraordinary session, may meet of its own right. The usual procedure with which we are familiar in India for the consideration and submission of a Bill obtains under the Egyptian constitution but the *quorum* for the consideration of a resolution in either Chamber is pretty high. It is half the total number of members of the Chamber concerned.

As in India so in Egypt when the two Chambers have to sit together, the presidency of the Congress—a joint session is so called—belongs to the President of the Senate, and there must be an absolute majority of each Chamber in order that any resolution may be passed.

(k) *The Judiciary.*

The general principle that Judges of all grades are independent of all authority in the State and are not subject in the administration of justice to any authority other than the law of the land is firmly and clearly established.

(l) *Local Government.*

The constitution of Municipal and Provincial Councils is almost on a par with Indian conditions under which certain towns and villages have municipalities or unions of their own, and declared by law to be juristic persons. Their organisation and functions are determined by special laws embracing certain principles, but always under the control of the Government.

(m) *Finance.*

The constitution prescribes that no tax which has been imposed by law can be modified or suppressed except as provided by law nor can any fresh financial liability be incurred without the consent of Parliament. *But the most important restriction which our legislators will not be a day too soon to take up in India is that which is imposed upon all concessions having for its object the exploitation of the natural resources of the country, or services of public utility or monopolies. They cannot be accorded otherwise than by special law for a limited time in the form of private legislation which under the constitution has, in the first place, to be placed before a committee having authority to decide whether it shall be submitted to the Chamber at all.*

(n) *General.*

Islam is the State religion and Arabic the official language. Subject to international agreements conducive to social order extradition of political refugees is prohibited. Nothing can be done under the constitution which might affect the obligations of Egypt towards foreign States or the rights which foreigners have acquired in Egypt by virtue of laws, treaties or established practice. The king is without any dispensing power. The power to suspend the constitution may be

taken advantage of under one pretext only, namely, in time of war or of a "State of Siege." It is, however, for a temporary period. And a further safeguard against any abuse of the suspending power is that under no pretext whatsoever, can the meeting of Parliament, as laid down in the constitution, be interrupted. Save the fundamental principles which have been guaranteed by the constitution, such as the representative or parliamentary character of the Government, the order of succession to the throne, personal liberty and equality, all other items in the constitution is liable to revision on the motion or initiative of either the King or the Chambers whose decision in a meeting assembled as the Congress is not of any force unless backed by a two-thirds majority of each House present in the proportion of two-thirds of its total strength.

The constitution of which the above is but a bare outline came into full force on the 1st of January last. Under it Egypt is subject to complete parliamentary Government and it is for the Egyptian people now to prove, by the manner in which it will assure the application of the constitution, that it is truly fitted to incur the high responsibilities which she has assumed and was always willing and eager to assume.

Following this, it may be of interest to the readers of this journal to know something of the Soviet Constitution, a short account of which I propose to place before them shortly.

A. K. Ghose.

[For the materials and substance of this paper I am indebted to Mr. Norman Bentwich, M. C. on whose learned article on the "Constitution of Egypt" in the last February number of the Journal of the Society of Comparative Legislation I have freely drawn.—A. K. G.]

LONDON NOTES.

(From our Correspondent.)

The Judicial Committee have now finished off their supplemental list and do not expect to sit for the hearing of Indian appeals again until May 2nd.

On the 3rd April *Sir G. Lowndes, K. C.* and *Mr. B. Dubé* obtained special leave to appeal from a judgment of the High Court in *Bhupendra Narain Singh* v. *Nurpat Singh*. The question involved is whether after the resumption of chaukidari chakran lands a zemindar is entitled to share in the profits arising out of unearned increment on the part of the *putnidar* by virtue of the resumption proceedings.

Mr. B. Dubé appeared *ex parte* in an appeal from Allahabad, *Lal Singh* v. *Raghunath Singh*. This was a suit to enforce a mortgage. After a short argument, the Board adjourned it for the production of further documents.

April 7th and 8th.—An appeal from the High Court of Bengal by the *Imperial Tobacco Co., India, Ltd.* v. *Bannon* was heard on the 7th and 8th April.

Lord Phillimore presided and the following members were also sitting:—Lords Blanesburgh and Darling, Sir J. Edge and Mr. Ameer Ali. The Appellants were endeavouring to prevent the Defendant from selling a quantity of Wills's "gold flake" cigarettes which he had purchased from the Canteen Board at the conclusion of the war. They contended that the public who purchased the cigarettes would be under the impression that they were imported by the Appellants.

Messrs. Clauson, K. C., Mangham, K. C., Kerly, Sebastian and *Wood* appeared for the Appellants.

Mr. S. Hyam for the Respondent.

Their Lordships reserved judgment.

The following judgments were delivered and the appeals dismissed:—

Kodoth Ambu Nair v. *Secretary of State.*

Midnapur Zemindary Co. v. *Naresh Narayan Roy.*

G. D. M.

Correspondence.

To

The Editor, "Calcutta Weekly Notes."

Sir,

With reference to the correspondence of Mr. Hemendra Nath Dutt in your issue No. 14 of 18th February 1924, I beg to make the following remarks for the consideration of the numerous readers of your journal.

Sec. 144 of the new Code of Civil Procedure seems to me to refer to execution of an appellate decree when a question of benefit by way of restitution or otherwise arises where and in so far as a decree is varied or reversed by the Appellate Court; and the application under sec. 144 starts an execution proceeding and should be registered as an execution and not as

a miscellaneous case. In order to appreciate this point it is profitable to advert to the history of the section. Sec. 583 (Act XIV of 1882) corresponding to the present section was inserted in Chap. XLI of the old Code dealing with appeals from original decrees and described in the marginal short note as 'execution of decree of Appellate Court.' In the present Code it could not be retained in the same order inasmuch as appeals are further hearing of the suits and are not matters of execution. But why it is not relegated to Part II, Or. 21 of the new Code dealing with execution, it is not easy to explain. It might come in company with sec. 51 of the new Code (Act V of 1908) dealing with procedure in execution and the powers of Court to enforce execution. Perhaps it was placed in Part XI of the new Code as it had to provide for special *modes of execution* of appellate decrees where the special circumstances contemplated in sec. 144 had intervened between the passing of the original and of the appellate decrees. This will be clear from the next point that I shall discuss. • • •

The chief object of the legislature is the same both in the old and the new sections, *viz.*, to give the party entitled the benefit (by way of restitution or otherwise) under a decree passed in an appeal. The difference or the main alteration lies in the fact that, whereas the enabling part of the old section enacts that "such Court shall proceed to execute the decree passed in appeal according to the rules prescribed for the execution of decrees in suits" in the new, it is provided : "The Court shall cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed ;" and the section concludes with some specific modes of relief. And this alteration is surely an improvement upon the old section as it did not indicate how the restitution should have been made.

Moreover, if proceedings under sec. 144 be taken as execution proceedings, any question arising between the parties relating to the execution would attract the operation of sec. 47, C. P. C. and the decisions thereon may be tested through the Appellate Courts.

I am strengthened in my opinion by a recent decision of Sir Dawson-Miller, Kt., C. J., Patna High Court reported in [1924 Pat.]133, in which it was held that as regards limitation applications under sec. 144 are governed by Art. 182, Sch. I (Act IX of 1908) which prescribes the period of limitation for the *execution* of a decree or order of a Civil Court. It is also held by his Lordship that the application under sec. 144 is in substance an application in *execution.*

Yours truly,
LALIT MOHAN INDRA, B.L.,
Pleader.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before NEWBOULD AND B. B. GHOSE, JJ. CIVIL REVISION NOS. 886—888 OF 1923—BARADA PRASAD ROY CHOWDHURY, Objector, Petitioner *v.* FOIJUDDI HALDAR and others, Applicants, Opposite Party. The 1st April 1924.

Bengal Tenancy Act (VIII of 1885), sec. 170, cl. (3)—Transferee of whole or part of non-transferable occupancy holding, if has an interest voidable on the sale and if entitled to deposit.

The Petitioner landlord obtained rent decrees against his recorded tenants in respect of non-transferable occupancy holdings and in execution of those decrees advertised the holdings for sale. The Opposite Parties who claimed to have purchased parts of the holdings from the raiyats and who were not recognised by the Petitioner landlord applied to deposit the decretal amounts in Court under sec. 170 cl. (3) of the Bengal Tenancy Act. The Opposite Party in Rule No. 886 of 1923 stated in his application before the Munsif that the raiyats of the Petitioner sold 17 bighas and odd of the holding to one Pitambar Baur, and sold the rest of the holding, 10 bighas and odd to Nanda Kumar Baur who sold his 10 bighas and odd to the Opposite Party, and that the raiyats were no longer in possession. In the other two Rules 887 and 888 the Opposite Parties claimed to be part transferees from the raiyats.

The Petitioner objected to the deposits. The Munsif of Diamond Harbour, by his orders dated the 13th June 1923, allowed the deposits. Against these orders the landlord Petitioner obtained these three Rules. It was

contended on his behalf that the interests of the Opposite Parties, either as transferees of the whole or part of non-transferable occupancy holdings were not voidable on the sale but would pass by the sale of the holdings in execution of the decrees against the raiyats, and as such they were not entitled to make the deposits under sec. 170 cl. (3) of the Bengal Tenancy Act:

Held—That the Opposite parties were not entitled to make the deposits under sec. 170 cl. (3) of the Bengal Tenancy Act, and the orders of the Munsif allowing the deposits were set aside: The interest of an unrecognised transferee of a non-transferable occupancy holding passes by the sale and is not voidable on the sale.

Nalin Behari v. *Fulmani*, 16 C. W. N. 421; *Mahmmad Ismail* v. *Satyesh Chandra*, 26 C. W. N. 170 (notes); *Kumar Narendranath Mitter* v. *Abdul Molla*, 27 C. W. N. 175 (notes) followed.

Tarak Das v. *Haris Chandra*, 17 C. W. N. 163; *Ahmadullah* v. *Hakaru Sahu*, 20 C. W. N. 39 referred to and not followed.

Their Lordships *inter alia*, held as follows: "When the transferee of a non-transferable occupancy holding has not been recognised by the landlord a decree obtained against the tenant transferror would be binding on the unrecognised transferee, and in execution of the decree the interest of the transferee would also pass along with the interest of the transferror and the auction-purchaser gets the interest of both the persons, the transferror and the transferee, who were interested in the holding. It can therefore hardly be said that the interest of the transferee is one which is voidable on the sale and therefore upon the terms of the section it would appear that the transferees are not entitled to make the deposit under sec. 170, cl. (3) of the Bengal Tenancy Act.

We are asked on behalf of the Opposite Party having regard to the conflict of decisions that this question should be referred to a Full Bench. But the view we now take has been taken generally in a number of cases and these cases being more recent than the case in 17 C. W. N. 163 we do not think necessary to make any reference to a Full Bench.

Furthermore both of us agree with the reasoning in the decision of one of us reported in 27 C. W. N. 175 (notes) mentioned above. The case in 20 C. W. N. 39 merely follows the decision in 17 C. W. N."

Rai Surendra Chandra Sen Bahadur and *Babu Hemendra Chandra Sen* for the Petitioner.

Mr. S. C. Maity and *Babus Kanaidhan Dutt* and *Jatis Chandra Guha* for the Opposite Party.

H. C. S. *Rule made absolute.*

CIVIL REVISIONAL JURISDICTION. Before M. N. MUKERJI. J. CIVIL REV. No. 385 OF 1923. JATINDRA CHANDRA CHOUDHURI, Decree-holder, Petitioner *v.* THE RANGPUR BANK, LTD., and another, Opposite Party. The 26th March 1924.

Mortgage of movable without delivery of possession, if legal.

The Petitioner obtained a Small Cause Court decree against the Rangpur Tobacco Company, Ltd. and in execution thereof attached some movable properties. By a deed of mortgage the judgment-debtor the above Tobacco Company had, long before the execution of the decree, mortgaged all its movable and immovable properties to the Rangpur Bank, Ltd. The Bank preferred a claim under sec. 73, cl. (b) of the Civil Procedure Code. This claim was objected to by the decree-holder on the ground that the movables which were in the possession of the judgment-debtor could not be mortgaged as no possession was delivered to the mortgagee the Bank. This objection was overruled by the execution Court:

Held—That having regard to the preamble of the Contract Act and the Transfer of Property Act a mortgage of moveables without delivery of possession is legal (9 C. W. N. 14: 22 C. W. N. 758; 4 B. L. R. 577; 8 Bom. L. R. 344 referred to).

Babu Rishindra Nath Sarkar for the Petitioner.

Babu Phanindra Lal Maitra for the Opposite Party.

S. C. C. *Case remanded.*

[illegible] Weekly [illegible]

Vol. [illegible] MONDAY, MAY 12, [illegible] [illegible]

The Report of the Bar Committee.

The Bar Committee have been well-advised in dropping the idea of an All-India Bar Council. The proposal for the establishment of an Indian Bar was first made by Lord Haldane giving evidence before Lord Lytton's Committee in July 1921, and was definitely embodied by Mr. Iswar Saran in a resolution which he moved that year in the Legislative Assembly recommending "legislation with a view to create an Indian Bar so as to remove all distinctions enforced by statute or by practice between barristers and vakils." The idea of an Indian Bar or of an All-India Bar Council is attractive but impracticable as the Bar Committee finds. The two chief obstacles in the formation and proper working of such a body are, first: a central body would necessarily have inadequate knowledge of local conditions and a provincial Bar is not likely to submit readily to being governed by a body which would necessarily contain a majority of members insufficiently acquainted with its special needs and difficulties. And secondly, busy practitioners could not be expected to attend frequent meetings of an All-India Bar Council at places far distant from their homes. An All-India Bar Council if set up will in course of time get into the hands of a limited number of men who may use their position irresponsibly.

The Bar Committee have proposed that there should be a Bar Council in every province, and that its constitution should be as follows. The number of members should be limited to fifteen of whom four should be nominated by the High Court of the Province. The remaining eleven should be selected by the advocates of the High Court. It is left to the High Courts of Calcutta and Bombay to determine how many of the eleven should be advocates entitled to practise on the Original Side. Of the eleven to be elected by advocates, the Committee have recommended that six should be advocates of ten years' standing. As regards the powers of the Bar Council, the Committee's recommendation is that it should have power to make rules subject to the approval of the High Court in respect of the following matters.—

(a) The qualifications, admission and certificates of proper persons to be advocates of the High Court.

(b) The powers and duties of advocates.

(c) The conduct of any examination which may be prescribed by it and the fees to be paid for appearing at the same.

(d) Legal education, including the delivery of lectures to students and the fees chargeable therefor.

(e) Matters relating to the discipline and professional conduct of advocates.

(f) Procedure and practice in cases falling within the disciplinary jurisdiction of the Council.

(g) The method of holding elections of members of the Council and all matters incidental thereto.

(h) The meetings of the Council, the quorum necessary for the transaction of business, the election of a President or other officer and the appointment of committees for special purposes.

(i) The period for which a Council, after the first Council, should hold office and the filling of vacancies occurring between elections.

(j) The terms on which advocates of another High Court may be permitted to appear occasionally in the High Court to which the Council is attached and

(k) any other matter prescribed by the High Court.

The Council of Legal Education in England is the sole authority in regard to all matters concerning the admission of Barristers, their qualifications as well as the examinations they have to pass. They prescribe the course of instruction to be followed by students reading for the Bar, and [illegible] University degree is no passport [illegible] Here the state of things is [illegible] degree with some other [illegible] lutely essential. The Bar [illegible] proposed any alteration [illegible] that they

have suggested that the Bar Council may make some arrangement "to supplement the education the students receive at the Universities by the provision of practical training or lectures on the procedure of the Courts and the duties of members of the legal profession." In our opinion, the ideal which the Bar Council should have in view is its complete independence in matters relating to the admission of men to the Bar and the examinations they have to pass. The University should have nothing to do with the profession. Under the present arrangement the work of the University materially suffers because of the arrangements it has to make to meet the needs of those who intend to join the legal profession.

Disciplinary powers of a limited character have been proposed to be given to the Bar Council over advocates. The Committee have recommended that the Bar Council should have power either of its own motion or on complaint or on reference by the High Court to inquire into all matters of the kind referred to in secs. 12 and 13 of the Legal Practitioners Act, breaches of rules and other improper conduct in which an advocate is concerned, and make a report to the High Court with a recommendation as to what action should be taken by the Court. The existing disciplinary jurisdiction of the High Court is maintained but the Court will be bound, before taking disciplinary action against an advocate, except in regard to contempt of Court and the like, to refer the case to the Bar Council for enquiry and report. For ourselves we should like to see the existing disciplinary jurisdiction of the High Courts taken away and vested in the Bar Councils. But we have our doubts whether a provincial Bar Council will be found strong enough to exercise their disciplinary jurisdiction in cases where it ought to be. So far as our experience goes the existing Bar Associations have not shown much keenness in exercising their influence in matters where it ought to be, as for example, touting by members of the professions. There are no grounds for hoping that the Bar Associations when converted into Bar Councils will prove more jealous of the etiquette of the profession or of its integrity than they have hitherto been. We know that during recent years there have been a few cases where the action taken by some High Courts against certain members of the profession under the disciplinary jurisdiction has not given satisfaction to the public and the profession and may have been prompted by considerations of an extra-judicial character. But so long as the members of the profession remain unmindful of the duties they owe to it, individually and collectively, so long, we are afraid, the existing disciplinary jurisdiction of the High Courts will have to continue.

Correspondence

ADMINISTRATIVE WORK BY JUDICIAL OFFICERS.

To

The Editor, "Calcutta Weekly Notes."

Dear Sir,

Your editorial notes of the 31st March and 14th April 1924, ably point out the defects of the present system of allowing the return of judicial work of the subordinate judiciary of a district to pass through the District Judge's Sheristadar. There is also another serious drawback of this system to which I beg to draw the attention of the Civil Justice Committee through your columns. It is the interference by the District Judge's Sheristadar with the administrative work of the subordinate judiciary.

It had been pointed out before the Committee already that the perversity and inefficiency of ministerial officers have something to do with the delay in judicial proceedings. The situation is rendered more complicated by the fact that judicial officers under whom they serve have to write to the District Judge for punishment of their guilty subordinates. These letters are put up before the District Judge by his Sheristadar, the chief ministerial officer of the district. This officer even though he is honest and competent, has a natural sympathy for the *amlah* reported against, and instead of being an independent assistant of the District Judge in the performance of his functions, he acts in reality as the *amlah's* advocate in an *ex parte* hearing so to say. It thus not unoften happens that a clerk whom a Munsif reports against for punishment is rewarded with a promotion, through influence at headquarters. A concrete example may be cited from Howrah. A judicial officer whose official life was simply made miserable by the notorious insubordination and neglect of duty of one of his subordinates, requested the District Judge to suspend him but instead of being punished the man was transferred to a lucrative post in a permanent Court, and it was after writing a strong demi-official letter

personally to the District Judge that the Munsif could get the *amlah* suspended.

Another instance may be added. Considerable delay and difficulty occur in those cases where local investigation Commissioners have to be appointed, for in such cases the appointment is made by the District Judge. Suggestions have already been made, I believe, to empower local Courts to appoint Commissioners direct in such cases, as they can use their choice in appointing a person who is able, prompt and ready to do the work expeditiously, and the time and labour spent in writing to the District Judge, who has no personal knowledge about the Commissioner, for such appointment and the consequent employment of a man who is perhaps not ready to work promptly, can be avoided. The District Judge of Hooghly (which includes Howrah) has on the other hand lately issued a Circular directing the appointment of Partition Commissioners, which had been hitherto done locally, through him. The law does not provide for this and besides causing waste of time, labour and additional expense, it helps the growth of favouritism in the giving away of such commissions. The District Judge himself cannot be reasonably expected to spend his time and energy in scrutinising such matters and the duty must necessarily fall upon his Sheristadar with its consequent evils. The Bar has strongly protested against this innovation.

As similar drawbacks are present in almost every district it is necessary to make a general suggestion for remedying the defect. The best course seems to be, as suggested by you, that the administrative work of the district instead of coming to the District Judge through his Sheristadar, should in future be dealt with by a senior Sub-Judge and only important matters be put up before the District Judge. This officer may be regarded somewhat like the personal Assistant to the Divisional Commissioner, and the time devoted by such officer for such work may be duly noted in his diary for consideration at the time of estimating his general outturn of work. This will not only help better administration of the district but will give a better tone to it and at the same time bring the ministerial officers under stricter discipline and control.

Yours truly,

KHAGENDRA NATH GANGULY,

Vakil, M. L. C.,

Hony. Secretary, Bar Association, Howrah.

The 5th May 1924.

COMMITTING MAGISTRATE'S POWERS.

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

As the sufficient grounds for committing to Sessions Court are not, in any way, defined in Criminal Procedure Code, dispute often arises about the power of a Magistrate in cases triable by the Sessions Court. The *primâ facie* case that warrants a committal is defined in English Law as one "that is sufficient to put the party on his trial for an indictable offence." *Vide* Stat. 11 and 12 Vic., Ch. 42, sec. 25.

Under the Criminal Procedure Code, it is, however, clear that the enquiring Magistrate is not a mere automaton or a machine just recording the evidence and then making a bundle of papers and sending them up to the Sessions Court holding that the cognizance of the case for actual trial belongs to the Sessions Court. That the Magistrate should exercise his judicial mind and should weigh evidence seems to be clear from secs. 209, 210 and 213 of Criminal Procedure Code. The true principle appears to be expressed in the English statute mentioned above. While nobody disputes that the cognizance of the case for actual trial belongs to the Sessions Court and that no Magistrate can supersede the power of the Court of Sessions, the Magistrate should at the same time see whether in a case there is enough evidence to put a party on his trial following the English principle stated above. Thus when credible witnesses make statements which, if believed, would not sustain a conviction the Magistrate must discharge the accused. As laid down in 5 All. 161, *In the matter of Lachman* v. *Juala and others*, "this provision of law is calculated on the one hand, to save the subjects from prolonged anxiety of undergoing trials for offences not brought home to them; and, on the other hand, to save the time of Court of Sessions from being wasted over cases in which the charge is obviously not supported by such evidence as would justify a conviction." Now under secs. 209 and 210, Criminal Procedure Code, a Magistrate is to commit or not as there are or are not in his opinion sufficient grounds for committing. The wholesome provision of enquiry is with a view to find out whether there is at all any necessity for sending up the case to the Sessions Court and which necessity must be found out by "taking all such evidence as

may be produced in support of pr[illegible]tion." *Vide* 208, Cr. P. Code. For the [illegible] legitimate object of a prosecution is to secure not a conviction but that justice be done and the prosecutor is not therefore free to choose how much evidence he will bring before the Court and he is bound to produce all the evidence bearing on the charge and to call anybody and everybody able to give important information by reason of their connection with the transactions. This has been clearly laid down in 10 Cal. 1070, 14 Cal. 245 and F. B. 16 All. 84. As laid down in *Rashbeharilal* v. *Emperor*, 12 C. W. N., it is not incompetent to a Magistrate holding a preliminary enquiry into Sessions cases to examine the credibility of evidence adduced in the course of enquiry and such Magistrate should not commit the accused for trial in the Sessions Court if he be of opinion that notwithstanding direct evidence adduced against the accused, the prosecution case is improbable and evidence is unreliable. It has now been settled law that a Magistrate holding a preliminary enquiry would not exceed his jurisdiction if he examines the testimony of witnesses adduced before him in the course of enquiry and it is only by such examination that a Magistrate can ascertain in every case whether there are sufficient grounds for committing or not.

Yours truly,
BAIDYANATH MUKHERJI, M.A., B.L.,
Pleader, Siliguri.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before NEWBOULD AND B. B. GHOSE, JJ. APPEAL FROM ORIGINAL ORDER No. 341 OF 1922. KHAJEH SALAUDDIN and another, (Judgment-debtors), Appellants *v.* MUSSAMMAT AFZUL BEGUM and another, (Decree-holder and Judgment-debtor), Respondents. Heard 9th and 10th April 1924. Judgment 10th April 1924.

Limitation Act, Art. 183—Order transmitting decree for execution, if "revivor" of decree—Guardian appointed in suit, if remains guardian for execution.

Johura Begum obtained a decree for her dower money against her two minor children and her minor step-son in the Original Side on 24th February 1909. Upon application for transmission of the decree for execution by the Respondent, Afzul Begum, assignee of the decree, the Master made an order on 17th May 1920 that the certified copy of the decree and a certificate of non-satisfaction, signed by a Judge, be transmitted to the Court of the District Judge of Dacca for execution. The latter transferred the same to the 1st Court of the Sub-Judge, Dacca, for execution.

Application for execution was then made on 2nd December 1921 and the judgment-debtors were described in it as represented by Babu Anil Nath Basu, Solicitor, High Court, who was appointed the minor's guardian *ad litem* in the original suit in which the decree sought to be executed was passed. In this execution case the judgment-debtors' money in the hands of Mr. H. C. F. Myer was attached; upon Mr. Myer's objection to execution under secs. 47 and 151, C. P. Code, the learned Subordinate Judge decided that Mr. Myer had no *locus standi* under sec. 47 as the existing guardian *ad litem* had not been removed or retired under Or. 32, r. 11. But still he went into the merits of the case and decided the issue of limitation against him.

Held—That the guardian *ad litem* appointed in the original suit does not continue as such without a fresh appointment during the execution proceedings.

Kinsman v. *Kinsman*, [1831] I. R. & M. 622 referred to and followed.

Sec. 51 of Act IX of 1879, B. C., referred to.

That the order made by Master, Original Side on 17th May 1920 for transmission of decree for execution did not operate as a revivor under Art. 183., Sch. I of the Limitation Act (IX of 1908).

Chatterpat Singh v. *Rai Bahadur Saitu Sumarilal* [1916] 20 C. W. N. 889: [illegible] C. 903; 23 C. L. J. 645 (F. B.) followed and referred to.

Mr. B. L. Mitter and *Babu S. N. Guha* for the Appellants.

Babu Probodh Chunder Das for the Respondents.

H. D. C. *Appeal decreed.*

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, MAY 19, 1924. [No. 26.

Contents.

NOTES

The late Sir Courtenay Peregrine Ilbert.

Sir Courtenay Peregrine Ilbert's death, which took place on the 14th instant, will recall to many minds the great unrest and agitation which followed the introduction of the Bill associated with his name. It was during the viceroyalty of Lord Ripon who, in many respects, was much in advance of his times. The noble Lord conceived the idea of racial equality between Indians and Europeans, and, under his inspiration, Sir Courtenay introduced a Bill in the Council in 1883, one of the provisions of which enabled an Indian Magistrate to try a European British subject. The European community strongly resented the measure and organised an agitation on a large scale, characterised by a display of personal feeling against the Viceroy. Members of the Bar and other branches of the legal profession took part in the agitation and for a time the relations between some members of the profession and others became strained. The Europeans succeeded in their objective. The provision conferring on an Indian Magistrate the power of trying a European was withdrawn and Lord Ripon resigned.

Sir Courtenay after having served his time as Law Member returned to England where he came to be employed in several responsible capacities till he was appointed Clerk to the House of Commons in 1903. "He has died full of years," as a Calcutta contemporary puts it, "nearly half a century after the stormy episode of the Ilbert Bill; the tranquil autumn of his life is symbolical; and the smooth passage of the Racial Distinctions Bill last year affords a gratifying illustration of the extent to which the European community in this country has freed itself from the prejudices which wrecked Lord Ripon's Viceroyalty."

The Tariff Bill.

The Tariff Bill which comes up for consideration during the last week of this month before the Assembly is a measure of considerable importance in that it recognised the principle of "discriminating protection" for Indian industries. We do not wish to go beyond the scope of our weekly by discussing the merits of the Bill, but we take this opportunity to congratulate the Government on the strength and independence they have shown by introducing the present measure in compliance with the wishes of the Assembly.

Byron and the Law.

The following extract from our London contemporary, *The Law Journal*, will be of interest to those of our readers who still retain their interest in English poets:—

So widely and fiercely did Byron wield his satiric lash that it would have been surprising if the law and lawyers had escaped it. The author of 'Don Juan'—the centenary of whose death is being celebrated to-day—spared, indeed, neither the law nor those who practise it. English literature may be searched in vain for a more disagreeable sketch of a legal adviser than that of Don Alfonso's attorney:—

With prying snub-nose and small eyes he stood,
Following Antonio's motions here and there,
With much suspicion in his attitude,
For reputation he had little care;
So that a suit or action were made good,
Small pity had he for the young and fair;
And ne'er believed in negatives, till these
Were proved by competent false witnesses.

The only consolation that solicitors can obtain from reading Byron is that he is equally harsh in his treatment of barristers. They, too, are presented as strife-mongers rather than as peace-makers. In an earlier adventure of Don Juan the lawyers, we are told, 'did their utmost for divorce,' but the husband's death put an end to their labours.

He died, and most unluckily, because
According to all hints I could collect
From counsel learned in these kinds of laws
(Although their talk's obscure and circumspect),
His death contrived to spoil a charming cause.

. . . .

Lawyers need not, of course, take seriously Byron's treatment of them in his great satiric poem. The members of other professions, including the Church and Medicine, would be their companions in sombre protest if they did. . . .

AWARD BY ARBITRATOR NOT APPOINTED BY COURT WHILE SUIT PENDING.

The decision of the Calcutta High Court in the case of *Mahmud Sheikh* v. *Messrs. Kankinarah Co., Ltd.*, reported in 28 C. W. N. 634 deals with an important point in the law of arbitration.

The facts were that the parties to a suit filed a petition for compromise on certain terms and the remaining matter in difference between the parties was referred to the arbitration of three persons named in the petition of compromise and reference. One of the arbitrators having refused to act, the other two arbitrators co-opted another member to which course the parties consented.

The Defendants applied for setting aside the award. It was held that the award could not be set aside though the addition of the co-opted arbitrator was made without the intervention of the Court.

It is well-settled law that "where parties to a litigation desire to refer to arbitration any matter in difference between them in a suit, in that case all proceedings from first to last are under the supervision of the Court"—29 Cal. 167 at 182 P. C. *Primâ facie*, therefore, no arbitrator can be appointed quite independently of the Court; secs. 4 and 5 of the Second Schedule of Civil Procedure Code provide apparent exceptions. Sec. 4 relates to cases of difference of opinion and we are not concerned with the same in the present case. Other exceptional cases are mentioned in sec. 5, *e.g.*, when on refusal by an arbitrator to act, any party serves the other party with a written notice to appoint an arbitrator and in compliance with such notice an appointment is made by the party so called upon. No such thing happened in the case under consideration. Sec. 5 (*1*) also provides for a case where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, in which case any party may serve the arbitrators with a written notice to appoint an umpire. No such thing happened either. The order of reference is not stated to have contained any powers to the arbitrators to co-opt a member: no written notice has been mentioned. The words "empowered by the order of reference" are somewhat significant. They seem to make it necessary that the power must be contained in the order of the Court and not in mere subsequent agreement or acquiescence of the parties. Sec. 6 also points in the same direction. It says: "Every arbitrator or umpire appointed under paras. 4 and 5 shall have the like powers as if his name had been inserted in the order of reference." It shows that an arbitrator or umpire has no power unless his name is in the order of reference. In certain exceptional cases the law itself provides the procedure which must be followed in order that in the eye of the law subsequently ascertained names should be deemed to be in the order of reference.

It may be said that sec. 6 is simply intended to define and not to confer jurisdiction. Be that as it may, sec. 5 (*2*) provides that in case no appointment is made in accordance with sec. 5 (*1*) the Court may make an appointment. That does not seem to leave any room for appointment by the arbitrator on the mere consent of parties not given in compliance with the written notice mentioned in sec. 5. The Court observed: "I cannot adopt the view that the omission to move the Court under sec. 5 (*2*) of the Second Schedule of the Code of Civil Procedure rendered the award a nullity." Two reasons are apparently assigned for this rule. One, that the foundation for proceedings in arbitration is the consent of the parties. As to this, it must be said that the foundation is the consent of the parties' plus an order of the Court. If either is absent then the award as an award is bad unless the award itself is accepted by all parties when it would amount to an adjustment of the suit. The order of Court is not dispensed with by any provision of law. Even in the exceptional cases mentioned in secs. 4 and 5 the "Order of Court" element is preserved by a fiction so to speak because the name is deemed to be "inserted in the order of reference." In short as to the personnel of the arbitration tribunal, the order follows the petition, and jurisdiction follows the order. As to the argument that some other law may validate such an award, the answer is thus supplied by Rankin, J., in 49 Cal. 608:—"It is difficult to see what point there is in the second schedule saying or meaning that arbitration must be done in a particular way if, according to some other law or principle, it may still be done in another way."

The second reason given in support of the judgment under consideration is: "As an award it could be set aside only on one or more of the grounds mentioned in sec. 15 and it is not alleged that any of the grounds exist." This does not seem to be correct because one of the grounds mentioned in sec. 15 is "being

otherwise invalid" and the Defendant contended that the award was invalid. However, sec. 15 is not necessarily exhaustive. It may be that sec. 15 contemplates a case of an award by properly appointed arbitrators.

The objection in the case was an objection going to the very root of the jurisdiction of the three persons purporting to act as arbitrators together. In connection with sec. 11 of Indian Arbitration Act, it has been repeatedly held that questions of jurisdiction often arise which are not covered by the section. Questions of jurisdiction have always been very strictly dealt with and in the case of a pending suit the Court retains seisin except to the extent it parts with the same to an extra-judicial tribunal.

The point involved in the case has been the subject of serious diversity of judicial opinion both in the past and recently. The better view seems to be that the existence of a suit and the absence of an order of Court clothing the co-opted gentleman with jurisdiction is an effective objection to the validity of the award and the Defendants would seem to have been entitled to take up such a position although they consented to the co-option. As Rankin, J., observed in a similar case (25 C. W. N. 127): "Their law is better than the principles of their conduct."

K. P. KHAITAN,
Bar-at-Law.

Reviews.

THE LAW OF EVIDENCE IN BRITISH INDIA. *By M. C. Sarkar and S. C. Sarkar. Second Edition. Re-written and re-arranged by S. C. Sarkar. M. C. Sarkar & Sons, 90/2 1, Harrison Road, Calcutta. 1924.*

The Indian Evidence Act which codified the English law of evidence (with modification here and there) for British India is not a text-book but a statute, and it was inevitable that, during more than a half-century it has been in force in this country, it should be subjected to meticulous examination and interpretation by the High Courts and the Privy Council. The learned writer of the foreword, himself a High Court Judge, expresses surprise that this should have been so, and seems inclined to lay the responsibility for it on the reporter rather than on the Judges themselves, whose platitudes, according to him, are solemnly recorded as authoritative expositions of the statute. [illegible] responsibility really rests on the highly abstract character of the legal rules themselves, which Sir James Stephen's innovations have rather aggravated than diminished, so that glosses are necessary at every step to enable the judiciary and the legal practitioners in presenting their cases before the Courts to apply them with a reasonable approach to the intentions of the framers of the statute. This in itself is a sufficient justification for the excessive amount of case notes which have found their way into the commentary and the present editor deserves the thanks of the public interested in the proper administration of justice in this country for the very conscientious, comprehensive and exhaustive manner in which he has sought to work up the relevant judicial decisions, Indian and English, into his notes. That he has not merely contented himself with noting up recent decisions and incorporating them in the text of the previous edition is so much the more to his credit. The result is a marked increase in bulk, which is to be regretted. More attention, we hope, will be paid in future editions to compression, for brevity, if it is the soul of wit, is also the essence of a good commentary. The danger of all bulky treatises is that you cannot see the trees on account of the wood, a difficulty which is only partially got over by a carefully prepared subject index such as we have got in the present case. The appendices to the present edition include a list of places to which the Act has been specially applied, extracts from the proceedings of the legislature embodying elucidatory observations by the originator of the Act, Sir James Stephens, and from his Introduction to the Act and the texts of the Indian Oaths Act, the Banker's Books Evidence Act and the section of Act XIX of 1853 and Act X of 1855 which confers on a party a right to sue in damages a person who being summoned fails without lawful justification to give evidence. We have no doubt that the commentary revised and enlarged as it has been in the present edition will prove of real assistance to Judges and legal practitioners.

THE LAW OF GIFT IN BRITISH INDIA. *By Bimala Charan Law, M.A., B.L., Calcutta and Simla: Thacker, Spink & Co. 1924.*

This little Book collects in one place the law of gift (i) as applicable to Hindus, (ii) as applicable to Mahomedans and (iii) as contained in the Transfer of Property Act. It is, we are

glad to observe, not a mere collection of texts and case notes, but an intelligent attempt to co-ordinate them into a coherent commentary, which with the assistance afforded by marginal notes and a subject index is bound to be of use to legal practitioners. In the appendices are collected the Sanskrit texts bearing on the Hindu Law of Gifts, the relevant sections of the Stamp and Registration Acts, and a model form of a deed of gift. The book is all that can be desired in the matter of mechanical execution.

SUPPLEMENT TO THE FOURTH EDITION OF SEN'S BENGAL TENANCY ACT. *By Rai Surendra Chandra Sen Bahadur, B.L. Calcutta: Das Gupta & Co., Publishers and Book-sellers; 64/3, College Street, 1924. Price Rs. 3-8.*

No statute comes up for consideration before Courts of law in the three provinces in which it is applicable oftener than the Bengal Tenancy Act and no commentary of the Act is called into requisition to aid Judges and legal practitioners in administering the Act more frequently than Mr. Sen's. Even Mr. Sen's untiring industry cannot, it seems, keep pace with the development of the case-law round and about the provisions of one of the most difficult statutes which Courts of law are called upon to interpret and administer daily, if not hourly, in places where it is applicable. By issuing this *interim* collection of case-notes and comments (always acute and to the point) he has supplied a widely-felt want. Besides the notes and commentaries, the reader will not fail to notice the new price-lists, the subject index and the *addenda* of cases which were decided when the supplement was passing through the press, the statement of repeals and amendments and the quite attractive get-up of the compilation. The supplement will undoubtedly serve its purpose and save the legal practitioner the trouble of hunting for references in Indexes and Digests until the publication of the next edition of the commentary which the supplement itself shows must be in active preparation.

THE PROVINCIAL INSOLVENCY ACT (V OF 1920). *By Mahim Chandra Sarkar Rai Bahadur. Third Edition By Subodh Chandra Sarkar, B.L.: M. C. Sarkar and Sons. 90-2A, Harrison Road, Calcutta, 1924.*

We cannot speak too highly of the untiring industry of Mr. Sarkar, which has enabled him to revise and bring up to date practically simultaneously two commentaries on two enactments, one the Evidence Act and the other the Provincial Insolvency Act. Yet Mr. Sarkar is full of regrets for the delay which has taken place in bringing out this third edition of the latter book. However, what delay there has been is more than made good by the quality of the revision to which it has been subjected. We have tested the notes and found them up-to date and informing. The inclusion of the Rules of the several High Courts and an *addenda* of cases which were decided during the preparation of the present edition contribute to the making of the commentary as complete as one may desire it to be. The get-up of the publication is commendable.

THE CIVIL COURT PRACTICE AND PROCEDURE. *By Atul Chandra Ganguli, M.A., B.L., Member, Bengal Civil Service (Judicial). Third edition: Calcutta Weekly Notes Printing Works, 3, Hastings Street, 1924. Price Rs. 4-12.*

This is a greatly enlarged edition of a compilation which has established its usefulness by creating and supplying a demand which can be properly met by itself. There are certain new features in the present edition of which the most notable are the incorporation of portions of the Bengal Court Fees and Stamp Acts and the addition of a number of new plaints and written statements and chapters on "The Laws of Everyday Reference" and "Practical Hints for Cross-examination of Witnesses in Civil Cases." The addition of matter in both the English and the Bengali parts has necessarily increased the bulk of the book. It would be impossible without trenching unduly on our space to state in detail all the variety of materail which has been collected in it. Suffice it to say, that the wants of the beginner in practice in particular have been closely studied and supplied with thoroughness and insight. In the present edition, the compilation will without doubt maintain the hold it has secured as a practical guide for lawyers and students in the Mofussil.

THE

Calcutta Weekly Notes.

MONDAY. MAY 26, 1924. [No

ents.

The late Sir Asutosh Chaudhuri.

It is with a sense of profound grief that we have to record the death of Sir Asutosh Chaudhuri who was connected with the Calcutta High Court and with public life for the last thirty-eight years. Although he was ailing for some time, no one apprehended that the end was so near. His sudden death is such a great shock to us that we find ourselves unable to pay a worthy tribute to his memory in this issue. We, therefore, publish a report of what was mentioned in Court, and also a sketch of his career published in the Indian Cyclopaedia some years ago with some additions and bringing it up-to-date.

Law's Delay and the Civil Justice Committee.

We have been receiving so many communications on the subject that we find it impossible to make room for all of them within the limited space available in our columns. We are consequently, much against our inclination, driven to make some sort of selection amongst them, and we wish it to be understood by our correspondents that we do so not because we do not value the suggestions contained in them or fail to appreciate the time and labour spent by them in framing them. In view of the pressure on our space, we would not be justified in publishing in these columns suggestions which merely confirm what we or our correspondents have already previously expressed. But we propose to give publicity to every fresh suggestion of value we come across in these communications and publish as many of them as we consider desirable *in extenso* with our own remarks on them, for or against, as may appear proper.

We desire to draw particular attention to the communication which appeared in a previous issue (p. cxviii) from Mr. Khagendra Nath Ganguli, Vakil, M.L.C., which gives practical illustration of the evils which follow from leaving the supervision of the ministerial staff and the appointment of Civil Court Commissioners for local investigation in the hands of the District Judge, which really means leaving these matters in the hands of his Sheristadar. We do not know if these evils are prevalent in the same degree in other provinces. But its prevalence is so well established in this province that we think that the matter should receive the attention of the High Court at once without waiting for the recommendations of the Civil Justice Committee.

In one of our previous issues, we took exception to the sweating of the subordinate judiciary which follows through leaving leave vacancies unfilled—which, we thought, was prompted by motives of economy. Thereby, it is said, we suggested that the blame for not filling up these vacancies rested on the Government or the High Court—a suggestion which, we are told, is not altogether fair to the authorities. It is, we are told, at the instance of specially zealous District Judges that these vacancies remain unfilled. If a District Judge says that he can get the work done by a depleted staff and takes the responsibility for the same, it is not for the High Court or the

Government to force additional officers on him. There is justice in this comment, but we say that the High Court should take care to satisfy itself that the judicial work of the District is not sufficient to occupy the time and energies of the full complement of officers before acceding to the District Judge's proposal to work with a reduced staff. In any case, the District Judge who justifiably puts forward such a proposal for sanction does no more than his duty and should not get any special credit for getting such a proposal through when it is justified by the circumstances of his District, whilst such a proposal should be unreservedly condemned where the circumstances do not justify it. Getting work done by others by pressure does not prove one's own merits as a judicial officer and we should be glad if it was expressly recognised that this will not be counted in his own favour in the matter of special promotions.

Mr. Rasbehari Mookerjee whose letter we published and commented on in a previous issue will excuse us for not printing *in extenso* his reply in view of its length. But we take this opportunity to note that his suggestions about the extension of the jurisdiction of the Munsifs had in view not the levelling down of Sub-Judges to the rank of Munsifs but that of levelling up the Munsifs to the rank of Sub-Judges. His idea, he says, "is of one uniform cadre of judicial officers, with graded jurisdictions, on the usual provincial scale of pay, with a select grade of Civil Judges of District rank, wielding reserved jurisdiction and appellate powers." As regards his proposal to confer summary powers in dealing with rent-suits, he writes: "Given the right sort of officers (and I admit that that is an important qualification)," the innovation can only result in saving of time and clerical labour, and he adds "given the right spirit of administration, I am confident there will be no lack of the right sort of men." Well, what is this "right spirit of administration?" And how are the "right men" to be discovered and who is to discover them? In this imperfect world, it is safer, we think, in framing a system, not to count upon super-spirit and supermen.

In conclusion, Mr. Mookerjee points out that we were in error in supposing that he had suggested a "fundamental alteration" in the method of trial as enacted in the Civil Procedure Code. What he stood out for was, he says, the "seasoning" of the Code, by increasing the scope (if we understood him aright) of arbitration through Court—some sort of compulsory arbitration, which itself appears to us to be a contradiction in terms. "Arbitration," he writes, "is in the air, and it cannot be in the interest of good administration to let the idea work in antithesis to, or rivalry with the Civil Court. The provisions about arbitration in the Code were thrown into the form of a separate schedule with the express intention of re-enacting them on comprehensive lines in the future." But we cannot imagine that the framers of the Code of 1908 ever dreamed of compulsory arbitration. Even at the present day, when consent of the parties is the indispensable foundation of an arbitrator's jurisdiction, does not Mr. Mookerjee's own experience tell him that the almost invariable issue of such a proceeding is a strenuous endeavour on the part of the defeated party to nullify the award and to re-start the case before the Court? No: this idea of solving civil disputes by arbitration is too airy to come within the range of practical politics. Trial with jurors is nearer the mark, but the trend of forces in England, the home of jury trials, is in the direction of doing without them in civil litigation.

Reciprocity in the matter of execution of decrees of British Indian Courts and Courts of Feudatory States.

Mr. M. Rama Chandra Rao, B.A., B.L., Advocate and High Court Vakil and Member, Mysore Legislative Council, about a year ago, moved a resolution in the Mysore Legislative Council recommending that as, according to the existing law, *ex parte* decrees against non-resident Mysore subjects passed by the Courts of British India and of the C. and M. Station, Bangalore, are not executable in the Mysore State and also as *ex parte* decrees passed by Mysore Courts against non-resident British Indian subjects and subjects of the C. and M. Station, Bangalore, are not executable outside the Mysore State, necessary steps be taken by legislation or otherwise to rectify the existing law so that the inconvenience and hardship which people are now put to may be removed at an early date. There is no question that the law in this matter is, as was laid down by the Privy Council in the *Faridkote* case, I. L. R. 22 Cal. 222, that in a personal action a decree pronounced by a Court of a Foreign State *in absentem*, that absent party not having sub-

mitted himself to its authority and not owing allegiance to that State, is by private international law a nullity; and there is no question also as to the inconvenience and hardship that follow from it or the encouragement to fraud this law lends to dishonest foreigners who are free to enter into business relationship within the State and profit by them without the inconvenience of having to meet the obligations arising therefrom except when it may suit their own sweet will and pleasure to do so. The Mysore Government, it appears, promised to give the matter due consideration.

However as the question interests not merely the Mysore State and its inhabitants but also the Government of India and British Indians as also the other Feudatory States and their subjects, the Government of India must obviously be the principal party to any arrangement which may be expected to lead to a satisfactory solution of the problem. Mr. M. Rama Chandra Rao has therefore been seeking to ventilate the matter in British India also, in order that a practical solution of the difficulty may be reached as speedily as possible. As Mr. Rao points out, in order to escape liability for a transaction effected in one territory, a man has only to cross the border and not appear in a suit which may be filed in the other territory for the enforcement of all obligations arising out of that transaction. The recent Reciprocity Bill (No. 15 of 1924) introduced into the Indian Legislative Assembly which seeks to make decrees passed in Great Britain and the Dominions executable in British India will not meet the situation. There is, we agree with Mr. Rama Chandra Rao, even greater necessity for creating reciprocity between India and the British Indian Protected States than between Great Britain and its Dominions and British India. It is time, we think, that the matter was taken up by some member of the Legislative Council. It should be possible to devise a bill which whilst providing proper safeguards may bring in reciprocity of the kind demanded as between at any rate the more advanced Feudatory States and British India, reserving, it may be, power in the Executive Government to extend it to other territories.

THE LATE SIR ASUTOSH CHAUDHURI.

Sir Asutosh Chaudhuri, Kt., Barrister-at-law, Advocate and ex-Judge of the High Court, Calcutta, came from an old zemindar family of Haripur, Pabna, a member of which, Dewan Ram Deva Chaudhuri, the reputed founder of the Natore Raj family, obtained great distinction at the time of Nawab Murshid Quli Khan, the founder of Murshidabad. On his mother's side he was descended from the Roys of Bág (Kasinathpur), Pabna, who trace their descent from one of the twelve Bhuians of Bengal who were territorial magnates and wielded large political powers in Mohammedan times. His father, the late Durgadas Chaudhuri, was a scholar of the Hindu College, and a pupil of Captain D. L. Richardson, and one of the earliest members of the subordinate executive service in Bengal. He practised at the Calcutta Bar for more than thirty years, and during that time was identified with many of the important cases on the Original and the Appellate Side of the Court.

After passing through the usual preliminary course of education, at the Krishnaghur Collegiate School, attended and graduated at the Calcutta University where he was the last student to take the B.A. and M.A. degrees simultaneously.

In 1881 he went to England and entered St. John's College, Cambridge, remaining there until 1885; he graduated in Mathematics in 1884, and in the Law Tripos in 1885. He was for some years one of the editors of the College Magazine, 'The Eagle,' and was one of the founders of the Society of Indian students known as the Mujlis.

At Cambridge he competed for a prize poem on Savarnarola, which was greatly admired for the command he displayed over the English language.

At Cambridge, he was contemporary with Sir J. C. Bose, F.R.S., one of the most celebrated scientists of the day. His inclinations as a young man ran in the direction of literature and most of his spare time at St. John's was devoted to its study.

On his return to India in 1886, he had to face severe competition, and for a time experienced all the vicissitudes of a beginner. There was also at that time some prejudice against Bengali barristers. His talents, however, were appreciated quite early in his career and his work at the Bar speaks for itself.

Outside his profession, he took the keenest interest in politics and as Honorary Secretary to the Bengal Land-holders' Association, he exercised considerable influence. He strongly opposed the partition of Bengal and drafted a representation for the Association which the then Viceroy, Lord Curzon, characterised as the ablest and strongest produced by the opposition. As President of the Bengal Provincial Conference held at Burdwan in 1904, he delivered an address on the political situation of the day, the text being "A subject race has no politics," which created a public discussion in the press of India lasting over a year. Much notice was taken of it in European papers. He meant by it that a subject nation could attain its political and economic salvation by self-help and self-reliance. He believed more in constructive work than in platform politics.

He was a firm believer in the *Swadeshi* movement for which, however, he claimed no political significance. He was of opinion that the industries of India should be encouraged, and on principle claimed for the country rights similar to those enjoyed by the Colonies. As an elected Fellow of the Calcutta University, he took the keenest interest in educational matters, and was closely identified with the 'National Council of Education' with which Dr. Sir Gurudas Banerjee, C.I.E., late Vice-Chancellor of the Calcutta University was also associated.

During the Partition days and the *Swadeshi* movement he was chiefly instrumental in acquiring the Banga Laxmi Cotton Mills, which had been originally started with Bengal capital but had passed into the hands of Bombay merchants.

In 1912, after the Partition of Bengal was annulled, at the zenith of his reputation as a public man and a leader of the Bar, he was offered a judgeship of the High Court at the instance of Sir Lawrence Jenkins, the then Chief Justice of the Calcutta High Court. The acceptance of a judgeship meant an enormous sacrifice of income, yet he accepted it from a sense of duty, although he knew that he would not be able to serve for full time and earn full pension. He retired from the Bench in 1920 at the age of sixty.

REFERENCE AT HIGH COURT.

Tributes to the memory of the late Sir Asutosh Chaudhuri were paid by both Bench and Bar shortly after 1 o'clock when all the judges assembled in the Chief Justice's Court room which was crowded with members of the various branches of the legal profession as well as the general public.

Mr. S. R. Das, Advocate-General, Bengal, said it was with a deep sense of regret and sorrow that he had to announce the death of Sir Asutosh Chaudhuri. Sir Asutosh had been in bad health for the last few months but his death was unexpected and came as a shock to them all. Sir Asutosh was born in 1860 and belonged to the well-known Chaudhuri family of Haripur in the District of Pabna. Early in his life he showed promise of a brilliant career. He was a distinguished graduate of the Calcutta University, taking his B. A. and M. A. degrees in the same year. He then proceeded to Cambridge and joined St. John's College. There also he had a brilliant career and was a favourite pupil of the late Dr. Ruth. After taking his M.A. and LL.D. degrees at Cambridge, he joined the Bar in 1886. His career at the Bar needed no word from him because it was well-known to every one here. Sir Asutosh had a very extensive practice and in cross-examination and advocacy he had few equals in his time. Despite his extensive practice he devoted a good deal of his time to other works, political and social, which he considered to be for the welfare of his country. He was also keen on art and music in which he was considerably helped by the late Lady Chaudhuri. They all had recollections of the musical entertainments and soirees which they had in Sir Asutosh's house. At the request of the late Sir Lawrence Jenkins when he was Chief Justice, Sir Asutosh left a lucrative practice in 1912 and was raised to the Bench. His Majesty the King-Emperor conferred the honour of Knighthood on him in 1917 and he retired from the Bench in 1920, Sir Asutosh's cheerful and genial disposition, his generous hospitality and his genuine and real culture endeared him to all who had the pleasure of knowing him while his acquaintance was not limited to the narrow circle of the Bar but extended to a very much wider circle. Lady Chaudhuri's death was a great and severe blow to him and he did not seem to have recovered since her death. Sir Asutosh's death was a great personal loss to many of them as well as a great loss to the country at large.

The Hon. Dr. Dwrkanath Mitter desired on behalf of the vakils of this Court to join in the expression of deep sorrow at Sir Asutosh Chaudhuri's death. Sir Asutosh, who was a leading member of the Calcutta Bar, was appoint-

ed a Judge of this Court in 1912. In that capacity he endeared himself to the members of the profession by his two great virtues of patience and uniform courtesy. Outside the High Court, before he was raised to the Bench the members of the profession recognised his services to the country. Sir Asutosh took a very active part in the political life of India before he was raised to the Bench. But of all his qualities Sir Asutosh would best be remembered for his goodness of heart and disposition. He was one of those men of whom it might be said that he had no enemies. To Sir Asutosh the words of the poet could fittingly be applied "that even his failings lean to virtue's side."

In the death of Sir Asutosh the legal profession had lost one of its brilliant jewels and the country was poorer by his death.

Mr. J. C. Dutt said that Mr. Mohinimohan Chatterjee, President of the Incorporated Law Society, was overcome by feelings of personal bereavment as Sir Asutosh was related to him and he had therefore requested Mr. Dutt to represent the Incorporated Law Society on this mournful occasion. On behalf of the Society he associated himself with every word that had fallen from the Advocate-General and Dr. Mitter.

The Chief Justice said that his learned brothers and he desired to join in the expression of regret which had been so eloquently made by the Bar at the death of Sir Asutosh Chaudhuri. The last news which he received of Sir Asutosh's illness was that he was better and that there was every hope of his recovery. The result was that the news he received that morning had come as a very considerable shock to most of them. Sir Asutosh belonged to a well-known and highly respected family and his death would be mourned by a very large number of friends. But Sir Asutosh's death would be regretted not only by his friends but he would be missed by the general body of the public throughout Bengal, for he was prominently in the public eye for many years.

Before Sir Asutosh became a Judge he was well-known not only on account of his position at the Bar but also on account of the interest which he took in public affairs. In 1912 Sir Asutosh was appointed a Judge of this Court, sat till 1920 and retired. During these eight years every one would agree that he did much useful work in the Court. Sir Asutosh's knowledge of the customs and habits of this country and his experience in and familiarity with the business and commercial life of Calcutta was a very great asset to him in the administration of justice. After his retirement he again took a prominent part in public affairs and there was no doubt that his death would be felt as a great loss in Bengal.

Sir Asutosh was a high-minded gentleman, kindly, hospitable and of genial disposition, not only to the members of the profession but to all those who knew him. His brethren on the Bench were privileged to be numbered among his friends and his lamented death was deeply regretted by them all. His Lordship asked the Advocate-General to convey their sense of deep sympathy to the members of Sir Asutosh's family. The Advocate-General represented to him that morning that the death of Sir Asutosh was felt so acutely by the members of the legal profession that it would be regarded as a proper thing that the Court should adjourn that day. Having regard to the fact that Sir Asutosh was so prominently connected with the Court and was so universally esteemed not only in the profession but by the public at large, his Lordship thought it would be right to adjourn the Court for the day.

SOME PRACTICAL SUGGESTIONS FOR EXPEDITING TRIAL OF CIVIL SUITS IN BENGAL.

By Satis Chandra Basu, Subordinate Judge, Suri.

1. *Case of Minor Defendants:—*

(*i*) The notice for the appointment of a guardian, and the summons for the hearing of the suit, may be issued simultaneously. If the proposed guardian does not express his willingness to act as such or refuses to act, and it is therefore necessary to appoint a pleader or an officer of the Court as guardian, it will not be necessary to serve a formal summons upon him, it will enough to hand over a copy of the plaint to him and inform him of the date of hearing.

(*ii*) Where the proposed guardian is the natural guardian of the minor and a very near relation, *e.g.*, a parent or a grand-parent or an elder brother, it may, except in special circumstances, be presumed that he is willing to act as guardian although he has not expressly intimated his consent, so as to prevent the waste of time and money by the appointment of a stranger as guardian. Very often the guardian does not appear in the case, not because he is unwilling to act as such, but because he has no defence to take.

2. *Service of Summons*:—

One of the causes of the delay in the proper service of summons is that when the peon goes to the house of the Defendant or the witness, the latter may be temporarily absent from home, it may be for a few hours or a few days. Under the existing system the peon cannot afford to wait or to call again, and he affixes the summons to his house. The consequence is that the Court thinks the service to be not sufficient and orders issue of fresh summons. If the service of summons be entrusted with a local agency its man may call again when the Defendant or the witness returns home, and serve the summons personally upon him.

This local agency may be either the Union Board, or the President of the Chowkidari Panchayat, or better still, a peon of the Court stationed in the mofussil more or less permanently for serving processes in a defined small local area. The peon or the identifier need not come to Court to swear his affidavit, but the President of the Union Board or of the Panchayat or the Chairman of a Municipality may be authorised to administer oath for such affidavits; and the processes and the returns may be sent to and by the peon by registered post.

As an additional precaution a copy of the summons may be sent to the person to be served therewith by registered post with stamp paid for acknowledgment.

3. *Attendance of Witnesses*:—

Witnesses have often to come from long distances or make difficult journeys leaving their ordinary avocations or other important business at home. So they are naturally unwilling to attend unless there is a fair chance of the case being taken up. Under the present system of fixing a large number of cases each day (which the Courts are compelled to do in order to get sufficient work, as there is no knowing in how many cases the parties will apply for adjournment) such assurance can rarely be given. I would therefore suggest the following remedies:—

(*i*) Establishment of Courts at a larger number of stations, so that parties or witnesses may not have to travel long distances. In some stations there are as many as four, five, or even seven or eight Munsifs' Courts. Instead of centralising all these Courts at one station, some new stations may be opened and some of these Courts may be removed there. The ideal station, in my opinion, would be one with not more than two Munsifs.

Similarly I think there need not be in any place more than one Subordinate Judge exercising civil powers. Where there are more than one such Sub-Judge in a District, they may be stationed at some of the outlying Munsifis with powers to receive appeals.

(*ii*) Examination of those witnesses who may attend instead of waiting for the day when all the witnesses of both the parties may find it convenient to come. I think there cannot be any serious objection to the trial of cases "piece-meal" in this way. The circular of the Hon'ble High Court against "piece-meal" trial appears to be based not so much upon any apprehension of hindrance to the fair trial of the case, as upon the harrassment to the parties if the hearing of several *ready* cases go on simultaneously devoting only a part of the day to each case. The only objection that may be advanced against such a course is that it may open a way to the fabrication of evidence for filling up gaps that may be discovered in the evidence of the witnesses already examined, or for reconciling discrepancies. To my mind the danger in this respect is not very great, at any rate the advantage of this mode of examining witnesses will more than counterbalance the disadvantages. The party who is to begin will know that any witnesses whom he may be able to produce will be examined the same day and he will get, on sufficient cause being shown, further time to bring his other witnesses, and the other party will rest assured that he need not bring his witnesses until the former has finished, as is done in the trial of criminal cases.

If the witnesses know that they will be examined on the first day they attend Court and will not have to come again and again, they will all be able to come without any inconvenience if the hearing extends over two or three dates, and it will not be necessary to adjourn a suit for more than two or three dates on the ground of non-attendance of witnesses.

If this system be followed the number of cases fixed for a day may be greatly reduced, thus relieving the Court of much useless work in the way of fixing dates, writing orders, etc., and reducing the harrassment of the parties to a minimum.

(*iii*) Allowing sufficient compensation to the witnesses who attend Court but have to go away unexamined. The party in default should be made to pay it at once irrespective of the final result of the suit. This will have a two-fold beneficial effect—it will encourage

witnesses to come to Courts and discourage a party from taking adjournment on flimsy grounds.

4. *Stricter check on the dilatoriness of* the parties in such matters as ascertaining the correct address of a Defendant, citing witnesses, applying for the commission, etc.

5. *Rent Suits filed on the "Limitation Day":—*

Whatever tinkering may be done in the way of relief by fixing particular days in the week for the trial of the large number of such suits instituted on a single day in the year, or by assigning particular officers to try them, no appreciable expedition can be obtained unless the number of Courts with the necessary complement of ministerial officers and peons be temporarily increased for some months in the year. But this does not seem to be feasible from the administrative point of view.

The only remedy that may be suggested is the modification of the law of limitation for rent suits. Instead of making the period of limitation (whatever it may be—three years or four years) run from the end of the year, it should be made to run from the end of each quarter in which any instalment of rent falls due. This will insure more equable distribution of the suits instituted throughout the year.

6. *Execution Proceedings:—*

I see no harm in the simultaneous issue of the notice under Or. XXI, r. 22, notice under Or. XXI, r. 66 and the writ of attachment of immovable property. There are many places in which the notice under r. 66 is seldom taken any advantage of. In such places this notice may be dispensed with, and attachment and sale-proclamation may be issued simultaneously. This procedure will shorten the pendency of an execution case by several months.

7. *Objections to Execution:—*

Courts may be enjoined to try these objections as quickly as possible. Many of them are so flimsy that they may be disposed of on the very day they are filed, if only the Courts can make time to go through them.

Courts may be empowered to reject summarily objections which are filed untimely with the apparent intention of making the sale-date pass, so that after the ultimate rejection of the objection, the sale cannot be held without a fresh proclamation which takes about two months.

8. *Applications for setting aside Sales:—*

It often happens that a judgment-debtor who has appeared in the execution case and got the sale postponed on the promise to pay off the decretal amount, when he fails to do so and the sale takes place, comes forward with an application under Or. XXI, r. 90, on the ground of non-publication of the sale-proclamation. Rules may be framed to the effect that when a judgment-debtor is aware of the execution proceedings he cannot be allowed to raise such objection after the sale has taken place, and that if he takes such objection before the sale he himself should make arrangements for the due publication of any fresh sale-proclamation that may be ordered and that on his failing to do so the sale will take place on the adjourned date without any other proclamation and that no further objection on this score would be listened to.

9. *Indirect Stay of Suits:—*

Sometimes it happens that an appeal is preferred against an interlocutory order and the Appellate Court calls for the whole record thus preventing further prosecution of the suit till the appeal is disposed of, though that interlocutory order may have nothing to do with the merits of the original suit. In such cases the Appellate Court should direct the parties to file copies of the necessary papers, or direct the trial Court to send only such documents or copies of papers which are necessary for the hearing of the appeal, without interfering with the progress of the suit in the meantime.

10. *Insufficiency of the Number of Courts:—*

The number of Courts now existing may be said to be just sufficient, if not insufficient, for the trial of the cases in the dilatory way now prevailing. If the trial of suits be expedited in any way, they would not be able to cope with the work, and extra hands would be necessary, at least for sometime till the old cases are disposed of.

Correspondence

ADMISSIBILITY OF DEPOSITION NOT READ OVER TO WITNESS.

To

The Editor, "Calcutta Weekly Notes."

Sir,

In the case of *Emperor* v. *Nabab Ali Sarkar*, decided by their Lordships, Mr. Justice Suhrawardy and Mr. Justice Cuming, and recently

reported in I. L. R. 51 Cal. 236, it has been held that the deposition of a witness which was not read over to him is inadmissible in evidence in a subsequent judicial proceeding under sec. 80 of the Evidence Act, and that oral evidence of the same is inadmissible under sec. 91 of the same Act. It was assumed in that ruling that the deposition should have been recorded under Or. XVIII, r. 5, Civil Procedure Code. But it was not pointed out to their Lordships that the suit in which the witness was examined was a rent suit, and under sec. 148 (*f*) of the Bengal Tenancy Act only a memorandum of the evidence under sec. 189 of the old Civil Procedure Code (corresponding to Or. XVIII, r. 13 of the present Code) was to be made, whether an appeal was allowed or not. Such a memorandum is not required to be read over to the witness, and it is good evidence under sec. 80 of the Evidence Act. Moreover as the law does not require the evidence to be recorded in full, oral evidence of what the witness actually deposed to would not be barred by sec. 91. However the ruling gives the opinion of the learned Judges as to the admissibility in evidence of a deposition which should have been recorded under Or. XVIII, r. 5, but which was not read over to the witness. I may further point out that under the orders of the Local Government all Munsifs and Subordinate Judges in Bengal now take down depositions in ordinary appealable cases, not exactly under Or. XVIII, r. 5, but under sec. 138 of the Civil Procedure Code.

Yours truly,
S. C. BASU,
Sub-Judge.

Suri,
18-5-24.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before M. N. MUKERJI, J. CIVIL REV. NO. 943 OF 1923, RASH BIHARI MAJUMDAR, Petitioner *v.* KUSUM KUMARI GUHA and others, Opposite Party. The 29th April 1924

Auction-purchaser at revenue sale, if may apply for withdrawal of attachment of surplus sale-proceeds by mortgagee, after sale set aside—Civil Procedure Code, sec. 151—Court's inherent jurisdiction.

Estate No. 6394 of the Faridpur Collectorate was sold for arrears of revenue and purchased by the Petitioner in the name of one Bepin Behari Das, pleader. The defaulter's application before the Commissioner for setting aside sale proved unsuccessful. Meanwhile Opposite Party No. 1, mortgagee of the estate, brought a suit on the mortgage in the Bhanga Munsif's Court and prayed for a lien on the surplus sale-proceeds," which were attached before judgment, and there was a preliminary decree and a final decree on 11th March 1921. Meanwhile suit No. 1 of 1920 was instituted by the defaulters in the Subordinate Judge's Court of Faridpur, which was ultimately decreed and the sale set aside on the 5th March 1921 and the Petitioner was declared entitled to a refund of the purchase money. The Collector having refused refund in view of the attachment by the Munsif's Court at Bhanga, the Petitioner auction-purchaser prayed in the Munsif's Court for an order of withdrawal of the attachment under sec. 151, C. P. C. The Munsif held that the mortgagee being no party to the suit in the Subordinate Judge's Court, the order was not binding against him, and the applicant being no party in the mortgage suit had no *locus standi* to make the application :

Held—That the application being under sec. 151 for the ends of justice, the question of *locus standi* can hardly arise.

The sale being set aside the original security re-vested in the mortgagor, and the mortgagee was in a position to fall back upon his original security, and had no more lien on the sale-proceeds which no longer represented the interest of the mortgagor.

The order of attachment was therefore withdrawn.

Babu Surendra Nath Das Gupta (II) for the Petitioner.

No one appeared for the Opposite Party.
S. N. D.

THE

Calcutta Weekly Notes.

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Contents.

NOTES

The late Sir Asutosh Mookerjee.

The gloom in which the demise of Sir Asutosh Chaudhuri had plunged the public had scarcely time to abate, when it was overwhelmed on Monday morning last by the newspaper announcement of the death at Patna of Sir Asutosh Mookerjee. Sir Asutosh Mookerjee retired from the Bench only the other day, in all but full possession of his usual bodily vigour and carrying with him the universal desire that, freed from the trammels of office, he would be able to use his great powers of brain and body, undimmed by age and undiminished by use, in rearing up and rehabilitating the political life of Bengal and through Bengal of India. But the Fates have ordered otherwise, and Bengal stands to-day bereft of her noblest son and stunned by a blow of well-nigh incalculable magnitude. Monday morning, when his remains arrived by rail at Howrah, witnessed a scene unparallelled in the history of this City. The usual communication between Howrah and Calcutta could not be re-established owing to a break-down of the mechanical arrangement of the bridge; but members of the public from High Court Judges to clerks in offices and schoolboys took whatever other means of transport were available to cross over in order to obtain a last glimpse of the departed, so large a space did his great personality fill in the thoughts of the population, irrespective of rank and education. This spontaneous exhibition of love and reverence on the part of the general public was suitably responded to by his Lordship the Chief Justice immediately ordering a complete closing of the Court and its offices for the day. The bier was practically taken possession of by the crowd which led it, very appropriately, first to the Senate House of the Calcutta University, to which Sir Asutosh had given of his best, and followed it in procession to the burning ghat at Kalighat, which in the evening presented a spectacle not likely to be repeated within the life-time of the present generation.

Tributes to the memory of the great departed are being paid all over the country, and the newspapers are ringing with expressions of unfeigned sorrow from every quarter. In other columns of this issue will be found those paid on Monday last at the Patna High Court and on the following day at the Calcutta High Court. Nearly every aspect of the deceased's public activities has been suitably recognised in the speeches made on those occasions, and all that remains for us to do at the present moment is to stress the fact which is apt to be overlooked in all such notices of a man who stood for nearly forty-years as the very embodiment of brain, life and power, that his heart was even larger than his brains. The public feel not merely that they have lost a leader, but a friend. The student population of Bengal in particular have lost in him one who loved them as no one else in Bengal has done since the passing of Pundit Vidyasagar. To them and to the members of his bereaved family we offer our sincerest condolence.

The late Mr. Satish Chandra Ghose.

In the Calcutta High Court, mention was also made on Tuesday last of the death of Mr. Satish Chandra Ghose, a senior vakil, who until recently was a member of the Legislative Assembly and had retired from practice only about two years ago. He was a son of the

late Sir Chunder Madhab Ghose. We offer our sincere condolence and sympathy to his family.

Civil Justice—Sheristadars and Commissioners of Partition.

Several communications have been addressed to us commenting on the letter of Mr. Khagendra Nath Ganguli, Vakil, M.L.C., published at p. cxviii of this volume. Considerations of space prevent us from publishing them *in extenso*, and so we must content ourselves with noticing the points sought to be made in them. One is that the Sheristadar virtually acts as the personal assistant to the District Judge in matters relating to the administrative side of his duties, and simply transferring these duties from the District Judge to a subordinate Judge will not improve matters, for the Subordinate Judge himself will have to depend upon the Sheristadar in the same way as the District Judge now does, if he is to combine these duties with the discharge of his ordinary judicial functions. As one correspondent says, it is not surely proposed to appoint a senior Munsif or a Sub-Judge as the Judge's Sheristadar or personal assistant for these purposes. We are afraid Mr. Ganguli's critics have missed his point, which, if we understand it aright, is that under the existing system, the performance of administrative duties does not count for statistical purposes (that is to say, in estimating the amount of work to be credited to a particular officer in the returns), and the result therefore is that these duties are neglected and the Sheristadar is left to his own devices without any real supervision, and as the judicial duties of a District Judge are ordinarily too multifarious to admit of his sparing much time for these duties, the suggestion has been put forward that a senior Munsif or a Sub-Judge should be made primarily responsible for them in each district, and (this is important) that he should be allowed to note in his diary the time actually spent from day to day in the performance of these duties, and that this time, for statistical purposes, should be counted as of equal value to time spent in *bonâ fide* judicial work. Under this scheme the Judicial Officer in question will be expected to go into these matters himself instead of merely countersigning the opinions of the Sheristadar.

The other points made by our correspondents relate chiefly to the order recently issued by the District Judge of Hooghly withdrawing the power hitherto exercised by subordinate Judicial Officers to appoint Partition Commissioners in cases tried by them. It is stated that formerly commissions used to be issued by subordinate Courts indiscriminately upon the suggestion of the pleaders engaged in the case without due inquiry as to whether the person proposed had sufficient knowledge of surveying and without caring to see that the same person was not appointed Commissioner at the same time, in two or more cases. It is further stated that appointment by the District Judge ensures (1) that the Commissioner is an expert in surveying and (ii) that all pleaders with knowledge of surveying get work in rotation, because the District Judge has got a list of pleaders with knowledge of surveying graded according to qualification, and appointments are made by him with reference to this list: and that therefore the practice introduced by the District Judge of Hooghly makes for efficiency and more equitable distribution of work and also eliminates favouritism.

We do not doubt that the circular has been issued with the best of motives. But we fail to see why if appointment with reference to a list has these virtues, each subordinate Judicial Officer should not be (if they are not already, as we understand they are) provided with this list of pleaders possessing the requisite knowledge of surveying; and as to the same pleader being appointed Commissioner at the same time in several cases, this can be avoided by simply enquiring of the appointee if he has been already engaged in similar work in connection with a case or cases in other Courts. The circular in question does not prevent a pleader of Hooghly from being appointed a Commissioner of Partition in a case which is being tried at Howrah. On the other hand, cases are not unknown where the very object of a local investigation ordered by a subordinate Court has been frustrated by the delay incurred in getting the Commissioner appointed by the District Judge. The idea of fair distribution of work by an authority whose very detachment, in the matter of personal contact, from the candidates is a 'guarantee against favouritism, though it looks so attractive on paper, is a dilusion when it comes to practical application. Why cannot a Munsif or a Sub-Judge who can

be trusted to hold the balance even as between the parties to a suit be trusted also to be fair in the matter of appointment of Commissioners? In any case a Munsif or Sub-Judge at Howrah never appoints a pleader of Hooghly as Commissioner to partition property at Salkea or Uluberia and thereby saves the parties the trouble and expense which must otherwise be thrown away simply to establish effective business contact between the parties and the Commissioner. This is just one of those cases where decentralisation is preferable to centralisation from every point of view. And if the personal factor is bound to come into play in such matters, the public, at any rate, would prefer this to be the subordinate judicial officer's rather than the Judge's Sheristadar's.

THE LATE SIR ASUTOSH MOOKERJEE.

REFERENCE AT THE CALCUTTA HIGH COURT.

Eloquent and sympathetic reference to the memory and career of the late Sir Asutosh Mookerjee was paid at the High Court on Tuesday, the 27th May, when prior to the work of the day being taken up, all the Judges assembled in the Chief Justice's Court room, which was packed with members of the various branches of the legal profession as well as the general public.

Mr. S. R. Das, Advocate-General, on behalf of the Bar said :—" It is only a few months since your Lordships and the members of the legal profession assembled to bid farewell from the Bench to Sir Asutosh Mookerjee, and to wish him a happy and a long life during his retirement. No one then imagined that we should so soon meet again to bid him an eternal farewell and to mourn his loss. I wish it had fallen to a better man to represent the Bar on this occasion; I feel I am not capable of doing justice in giving expression to the irreparable loss the country has suffered.

Sir Asutosh Mookerjee was born on 20th June 1864. In 1879, at the age of 15 he matriculated, standing first in the whole University. In 1884, at the age of 20 he graduated with high honours in mathematics. In 1885 he took his M.A. degree, standing first in the whole University in mathematics. In 1886, he sat for the Premchand Roychand Studentship, which was then the most difficult and the highest examination in any subject, and succeeded in winning the handsome scholarship attached to it. He again sat for the M.A. degree in Physics and passed successfully. He then took up the study of law and attended the law lectures at the City College where the present Lord Sinha was one of the lecturers. He also attended the Tagore Law Lectures and for three successive years won the gold medal awarded for proficiency in the subject of the lectures. While still quite a young man, he joined the Asiatic Society of Bengal and his contributions in mathematical subjects attracted the attention of Professor Cayley of Cambridge, on whose recommendation he was nominated a Fellow of the Royal Society of Edinburgh.

In 1888, he took his B.L. degree, and was enrolled as a vakil of this Court. He served his articles under the late Sir Rashbehari Ghose. He continued the studies in law even after he joined the High Court, and in 1894 he received the degree of Doctor of Law from the Calcutta University. In 1898 he was appointed Tagore Law Professor. In the meantime, he had been taking a keen interest in the University, and in 1899 he was elected to represent the University in the Bengal Legislative Council, where he did much useful work in connection with the then Calcutta Municipal Bill. On the Bill being passed he was nominated by the Government a member of the Corporation of which, I believe, he continued to be a member till his elevation to the Bench. In 1901, he was re-elected to the Council and in 1903 he was elected by the members of the Bengal Council to represent them in the Council of the Governor-General, where he took a very active part in the discussions on the new Universities Bill. In 1904, he was appointed a Judge of the High Court.

His activities had covered a wide field while he was building up a large practice, and we all know the labour and time which that involves. But he made time in spite of his practice to take an active and a conspicuous part in the work of his University, in politics and in municipal affairs. He would even devote his spare time to the solution of mathematical problems, which was one of his hobbies. On his elevation to the Bench he was obliged to give up his activities in political and municipal affairs and devoted his entire attention, outside his judicial duties, to the University. In 1906, he was appointed Vice-Chancellor, the second Indian to be appointed to that high Office, the first having been the late Sir Gurudas Banerjee. He continued to

occupy that position for a number of years. In 1907 he was elected president of the Asiatic Society of Bengal, an office to which he was subsequently repeatedly elected. In 1908, he was temporarily relieved of his duties as a Judge, and placed on deputation in connection with the re-organisation of the Calcutta University, a task which he took up with his characteristic zeal and thoroughness. In 1909, he was elected president of the Trustees of the Indian Museum, and at about the same time he became president of the Board of Sanskrit Examiners in Bengal. He was also the founder and president of the Mathematical Society of Bengal which has given considerable encouragement to the study of that subject in Bengal. There is one other matter that I must mention before I come to his retirement from the Bench. It was due to his persuasive eloquence and his great work at the University, that the late Sir Tarak Nath Palit and Sir Rashbehari Ghose were induced to make such munificent donations to the Science College attached to the University.

A history of his life would not be complete without a mention of the very bold step he took in giving in marriage his widowed daughter. A thoroughly orthodox Hindu in all matters he did not hesitate to risk social persecution when he saw the sad state of his daughter, a widow from childhood. In December 1923, he retired.

I have now related in very bald terms the main features of the life of Sir Asutosh Mookerjee. Can mere words, however graphic, speak more eloquently of his life and work than the bare facts I have stated? It is only a man of extraordinary talents, of extraordinary industry, of great forcefulness of character, burning with a zeal to make his life of some use to his fellowmen, who could have within the short space of 59 years accomplished all that I have related to you.

We have had, and we have among us, men who have risen to high fame in the one particular line in which they have specialised. We have, and have had, great physicists, great chemists, great educationists and doctors and lawyers of great eminence. But I know of no one who has taken part in such varied activities as the late Sir Asutosh Mookerjee and in every one of which he occupied a prominent position. He was barely sixty years, when he died. Bengal—nay India, hoped he had still before him many years of activity for the benefit of his country. But it was not to be. A great man has passed away and we can only bow to the decree of Providence.

Babu Basanta Kumar Bose, President of the Vakils' Association, said that he had seen many Indians of very great intellect, but he had never seen a greater mathematician, or a greater lawyer or a greater Judge than Sir Asutosh Mookerjee. Bengal had lost one of its most brilliant sons in modern times.

Mr. Mohini Mohan Chatterji said:—On behalf of the Incorporated Law Society of Calcutta and generally of the attorneys of your Lordship's Court, I desire, with your Lordship's permission, to associate myself with every word of the warm and eloquent tribute to the memory of the late Sir Asutosh Mookerjee. The suddenness with which he was struck down by the hand of death while engaged in professional work is an impressive reminder, that in life we are in the midst of death. Sir Asutosh Mookerjee's courageous, persistent and whole-hearted labour in many spheres of usefulness evoked, as was natural, a diversity of estimation, but every unlovely thought directed towards him was burnt to ashes on his funeral pyre in the presence of a gathering, unprecedented on such an occasion a gathering which represented all sorts and conditions of men, irrespective of caste, creed and sect. But the assertion may be made with some confidence, that his memory is, and will long continue to be, an altar flame to enkindle his countrymen with enthusiastic and pure-hearted devotion to the good of others.

His Lordship the Chief Justice said:—As the learned Advocate-General has said, it is not six months since we assembled in this Court on the occasion of the retirement from the Bench of Sir Asutosh Mookerjee. We then paid a tribute to his great ability, his untiring energy, his unceasing work, and we expressed the hope that, though he was retiring from the Bench, his life would be spared for many years so that he might serve his country in other capacities. Our hopes have been shortlived for we are here to-day mourning his sudden death.

There is no doubt that his death, as far as our human limitations enable us to judge, is a great calamity. I think that no one will deny that Sir Asutosh stood prominent among his fellow countrymen. He was the greatest Bengalee of his generation. I do not think I should be wrong if I were to say that in many respects he was the greatest Indian of his day

When he retired from the Bench he was in full possession of his great faculties, his mind was indeed a store of knowledge. He was of ripe experience, his energies appeared to be unabated, and his health, though temporarily not so good as usual, was not such as to cause his friends any anxiety. Now India and Bengal are suddenly bereft of his services—services which might and probably would have been invaluable to the country in many respects. The cause of education in all its branches has lost a staunch friend and an untiring advocate. What the Calcutta University, to which he ungrudgingly devoted so much of his life, will do without him, it is difficult to imagine.

It has been stated that it was probable that he would take part in politics. His knowledge, experience and powers of debate would have stood him in good stead and might easily have led him to a prominent position in public life, which would have given him an opportunity of influencing the future of this province, and perhaps of India itself. The loss, therefore, which the country has sustained through the death of Sir Asutosh Mookerjee is indeed a severe one. It will be difficult, if not impossible, to find any one who will adequately fill the gap caused by his death.

We deeply regret his death for reasons of a public nature, we mourn the loss of a friend with whom we have been intimate for many years. We venture to extend our sincere sympathy with the members of his family in the great affliction which has so suddenly and so unexpectedly befallen them."

REFERENCE AT THE PATNA HIGH COURT.

Tributes to the memory of the late Sir Asutosh Mookerjee were paid both by the Bench and the Bar of the Patna High Court on Monday, the 26th of May, at about eleven, when the Judges assembled in the Chief Justice's Court room which was packed with members of both branches of the legal profession as well as the general public. As a mark of respect the Chief Justice ordered suspension of further business for the day.

Mr. P. C. Manuk, President of the Bar Association, said that the painful duty which devolved upon him as the President was to announce to their Lordships the death of a very distinguished member of the legal profession Sir Asutosh Mookerjee. It had been so very sudden and unexpected that they could hardly realise that that commanding intellect was no more.

Referring to his varied qualities, Mr. Manuk said that endowed by nature with a great and commanding intellect he made study and industry the hand-maidens of that intellect with the results that he showed in many fields of activity. As a vakil of the Calcutta High Court he rapidly climbed the steps of the professional leader.

As a man his amiable disposition and his genial smile endeared him to all with whom he came into contact and disarmed even those with whom he had of necessity to disagree in the course of his public career. All who opposed him either in profession or in public affairs felt that he was a foeman worthy of one's steed who fought hard but fair. When he retired from the Bench the eyes of his countrymen were fixed upon him, for they expected, and rightly expected, his guidance in the stirring political times in which they lived when the old order in India was yielding place to new.

He then on behalf of the Association tendered to the bereaved widow and children and to all those near and dear to him expression of deep condolence with them in their sorrow which Providence would help them to bear. Concluding, he thanked the Chief Justice for having assembled the Full Court to mark the passing away of so commanding a figure in the modern history of India.

Mr. Sheo Saran Lal, President of the Vakils Association, stated that the judgments of Sir Asutosh were monuments of legal lore and research. As an ardent educationist, he was for many years the Vice-Chancellor of the Calcutta University and for many more years, as a leading member of the Syndicate, he guided its destinies with energy and thoroughness so characteristic of the man. As an erudite scholar and man of great culture, he was both deeply interested and versed in History, Art, and Archaeology of India, and as a philanthropist, his generosity to every deserving cause, both public and private, was well-known. India could ill-afford to lose so early so great and so worthy a son. But India, his dear ones and friends must bow to the inscrutable decrees of Providence.

The Chief Justice, Hon. Sir Thomas Dawson-Miller said :—"On behalf of Bench I desire earnestly to express our deep regret at the sorrowful event which you and Mr. Manuk have referred to in such moving terms. Only a few days ago Sir

Asutosh Mookerjee was amongst us taking an active part in our discussions and to all outward appearances, in full vigour of his manhood. Thought of death must have been as remote from his mind as it was from the minds of those with whom he was in daily intercourse. To-day with appalling suddenness he has passed away from us for ever, but the memory of his great personality remains so strongly impressed upon us all who have been so intimately associated with him in these last months of his life that it is difficult to believe that he is no longer with us. The shock of his sudden death has been so great that it is hardly possible yet to realise the full force of the loss which not only his friends but the whole of legal profession, I may say the whole of India, has sustained by his untimely death. On behalf of the Bench I desire to express our profound sympathy with Lady Mookerjee and his family who have been left behind to mourn his loss. Out of respect to his memory, the Court to-day will be closed for further business.

Correspondence.

LAW'S DELAY.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

You appear to have opened the hospitable columns of your journal for ventilation of opinions about law's delay and to have ably and comprehensively dealt with the subject in the editorial notes of your journal in many of its issues. As the main points may be clouded by the volume of matters introduced in connexion with the subject, I would venture to make the following suggestions, though most of them are not new and original, by way of summary of the leading points tending to minimise delay in the dispensation of justice in Mofussil Courts :—

(1) *Registration of plaints*—I would suggest, as you have done, that the filing of process fee, copies of plaints and the first processes should precede the registration of plaints.

(2) *Service of processes :*—

I would venture to differ from you on this subject and am of opinion that service through the agency of Post Office and *panchayats* may not be as effective and satisfactory as desired. Corruption is not the monopoly of Civil Court peons and opportunity and lack of proper control may make postal peons and Chowkidars as corrupt, if not more. Judicial Officers shall have no control over them and will find it very difficult to mete out punishments to those in fault. The strictness with which the process-servers are now dealt with on account of the orders on the subject by the Hon'ble High Court and District Judges has minimised the evil to a great extent and my experience for 17 years as a Munsif and for 7 years as a pleader has shown that instances of suppression of processes are much rarer now than they were before. I would therefore suggest that the service of processes should be kept in the hands of trained process-servers under the control of Judicial Officers, with this exception that processes requiring service outside the jurisdiction of individual Courts should be served through the agency of Post Office. Much delay is caused in service of processes outside the jurisdiction of individual Courts and suitors find it very difficult to procure identifiers in distant places and to appear when the process-servers mind to serve the processes entrusted to them for a period. Service of processes may be made highly effective if it can be made obligatory on persons served with processes to sign their names or put their thumb-impressions.

(3) *Adjournments :*—

Judicious adjournments after due regard to the state of files and convenience of parties may minimise the delay. The suggestions that pleaders as a rule, cause delay or that Judicial Officers cannot record depositions properly are not worthy of notice.

(4) *Distribution of work :*—

(a) I do not think that the allotment of a special day for disposal of rent suits or assignment of all rent suits to one Court is likely to be of any help in the matter. There are some Courts which have to deal mostly with rent suit and there are others which have to deal with rent suits as complicated as title suits. The fixing of dates of hearing of rent suits should be in the discretion of the presiding officers and any rigid rule on the subject may hamper the orderly progress in disposal of suits.

(b) I would suggest that all provincial Judicial Officers should be known as Subordinate Judges or Deputy Judges 1st and 2nd grade and that Subordinate Judges 1st grade with appellate powers and powers of Assistant Sessions Judges should be posted in important Sub-Divisions in order to have civil and criminal appeals quickly disposed of and to

prevent congestion in District Courts. This arrangement is likely to minimise delay in appeals and to help decentralisation.

(5) *Execution proceedings:—*

Issue of registered card to every judgment-debtor in case of execution sales is likely to be of great advantage for prevention of institution of cases for setting aside sales on the ground of fraud and irregularity; and processes of attachment and sale proclamation, if allowed to be simultaneously issued in all cases, may expedite the disposal of execution cases to some extent.

Yours truly,
SHASHI JIBAN SEN,
Munsif, Kasba.

22-5-1924.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before GREAVES AND CHAKRAVARTY, JJ. S. A. No. 586 OF 1922. KRISHNA MOHON CHOWDHURY, Plaintiff-Appellant *v.* GOUR SUNDER CHOWDHURY and another, Defendants-Respondents. The 1st May 1924.

Specific Relief Act, sec. 42—Suit for declaration without consequential relief—Court-fees ad valorem, *when to be paid—Court Fees Act, Sch. II, Art. 17.*

The Plaintiff instituted a suit to have a *solenama* and a decree based thereon in a partition suit declared null and void and inoperative as having been obtained by undue influence, coercion and fraud. The Defendants raised the question whether the suit was maintainable without the payment of *ad valorem* court-fee and also whether the suit was bad under sec. 42 of the Specific Relief Act as the plaint disclosed no consequential relief. Both Courts held that *ad valorem* court-fee was to be paid and further held that sec. 42 of the Specific Relief Act was a bar and dismissed the suit. In second appeal it was contended that the suit as framed was maintainable with a court-fee of Rs. 10 and the question regarding the plea in bar under sec. 42 did not arise at that stage (cited 27 C. W. N. 972 : s. c. 37 C. L. J. 499):

Held—That the plaint as framed should be registered on a court-fee stamp of Rs. 10, as the case came under Art. 17, Sch. II of the Court Fees Act and no *ad valorem* fee was necessary; that the question as to applicability of sec. 42 of Specific Relief Act could not be decided before the plaint was registered.

Babu Chandra Sekhar Sen for the Appellant.

Babu Narendra Kumar Das for the Respondents.

S. C. C. *Appeal allowed; Case remanded.*

CIVIL APPELLATE JURISDICTION. Before SUHRAWARDY AND GRAHAM, JJ. APPEAL FROM ORDER No. 32 OF 1923. KHETRA MOHAN DAS (Defendant No. 1), Appellant *v.* BISWA NATH BERA and another, (Plaintiff and Defendant No. 2), Respondents. The 2nd April 1924.

Transfer of Property Act (IV of 1882), sec. 6 (e)—Assignment of right to sue for accounts, if valid and enforceable in law.

Plaintiff purchased two mouzas from Defendant No. 2 in Falgun 1327 A. S. together with his right to call for accounts, and papers and also to recover the sum of money which would be found due to him from the Defendant No. 1 who was his *gomasta* upon taking accounts. The suit out of which this appeal arose was brought by the Plaintiff-Respondent against the Defendant No. 1 the *gomasta* of Defendant No. 2 for accounts and papers, etc., from 1310 to 1327 A. S. and also for recovery of the sum which would be found due by the Defendant No. 1 upon taking such account. The Defendant No. 1 was liable on the basis of a security *kabuliyat* executed by him in favour of the Defendant No. 2 in Kartick 1306 A. S. to submit all papers, accounts and also to pay all moneys found due by him upon such accounts being taken.

The trial Court decided that the transaction was a transfer of this Defendant No. 2's mere right to sue and that it was unenforceable and inoperative under sec. 6 (e), Transfer of Property Act (IV of 1882). The suit was dismissed. The lower Appellate Court determined that the transaction was a transfer of the Defendant No. 2's right to recover from the Defendant No. 1 a specific sum of money that would be found embezzled by him upon taking accounts and remanded the case to the primary Court for taking accounts (Or. 41, r. 23):

Held—(*a*) Mere right to sue for account as also that for money which might be found due upon taking such account are both unassignable under sec. 6, cl. (*e*) of the Transfer of Property Act (IV of 1882).

(*b*) Mere right to litigation cannot be transferred.

Abu Mahomed v. *S. C. Chander*, [1909] 36 C. 345, *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India*, [1883] 9 C. 695, *K. Seetamma* v. *P. Venkatarammanyya*, [1913] 38 M. 308 and *County Hotel and Mine Company, Limited* v. *London and North-Western Railway Co.*, [1918] 2 K. B. 251, 260, *followed* and *referred to*.

Babu Samarendro Kristo Dutta for the Appellant.

Babu Jogesh Chander Rai for the Respondents.

H. D. C. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before PEARSON AND GRAHAM, JJ. M. A. No. 313 OF 1922. HARIPADA HALDAR and others, Judgment-debtors, Appellants *v.* BARADA PRASAD ROY CHOWDHRY and others, Respondents. The 8th May 1924.

Limitation—Application to set aside sale—Application under sec. 173 of the Bengal Tenancy Act, if cognisable under sec. 47 of the Civil Procedure Code—Limitation Act (IX of 1908), Art. 166, if governs all applications to set aside execution sale—Art. 166, if applies to an application to set aside sale under sec. 173 of the Bengal Tenancy Act.

The facts material to this report are as follows:—The decree-holder Respondent Barada Prosad Roy Chowdhry in execution of his rent decree put up the *jama* of the judgment-debtors Appellants and their co-sharers to sale, and it was purchased by Jadunath Sarma in July 1918. In August 1920, that is, more than two years after the sale, three of the judgment-debtors, the Appellants, applied to set aside the sale under Or. 21, r. 90, sec. 47 of the Civil Procedure Code, and sec. 173 of the Bengal Tenancy Act. The question arose whether the period of limitation would be three years under Art. 181, or 30 days under Art. 166 of the Limitation Act. The Appellants relied on sec. 18, and Art 181 of that Act to bring it within time. The Respondents contended that Art. 166 was applicable and the application was barred. The Munsif of Diamond Harbour held that the application was barred under Art. 166, and dismissed the application. On appeal by the Appellants, the Additional District Judge of 24-Parganas affirmed the decision of the Munsif, and dismissed the appeal. Against this order of the Additional District Judge the Appellants preferred this appeal, and also filed an application for revision in the alternative. A preliminary objection was taken on behalf of the Respondents to the competency of the appeal on the ground that in so far as the application was one under sec. 173, Bengal Tenancy Act, no appeal lay either to this Court or to the Court of first appeal.

As their Lordships dismissed the appeal on the merits they did not decide the preliminary objection, or pass any order on the application for revision:

Held—That the application was barred under Art. 166 of the Limitation Act, and the decision of the Courts below was affirmed.

Under the old Limitation Act, Art. 166 was restricted to a particular class of applications, but as now worded is very much wider and quite general in its terms governing all applications to have an execution sale set aside. An application under sec. 173 of the Bengal Tenancy Act is cognisable under sec. 47 of the C. P. C., and Art. 166 of the present Limitation Act governs such an application.

Chandmani v. *Santomani*, 1 C. W. N. 534; *Satish* v. *Nishi Kanta*, 46 Cal. 975: *Chandrama* v. *Maharaja of Burdwan*, 38 I. C. 209 *referred to*.

Babu Hiralal Chakravarti for the Appellants.

Rai Surendra Chandra Sen Bahadur (with *Babu Hemendra Chandra Sen*) for the decree-holder Respondent.

Babu Manmatha Nath Roy for the judgment-debtors Respondents Nos. 5 and 6.

H. C. S. *Appeal dismissed with costs.*

THE

Calcutta Weekly Notes.

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Contents.

NOTES

Birthday Honours.

Amongst the birthday honours recently announced, the Knighthoods conferred on Mr. Justice Newbould and Mr. Provash Chandra Mitter, Vakil, and lately a Minister of Bengal, are of interest to the profession on this side of India. We offer our hearty congratulations to both.

Valuation for jurisdiction—A plea for reform of the law.

The decision reported at p. 710 of this volume (*Saroda Sundari Bosu* v. *Akramanessa Khatun*) aptly illustrates the unsatisfactory state of the existing law for determining the valuation of suits for purposes of jurisdiction. This was a suit for redemption brought in the Munsif's Court, apparently because the principal money stated to be due on the bond was below Rs. 1,000. Objection to the competency of the Court was taken by the Defendant on the ground that the amount actually due on the bond would upon adjudication be found to be above Rs. 1,000, and that though for purposes of court-fees the Plaintiff was entitled to value the suit at the figure stated in the bond as the principal amount secured, sec. 8 of the Suits Valuation Act did not require the valuation for purposes of jurisdiction in redemption suits to follow that for the purposes of court-fees. This quite logical interpretation of the law found favour with the Munsif and ultimately with the High Court. The Munsif accordingly proceeded to decide what was due on the bond—the very issue of the suit on the merits—for the purpose of seeing whether he had jurisdiction to try it. He found that the amount due would exceed Rs. 1,000, but as his jurisdiction was limited to claims up to Rs. 1,000, he had no alternative left but to return the plaint for presentation to the proper Court, though if his jurisdiction had not been limited, the finding would have enabled him to pass his decree in the suit.

The Plaintiff appealed, and the lower Appellate Court was of opinion that the valuation for jurisdiction should follow that for purposes of court-fees, and so without going into the question of what amount was actually due to the Defendant on the bond the said Court remanded the case for trial to the Munsif. The High Court, as observed before, did not accept the lower Appellate Court's view of the law. But the lower Appellate Court was not asked, as according to strict law it might have been, to find what in its view (that Court being the final Court of facts) was actually due on the bond. The High Court accepting the Munsif's finding on the point ordered that the plaint be returned to the Plaintiff for presentation in the proper Court. And so (mark this) was avoided the possibility of the lower Appellate Court finding *on the evidence* that the amount actually due was less than Rs. 1,000 and taking the very logical course of remitting the case to the Munsif for finding again on the same or perhaps fresh evidence what amount was due on the bond for the purpose of passing a decree in the suit, and the further possibility of that Court finding again on the merits that the amount due was above Rs. 1,000 and again returning the plaint for presentation to the proper Court, for it is perfectly arguable that the decision of the lower Appellate Court on the preliminary issue of jurisdiction being on a collateral issue was not *res judicata*; and this view would receive support from the further consideration that if the findings for the purpose of jurisdiction by the Appellate Court were binding as *res judicata* for all purposes,

the Appellate Court would be competent to pass a decree in the suit for the amount found due upon appeal on the question of jurisdiction, and a remand for trial on the merits would be unnecessary. It might no doubt be argued with reason that on the question of valuation for purposes of jurisdiction, the decision of the Appellate Court would be final, so that the trial Court would have jurisdiction to dispose of the case on the merits, and having jurisdiction to decide on the evidence, his decision that the amount actually due was over Rs. 1,000 would be *intra vires*, however anomalous and illogical it may appear to be. One may thus find oneself driven to an illogical situation by the very endeavour to be strictly logical. In the present case, the High Court accepted the Munsif's finding that the amount due was above Rs. 1,000, and ordered the plaint to be returned to be presented in a Subordinate Judge's Court. This, it may be taken, has finally determined the question of jurisdiction, but does not prevent the Subordinate Judge who shall try the suit from finding that the amount actually, or as the judgment says "ultimately," due is less than Rs. 1,000. Then again, it may be asked, is it open to the Court in arriving at a finding for purposes of jurisdiction as to what may be ultimately due on the bond to regard pleas of payment or other pleas for reducing the amount? We cannot think if the matter had been put before the Division Bench at the hearing of the case, they would have held that for determining such questions as the court-fee payable or the jurisdiction of the Court to entertain a suit, regard can be had to anything except the allegations in the plaint. The written statement of the Defendant and the allegations therein can have nothing to do with such questions.

The law cannot be satisfactory which makes it possible for *bonâ fide* litigants to exhaust their resources and waste their own time and the Courts' in striving to reach a solution on a more or less academical issue before they are enabled to come to grips upon the matter in dispute. To be sent from Court to Court and back again like battledores and shuttlecocks is not a dignifying spectacle from whatever point of view the matter is viewed. The game has to be terminated in most instances by a *tour de force* performed in the name of logic as was done in this case and in *Chanderbodan* v. *Sheodhar*, 18 C. W. N. 380, and the final result may nevertheless be as illogical as ever.

The point we desire to establish is that this is one of those cases where an arbitrary rule is more conducive to justice than strict conformity to logic. What litigants want is a definite "rule of the road" to Courts and not a rule of logic to be applied in each case by anticipating results which *ex hypothesi* must be uncertain. Claims for accounts and mesne profits prove mints of money to legal practitioners but veritable morasses to litigants. In the class of cases of which the one under notice is an illustration, let it be laid down once for all that the amount to be taken for determining jurisdiction is the principal money stated on the bond, or, the same with interest calculated up-to-date without regard to pleas available in reduction of the amount—one or the other, it does not matter which. As regards suits in which mesne profits or accounts are demanded, let the Plaintiff's valuation be accepted as conclusive for this purpose whatever the ultimate decision of the Court. Valuation for purposes of court-fee calls for some reasonable approach to precision to satisfy the claims of the State, but there is no earthly reason for wasting time and money on questions of valuation for purposes of jurisdiction.

PART I.

ESTOPPEL AGAINST CONSENTING REVERSIONERS.

BY D. R. VAIDYA, SUB-JUDGE, 2ND CLASS, KHANDWA, C. P.

"A Hindu reversioner has no right *in presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His guardian cannot bargain with it or bind him by any contractual engagement in respect thereto." (*Amrit Narayan Sing* v. *Ganga Sing*, I. L. R. 45 Cal. 590 P. C.).

The interest of a Hindu reversioner is a mere possibility and comes within the prohibition of sec. 6, cl. (*a*) of Act IV of 1882. Under sec. 2 of the said Act, "nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or

Buddhist law." Sec. 6, indeed, occurs in the second chapter. If there is any rule of Hindu law authorizing dealings in reversionary rights, the prohibition in sec. 6 (*a*) will not apply. It has been held that Hindu law is against traffic in *spes successionis*. (*Bai Parwati* v. *Dayabhai*, I. L. R. 44 Bom. 488: Macleod, C. J.). It will thus be seen that dealings in reversionary rights come within the prohibition of sec. 6 (*a*), and the statutory law of India has outlawed all such transactions. It is not open to Courts to disregard the prohibition.

Dr. Gour in his commentary on the Transfer of Property Act says: "This clause merely prohibits a transfer of a mere possibility. It does not prohibit a contract for its transfer in future, in which case a deed intended to operate as a transfer *in praesenti* may still be used as an executory contract, of which specific performance might be enforced in a properly constituted suit and subject to the law governing it. Generally speaking such agreements are not void merely because they happen to be made at a time when the interest of the executant is merely one in expectancy, and the Courts in England, as well as in this country, have enforced them on the ground that the executant is bound *in foro conscientiæ* to make good his promise when he obtains an estate in possession." The same learned Doctor observes: "In the face of the positive prohibition here enacted there is no room for the application of the doctrine of English equity which upholds an assignment of such interests if made for a valuable consideration. In this respect the rule here enacted is different, since Indian law recognizes no distinction between law and equity, and the transfer once prohibited cannot be legalized by any rule of equity or equitable considerations" (pp. 120, 136, 142, Vol. I., 4th Ed.). It appears, in justice to Dr. Gour, that he is merely quoting opinions of others without giving us the benefit of his own opinion, unless we are to gather it by his quotations without comment.

We have now the high authority of the Rt. Hon. Syed Ameer Ali that not only bargaining with reversionary rights but even contractual engagements in respect thereto are prohibited. Sec. 23 of the Indian Contract Act contains this prohibition against contracts, as sec. 6 (*a*) of Act IV of 1882 contains the prohibition against transfers. Contracts which are forbidden by law or which defeat the provisions of any law are under that section no contracts at all. When we uphold such agreements, we but compel indirectly the doing of such things as are directly prohibited by law. To be consistent one must outlaw both executed and executory contracts with respect to reversionary rights. *Amrit Narayan's* case expressly enunciates this prohibition as being one both against contracts and transfers.

We must understand the reason of the prohibition. Napier, J., said: "The then existing next heir who may be in impecunious circumstances and prepared to lend himself to any arrangement for the sake of some ready money by which the greater part of the property will be diverted from the person who at the falling in of the estate would be entitled to the whole." (*Chinnaswami Pillay* v. *Appaswami Pillay*, I. L. R. 42 Mad. 25.)

There is an element of justice in the rule which upholds these transactions, if supported by valuable consideration and if no undue advantage is taken of the needy, thoughtless reversioners. It also appeals to one's sense of justice that a man should not be allowed to back out of his solemn transactions and that he should be compelled to make good his promise. In fact this very element of justice has biassed the opinion of good judges against the consenting reversioners. Learned Judges are found trying to get out of the prohibition.

We must first consider our attitude towards minors. Transactions by infants are outlawed altogether. There is nothing unjust if we uphold their bargains provided there is valuable consideration flowing into the minors' pockets and no undue advantage is taken of the infant. But nobody would think of doing that. Why? The reason is this:—For a few fair bargains by minors, there are bound to be such a large number of unfair bargains that there need be no enquiry at all into their propriety. For all practicable purposes, these judgments *primâ facie* are so true and just that it is better to ignore the small number of fair bargains. It will do us no good if we peep into the huge dustbin of the far too large a number of unfair bargains, the few may be sacrificed that the too many may not even have a chance of audience in Courts.

The choice of a principle is thus no easy task. We have to choose only between two evils. It is always better to choose the lesser evil. Let us fully bear in mind that the chosen principle is not an unmixed good and that it is but the least evil chosen. If that is done, we will be able to hold on to it. We

shall be able to shut our eyes on the small element of justice in the discarded rule only when we firmly take hold of the reason of our choice. If this is done, there will be possible the most loyal obedience to the statutory prohibition.

Exactly like infants is the case of reversioners. They are not knaves but only fools. They come before Courts not as breakers of law but as innocent victims of cunning people. They do not come there to blow up the law Courts, but seek its august powerful protection against the rapacity of the world. They do not want "to blow hot and cold in the same breath," "to back out of their solemn pledges," they seek law's protection as against their indiscretion and thoughtlessness. Courts of law ought to throw their cloak of protection round these grown up infants and not insist on the plighted pound of flesh being torn from their limbs. Only this angle of vision will set it right.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

May 7th.—The hearing of Indian appeals by the Privy Council was expected to commence last week but no satisfactory Board could be formed; in the result a Board has been sitting only for the hearing of Crown Colony appeals where principles of English law are applicable.

The Indian list contains 16 appeals, and as the Court will rise for Whitsun at the beginning of June, time is short. It is to be hoped that they will not be compelled to have two Boards sitting simultaneously.

There are five appeals from Patna, three from Bombay and two each from Allahabad and Lower Burma, the remainder being contributed by Bengal, Oudh, Madras and Lahore.

An interesting question is raised in an appeal from Bombay as to whether the reversioner to the estate of an intestate Hindu who left his mother as heir, is disqualified from inheriting because he had murdered the woman.

The list on the whole does not appear to be a heavy one.

G. D. M.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before SUHRAWARDY AND DUVAL, JJ. S. A. No. 840 OF 1922. KALI PRASANNA KAR and others, Plaintiffs-Appellants *v.* MD. EASIN and others, Respondents. The 21st May 1924.

Bengal Tenancy Act, sec. 52—Enhancement of rent for the increase in area—Sec. 30, cl. (b)*—Enhancement of rent for rise in price of staple food crops.*

The Plaintiffs instituted a suit for enhancement of rent on the grounds of increase in area and rise in the price of staple food crops with respect to an occupancy holding which comprised some demarcated plots of *mal* lands and portion of homestead land and tank held jointly with other co-sharer tenants. The lower Courts granted enhancement of rent on the ground of increase in area only. The Plaintiffs preferred this second appeal and contended that the demarcated parcels of land and the portions of homestead land and tank constituted a holding within the meaning of sec. 30 of the Bengal Tenancy Act and as such rent was liable to be increased:

Held—That the demarcated parcels of land and the portions of homestead land and tank did not constitute a holding within the meaning of sec. 30 of the Bengal Tenancy Act.

24 C. W. N. 1022 and I. L. R., 40 Cal. 29, referred to.

Babus Broja Lall Chakravarty and *Bipin Ch. Bose* for the Appellants.

Babu Upendra Kumar Roy for the Respondents.

S. C. C.

THE
Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, JUNE 16, 1924. [No. 30.

Contents.

NOTES

O'Dwyer v. Sankaran Nair.

The impeachment of Warren Hastings is one of the *causes celebres* in connexion with British rule in India. And so is the recent case of *O'Dwyer* v. *Sankaran Nair*. As in the one, so in the other, the official whose conduct was in question has been upheld. It is not for us to say whether there has been a miscarriage of justice. We have not got a complete record of the evidence which was led at the trial. Nor have we any idea as to how the case for the defence was actually put before the jury. But this much we are bound to say that the Plaintiff in choosing his forum in London did not give his opponent a sporting chance. The events complained of happened in the Punjab. A large number of witnesses were examined on commission. Evidence on commission is not so satisfactory as evidence actually given in open Court. Even a judge finds it difficult to follow and often finds it boresome. How much more so must have appeared the evidence of witnesses taken here on commission before an English jury. We think if the object of Sir Michael O'Dwyer in launching this action was to retrieve his reputation as an efficient Governor and a kind-hearted gentleman, the verdict which he has obtained will prove to him valueless.

Sir Sankaran had from the beginning a very great difficulty to contend with. The judge showed a marked bias for the Defendant. He mixed up legal and political considerations and his observations to the jury clearly show that he wanted the jury to weigh not merely the evidence actually before them, but also to take an imperial view of the case as a whole. In a case like the present it may be humanly impossible to separate the two aspects. Assuming, however, that had the trial Judge observed a studied silence throughout the trial, the verdict would have been the same as actually given, still we think Mr. Justice McCardie was ill-advised in taking the course he did. Judging from the reports which appeared in the newspapers, the political views to which he gave free expression in the course of the trial were of a pronouncedly partisan character. We have heard of judges who used to force the verdict they wanted out of the jury. We do not say Mr. Justice McCardie is one of them, but we cannot help saying that his conduct throughout the trial has caused intense pain to those who are anxious to keep the fountain of justice pure and undefiled.

Commissioners of Partition, who should appoint.

Mr. Jitendra Nath De, pleader, Hooghly, writes with reference to our criticisms of the recent circular of the District Judge of Hooghly taking away from subordinate Courts the power hitherto exercised by them to appoint Commissioners for partition in suits pending in their own Courts, that in the list prepared by the District Judge, "survey-knowing pleaders of the Sub-Divisions including the Sadar, have been grouped separately," so that as a rule "a commission of Howrah goes to a pleader of that Court first, but when all the survey-knowing pleaders of a certain Sub-Division are engaged and none of them is found free to execute a fresh commission, a pleader of a different Sub-Division is appointed to execute that commission to expedite the matter." Thus, "so long as the services of a local pleader are available, no commission is issued to a pleader of another Sub-Division." This is very re-assuring, so far as it goes. But what we cannot understand is why the subordinate Courts themselves cannot be left

to work this list on the same principle and must be required to refer every case calling for the appointment of a Commissioner to the District Judge?

"Because," says Mr. De, "it is not possible for all the Courts to enquire every time whether a certain pleader has already been engaged and is executing commission of another Court." Why not? "Moreover," says Mr. De, "by the present system introduced, all the survey-knowing pleaders would get equal number of commissions without even asking for the same," whereas "if every Court would appoint Commissioners only enquiring from a pleader whether he has got any work in his hand, the result would be that the work cannot be distributed evenly." If this be the real motive of the circular, what is there in it except hair-splitting arithmetic masquerading as justice? If to-day three Commissioners are wanted for the Courts at Howrah and one only by the Courts at Hooghly and there are two survey-knowing pleaders, not fully occupied, in the Howrah list, would it be such a calamity to appoint one of them to two of these commissions that to avoid this a pleader from Hooghly must be inducted to Howrah to take one out of his hands, whatever the resulting inconvenience to the parties? If this exaggerated sense of equality be not checked and restrained in time, it would not be long before Judges would be thinking of making rules for the equal distribution of professional work amongst the pleaders practising in their Courts.

Mr. De, in the course of his letter, gives us the interesting information that commissions have sometimes been issued by the District Court of Hooghly to pleaders of the Alipur Bar even, "for expediting matters"! He would have us believe that this was because the hands of the local experts were just then so full that foreign talent *had* to be imported to prevent a deadlock. Mr. De will pardon us if we cannot persuade ourselves to accept this explanation of what appears to us to constitute on the face of it the strongest condemnation of the policy of centralisation which is being pursued at Hooghly, and perhaps elsewhere, in the matter of appointment of Commissioners. May we inquire, if it is never the case that of two persons in the same list, one shows greater ability and despatch in this kind of work than another and why in such a case the former should not, within the same time, get more work of this kind than the latter? It is not as if the parties have no say in this matter, and they may surely be trusted to see that their vital interests in the suit are not jeopardised by mere favouritism on the part of the Judge.

PART I.

ESTOPPEL AGAINST CONSENTING REVERSIONERS.

BY D. R. VAIDYA, SUB-JUDGE, 2ND CLASS, KHANDWA, C. P.

(*Continued from p.* cxlviii.)

Courts in India appear to refuse to put their cloak of protection round these reversioners. They throw it round *pardanashin* ladies and infants. Justice demands that reversioners though grown up, should be protected. Manu has observed: "For a man destitute of knowledge is, indeed, a child, the sages have always said 'child' to an ignorant man." (Ch. 2, 146-148, 150-156, S. B. E.). Judges should assume this attitude of mind towards reversioners. They will not then be misled by the element of justice in the discarded rule. If the discarded rule contains a small element of justice, the accepted rule of prohibition contains a far greater element of justice in it. The decisions in India show a regrettable tendency against these prayers of reversioners. There is nothing at the bottom of this attitude except the fact that the true reason of the prohibition is not appreciated. Once this is done, no attempts will be made to get round statutes, no hair-splitting distinctions without any difference will be made; many inconsistencies and conflicts of opinion will be avoided; and the tangle would be straightened.

The learned Judges of the Allahabad High Court, in *Mahadeo Prasad Sing* v. *Mata Prasad* (I. L. R. 44 All. 44), after exhaustively reviewing the case-law on the point, arrived at the conclusion that the consenting reversioner is estopped. They referred to *Amrit Narayan's* case and observed: "No one can dispute that the right of succession of a reversioner is not a transferable right," and yet they said that no question of estoppel arose in that case! The learned Judges of the same High Court, in the Full Bench case of *Fatesing* v. *Thakur*

Rukmini Ravaji Maharaj, [1923] All. 387, All-India Reporter, affirmed this view. Here again the learned Judges referred to *Amrit Narayan's* case in these terms :—" Undoubtedly this is authority for the proposition that when he joined in the execution of this deed on the 12th of May 1905, Fatesing possessed no interest in the property therein referred to, which he could assign or relinquish; his right became concrete only on the demise of Mt. Munian, until then it was a mere *spes successionis*, without in any way questioning the correctness of this principle. . . . . ." The reasons which led the learned Judges to arrive at a conclusion contrary to that in *Amrit Narayan's* case appear to be conveyed by the following passage in the judgment :—" We have examined this document and we find that it is drawn up in the strongest possible terms. The two executants purport to renounce whatever rights and relinquish whatever interests they might conceivably possess under the Hindu law in respect of the property covered by the deed of gift : but they do even more than this. They expressly covenant that at no time hereafter will either of them or their heirs, successors or representatives, set up any right or claim whatsoever to the property." One can legitimately enquire if this is any reason at all. The strong terms do but express in so many words what in fact is implied in the simply-worded deed. On the contrary the strong terms leave no doubt that the deed shows a clear dealing in uncertainties and contractual engagements in respect thereto. If the " strong terms " are of any weight at all, they are rather against allowing it. It is like the doings of Excise Authorities who would say : " Mild vintages are allowed, strong ones are banned." The learned Judges found support for their view in an observation of their Lordships of the Privy Council in *Rangaswami Gounden's* (I. L. R. 42 Mad. 523, P. C.), where they said : " Of course something might be done even before that time (death of the widow) which amounted to an actual election to hold the deed good." This is scarcely fair to their Lordships, especially when there are deliberate, considered pronouncements of that high tribunal specifically on this point.

Justice Gokul Prasad, in *Ram Dayal* v. *Mithu Lal*, [1923] All. 410 All-India Reporter) said : " Nor could the assent of the next reversioner amount to a relinquishment, because he had no vested interest which could be relinquished." In *Narain Singh* v. *Raj Kumar Sing* (I. L. R. 44 All. 428), Gokul Prasad and Ryves, JJ., following *Amrit Narayan's* case held that the guardian mother could not bargain away her son's reversionary rights.

In *Bai Parvati* v. *Dayabhai* (I. L. R. 44 Bom. 488), Macleod, C. J., very properly held that a reversioner, joining in the deed of transfer by the widow, was not estopped. In *Basappa* v. *Fakirappa* (I. L. R. 46 Bom. 292), the same learned Judge, with Justice Shah, decided quite the other way, and observed that in the former case the question of estoppel was not argued. The learned Judges of the Allahabad High Court observed that *Bai Parvati's* case certainly decided that a consenting reversioner was not estopped (I. L. R. 44 All. 44). In *Bechardas* v. *Doongersey*, [1922] Bom. 437, All-India Reporter, Macleod, C. J., along with Justice Coyajee, held that a reversioner could not relinquish his rights in the life-time of the widow. The learned Chief Justice observed that the reversioner was not estopped. He gave as the reason thereof that there were no acts on faith of his consent. It is humbly submitted that it was not so. There was the will by the widow on the faith of that consent and there ought to have been estoppel on that ground. But there can be no estoppel against the statute and this is the real ground of there being no estoppel. It appears as if the decision was right, though the reason thereof was not right and the end justifies the means!

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The following business has been transacted by the Privy Council.

May 9th. In the Council Chamber before LORDS SHAW and BLANESBURGH and MR. AMEER ALI. *Asharfi Singh* v. *Bidya Prasad* (Patna).

The Appellant claimed a declaration of title to land under a grant from a Hindu widow. The question turned upon the construction of a deed of gift under which the lady came into possession of the property.

Messrs. DeGruyther, K. C. and *E. B Raikes* for the Appellant.

Messrs. Dunne, K. C. and *Kenworthy Brown* for the Respondent.

Appeal dismissed.

May 9th. Before the same Board. *Jagatput Singh* v. *Puran Chand* (Bengal).

In this appeal there was a question as to whether a suit had been settled by Counsel for both parties during the hearing.

Messrs. Dunne, K. C. and *Macaskie* for the Appellant.

Messrs. DeGruyther, K. C. and *Kyffin* for the Respondent.

Appeal dismissed.

May 12th. Before LORDS DUNEDIN, PHILLIMORE and CARSON and SIR JOHN EDGE. *Kenchana, K. S. Hosmani* v. *Girimallappa C. Somasgar* (Bombay).

This was an important appeal in which *Mr. E. B. Raikes* appeared *ex parte* for the Appellant.

The questions raised were whether a murderer can under Hindu law succeed to, or become a stock of descent for, the estate of the person murdered, and the further question arose whether in the Southern Maharatta Country the son of the paternal aunt is a nearer heir than the daughters of the paternal uncle of an intestate.

Judgment has been reserved.

May 12th and 13th. *Ganga Ram* v. *Natha Singh*.

This appeal was also heard *ex parte* by the same Board.

The Appellant was represented by *Mr. W. Wallach*.

The question at issue was whether on the construction of a mortgage the interest was a charge on the land. LORD DUNEDIN delivered judgment at the conclusion of the argument allowing the appeal.

In the Board Room before LORDS SHAW and BLANESBURGH and MR. AMEER ALI. *Maharaja Kesho Prasad Singh* v. *Sheo Parqash Ojha* (Allahabad).

The Appellant is the present Maharaja of Dumraon. The Respondents are the reversionary heirs of Monohar Ojha who was a co-sharer with the Raja in certain properties. The Appellant based his title on an alienation by a Hindu widow, and the question of legal necessity arose; there is also a question of *res judicata*.

Messrs. DeGruyther, K. C. and *Kenworthy Brown* for the Appellant.

Mr. A. Majid for the Respondent.

May 12th, 13th, 15th and 16th. In the same Court an appeal was heard from Bengal. *Maharaja Sir R. Singh of Darbhanga* v. *Hitendra Singh*.

The dispute arose in execution proceedings in which a Receiver had been appointed by consent. The effect of a compromise was considered and the re-opening of it.

Messrs. DeGruyther, K. C. and *Abdul Majid* for the Raja.

Sir G. Lowndes, K. C. and *Mr. B. Dubé* for the Respondent.

On May 13th. Judgment was delivered dismissing the appeal of the *Imperial Tobacco Co., India, Ltd.* v. *Bonnan* (Bengal).

May 13th. *Mahanu Wahad Lotu* v. *Khandu Walad Patil* (Bombay).

The suit was brought to eject the Appellant from certain lands. His defence was that the title deeds alleged by the Respondent to be deeds of sale were understood by him to be simple mortgages.

Mr. E. B. Raikes for the Appellant.

Mr. Parikh for the Respondent No. 2.

Appeal dismissed.

Rai Radha Krishun v. *Jag Sahu* (Patna).

The question for determination is whether, as stipulated in a mortgage deed executed by the manager of joint family property, compound interest is chargeable.

Mr. Kenworthy Brown for the Appellant.

Messrs. Dunne, K. C. and *Ramsay* for the Respondent.

May 19th and 20th. *R. Vaidyanatha Ayyar* v. *S. Tyagaraja Ayyar* (Madras).

This was a dispute as to the management of a religious charity. The Plaintiffs were remote descendants of the founder. The Appellant contended that there was no public trust and that the Plaintiffs had not an "interest" within the meaning of sec. 92 of the Civil Procedure Code to justify their institution of the suit.

Messrs. Upjohn, K. C. and *A Majid* for the Appellants.

Messrs. DeGruyther, K. C. and *Narasimham* for the Respondents were not called upon.

G. D. M.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY. JUNE 23, 1924. [No. 31.

Contents.

NOTES

Judicial Vagaries in England.

The unjudicial attitude of Mr Justice McCardie has shocked public opinion in England, no less than it has in India. We have never known a High Court Judge in India to perpetrate such indiscretions. It reminds one of the raw Mofussil Magistrates of days gone by. We have known of magisterial vagaries of many kinds, but if one like this had been perpetrated in India, his achievements would have been handed down to posterity as quite unique. The magisterial vagaries in England that used once to be pilloried by the late Mr. Labouchere in the columns of the Truth, suffered in no way in comparison with the performance of some of their erratic brothers in India. But the British Magistrates except in the big cities are not stipendiaries but well-nourished country gentlemen to whom poaching seemed to be a more heinous offence than wife-beating that resulted in grievous hurt and deserving of more exemplary punishment. The Members of the Indian Civil Service who come out to this country are of a more cultured class and, whatever their shortcomings may be, they are not always lost to all sense of proportion. The name of Mr. Justice Darling was well-known in India for his judicial indiscretions but the recent performances of Mr. Justice McCardie have taken the shine out of him. We invite attention to the following observations in the *New Statesman* which have been cabled out to India.

Proposed Parliamentary Censure on Mr. Justice McCardie.

Commenting on Justice McCardie's conduct of the O'Dwyer case the *New Statesman* says: It seems eminently desirable that Parliament should take some notice of this. Otherwise the impression is bound to spread throughout India that Indians cannot hope for justice when they sue or are sued in an English Court. The verdict was inevitable for it seems clear that a technical libel was committed and the damages agreed to are not excessive but the Judge's "*obiter dicta*" were such as to cast a stain on the English Bench which will not be easily wiped out. "From the very beginning of the trial he made no secret of his prejudice and in his summing up he even went so far as to condemn the Government of India in the strongest terms for having punished General Dyer, despite the fact that the Government of India were not represented in the trial and had been offered no opportunity of producing evidence on which they acted. Whether General Dyer was right or wrong in firing on an unarmed mob, whether he prevented a second mutiny or was guilty of a stupid and gratuitous outrage, we do not know, but we do know that Justice McCardie is guilty of an outrage upon the principles of British justice in saying what he said without even pretending to have heard all the evidence. He cannot be removed from the Bench without a resolution of both the Houses to which the Lords probably would not assent, but a vote of censure in the Commons will be better than nothing and might do something in India to restore confidence in the sense of justice of the British Parliament, if not of the British Courts."

Mr. Lansbury's motion.

Mr. Lansbury M. P. has given notice of a motion in the House of Commons calling atten-

tion to the observations of Mr. Justice McCardie in the above case and moving that an address may be presented to His Majesty praying that he may be removed from the Bench. We do not think that anything tangible will come out of the debate on the motion except that it will give an opportunity to the Commons to express their views on the great issues which have been raised by the decision of the jury as well by the observations of the trial Judge in the above case.

PART I.

ESTOPPEL AGAINST CONSENTING REVERSIONERS.

BY D. R. VAIDYA, SUB-JUDGE, 2ND CLASS, KHANDWA, C. P.

(*Continued from p.* cli.)

Macleod, C. J., distinguished the case of transfer with consent of reversioner from the case of a transfer of the life-estate and that of the reversion. Justice Walsh was satisfied with this distinction. [1922] All. 387 All-India Reporter. In *Rama Nana* v. *Dhondi Mahari*, [1923] Bom. 132, All-India Reporter, Macleod, C. J., said: "If then the widow does not convey her life-estate to the next reversioner, for which she is competent, but purports to convey the fee for which she is incompetent, the real result of the authorities is that the conveyance is split up into its component parts and effect is given to that part which is valid." This is a very lucid statement. If the widow transfers her life-estate in so many words, no dispute would arise at all. What frequently happens is this that she conveys the fee. When a reversioner consents to such a transfer, common sense dictates that the consent is to the transfer of the reversion and not to that of the life-estate; because the life-estate can be transferred without anybody's consent. Shah, J., in *Basappa's* case observed that the fact of joining in the deed of transfer necessarily showed that the reversioner consented to the transfer. If the reversioner in so many words says that he is transferring his reversionary rights, Macleod, C. J. would be satisfied and would not allow him to do that. If instead of doing it, he merely consents to the transfer by the widow of the fee the learned Judge would split up the whole into its component parts, *viz.*, transfer of the life-estate and a transfer of the reversion with consent of the reversioner. From this point of view, the whole transaction would be understood in a right way.

That a reversioner cannot assign, relinquish, or enter into contractual obligations about the reversionary rights is now firmly established. *Dayaram* v. *Bechardas*; [1922] Bom. 437 A. I. R., *Amrit Narayan* v. *Gaya Singh*, I. L. R. 45 Cal. 510; *Anand Mohun* v. *Gour Mohun*, I. L. R. 48 Cal. 536; *Ganga Bai* v. *Hari Ganesh*, I. L. R. 45 Bom. 1167; *Bhagwati Kuar* v. *Jugdam Sahai*, 2 Pat. L. T. 471. The only dispute is that the same man cannot consent and back out of it. There is no doctrine in support of this view. In *Anand Mohun* v. *Gour Mohun* (I. L. R. 48 Cal. 536), Justice Mookerji observed: "There is manifestly a fundamental difference between non-compliance with the formal requisites prescribed for a transaction whereby alienable property is transferred and an attempt to accomplish a transfer of property which has been rendered inalienable by a statutory provision. The Appellant is in a position of similar difficulty when he invokes the aid of the principle of law which is sometimes referred to as feeding the Court by estoppel. But this principle plainly has no application where the contract of assignment refers to property which has been expressly rendered inalienable by the legislature." The learned Judge explored all the grounds available to justify the transaction and held that none was applicable to transfers of reversionary interests. The doctrine of part performance, the doctrine of feeding the estoppel, the doctrine that sec. 6 (a) of Act IV of 1882 excepts Hindu law from its operation, and the doctrine that equity permits what law may not, were all considered and found insufficient to support dealings in reversionary rights. The whole is summed up in the phrase that there can be no estoppel against the statute.

The question is further complicated by the fact that the consenting reversioner may be a female having only a chance of a life-estate. Shah, J., left the effect of consent of such a reversioner open (I. L. R. 42 Bom. 719) Another question which will arise is whether the consent of a reversioner will bind the actual reversioner. Does the consenting reversioner represent the entire body of the reversioners? There is a conflict on this point. See *Hasli* v. *Hira*, 4 Lah. L. J. 201, *Gulab Thakur* v. *Fudali*, 68 I. C. 566, Nagpur, *Darbarilal* v. *Gobind Ram*, I. L. R. 43 All. 558; I. L. R. 44 All. 19; I. L. R. 43 All. 534.

If the reversioner expectant is very likely to

realize the present value of his reversion at a large discount, how much more would a female reversioner be inclined to do that. If an old father, expecting to inherit after the life-estate of the daughter-in-law, expects but a short tenure of it, he would sacrifice very valuable future rights for paltry gains in the immediate present.

Often with these cases is mixed up the question of acceleration of the estate. We can imagine that the widow surrendered the estate to the immediate reversioner and that the latter transferred it after that. Whether the transfer is of the whole estate or substantial portion of it and whether the reversioner is a female or male, are then important questions. We may arrive at the same results as on the ground of estoppel but we must remember that it may not be so always. Though we may ultimately arrive at the same result in some cases, we shall better understand the reason therefor. Confusion of ideas may sometime lead to miscarriage of justice. And lastly there may be cases where we shall arrive at the different conclusions and it is here that we must guard against being misled by the question of estoppel.

In fact there is considerable conflict of opinion on the point whether when a reversioner consents to a transfer by a widow, we can understand the composite transaction to mean that the widow surrenders the estate and the reversioner then transfers it. Then there is much conflict on the question whether a widow can be said to accelerate the succession by surrendering her husband's estate reserving a part of it for her maintenance. Then there is conflict of opinion as to whether the immediate reversioner represents the actual remote reversioners. Lastly, comes the question how far acceleration of estate in favour of a female reversioner may help to validate the composite transfer. To it may be added the questions arising from the consent itself being understood as presumptive proof of justifiable purpose for the transfer. I shall deal with all these aspects in my next article.

(Part I concluded.)

Correspondence.

LAW'S DELAY.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

I have read with keen interest in the newspapers the depositions given by witnesses before the Civil Justice Committee about the causes of Law's Delay in the Civil Courts and also your suggestions published in the 28 C. W. N. 65. For myself I have been thinking about this problem for the last 18 years. I therefore beg to submit for publication in your esteemed Journal the following observations:—

I concur with you when you say that "its chief cause, so far as it exists in the Presidency of Bengal, is that the Civil Courts in the Mofussil are under-manned. The Munsifs and the Subordinate Judges in the Districts are very hard-worked officers." I further beg to add that in their attempts to become Assistant Sessions Judges, some of the most conscientious among them undermine their health and others do positive injury to the litigant public in their zeal for speedy disposal resulting very often in miscarriage of justice. Considering the quality and the q[illegible] the work they have to perform daily it is impossible for them to look to every order that is to be passed in every case. These orders are, therefore, necessarily written and practically passed by the ministerial officers, which is the cause not only of delay but of various kinds of well-known mal-practices too common in Mofussil Courts. This can be stopped if the judicial officers can have sufficient time at their disposal to pass these orders themselves with their considered opinions on them. Next and the most important cause of delay and hardship to the litigant is the present system of process-serving in Bengal. By this system a litigant is to supply an identifier to the process-server and to swear an affidavit as to the service of the process exactly in the same words in which the peon has submitted his return. By the letter of the circular the peon has to write his return in the spot. But the letter of this circular is observed only in its breach.

It is now well-known fact that these peons never write these returns on the spot and in the majority of the cases in which they do actually serve the processes on the persons concerned, they are not accompanied by an identifier. Now the prevalent custom is that these peons on receipt of their dues (bribes) supply the litigants with pencil notes of their return. Along with the universal rise of salaries of public officers and the rise of price of staple food crops the peons, now the process-servers, have raised their

just (?) dues. The rapacious demands of these peons have now reached to such a height that civil administration of justice is growing unpopular day by day. The poor litigant has no other alternative but to submit to these demands. By our experience we know, they can have no remedy in Court or elsewhere. The High Court rule about the verification of service by Judge's Nazir do not and in the nature of things cannot produce any salutary effect.

There are suggestions from some quarters that these evils can be remedied by serving the processes through post offices or through the President Panchayats. But this, in my opinion, will not remedy the evil but will only change the agency of the evil. The only way, in my humble opinion, to remedy this evil, is to entrust the litigant himself with the service of the processes and the interests of the persons to be served with processes will be safe-guarded by the simultaneous issue of registered post cards from the Courts. A moment's consideration will show that so far as the service of processes upon the witnesses is concerned, it will certainly save time, trouble and expense of the litigant and at the same time remove the causes of fraudulent suppression of the processes. So far as service upon the opponent is concerned, the simultaneous service of registered post cards and the swearing of affidavit by the litigant himself or his agent and apprehension of criminal prosecution for false swearing will, I believe, prevent fraudulent suppression.

Yours truly,
SURENDRA KUMAR GHOSE,
Pleader.

31st March 1924,
Faridpur.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY AND CHAKRAVARTY, JJ. S. A. No. 343 OF 1922. MRITTUNJOY CHOWDHURI and others, Appellants *v.* SHYMA CHARAN DE and others, Respondents. The 2nd June 1924.

Rent suit, by landlord against former tenant—Applicability of sec. 153, Bengal Tenancy Act—Whether first appeal lies if decision relates only to relationship of landlord and tenant.

Plaintiff landlord instituted a suit for rent against the Defendants for rent for the year 1280 M. E. at 10 ans. of paddy per year alleging that the Defendants took a verbal settlement for the year in suit. It was alleged further that thereafter the Defendants abandoned the holding. Defendants in their written statement disputed Plaintiffs' title to the land, denied relationship of landlord and tenant and set up one Akhil Chandra Sen as landlord.

The alleged landlord was not made a party to the suit for rent.

The learned Munsif decreed the Plaintiffs' suit holding that there was relationship of landlord and tenant. An appeal was consequently preferred to the learned District Judge. In appeal the landlord Respondent contended that sec. 153 of the Bengal Tenancy Act was a bar to the competency of the appeal. The learned Judge overruled this preliminary objection on the ground that an appeal lay in this case since admittedly the suit was brought after the relationship between the parties had ceased and the suit had not been instituted by a landlord.

In second appeal by the landlord the learned vakil for the Appellant contended that no appeal lay to the District Judge and sec. 153 of the Bengal Tenancy Act was applicable [I. L. R. 27 Cal. 827, 16 C. L. J. 360; 1 C. W. N. 605, 1 C. W. N. 119 (notes) and I. L. R. 16 Cal. 870]. The Respondents' vakil relied on *Forbes v. Maharaj Bahadur Singh*, I. L. R. 41 Cal. 926:

Held That sec. 153 of the Bengal Tenancy Act was not applicable to the present case inasmuch as the Plaintiff was not the landlord of the Defendant at the time of institution of the suit, I. L. R. 41 Cal. 926, *referred to.*

Babus Chandra Sekhar Sen and *Pravath Ch. Dutt* for the Appellants.

Babu Hiralal Chakravarty for the Respondents.

S. C. C. *Appeal dismissed.*

THE

Calcutta Weekly Notes.

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Contents.

NOTES

Censure motion on Mr. Justice McCardie.

Last week we mentioned that Mr. Lansbury had given notice of a motion for moving an address for the removal of Mr. Justice McCardie from the Bench. On his asking for a day and time for the moving of his motion, the Prime Minister replied that the Government had decided that the moving of such a motion would be undesirable. The Prime Minister stated that such motion would only be permitted for discussion in cases of moral delinquency and not for any expression of opinion regarding the action or conduct of the Executive. The Prime Minister is quite right in the constitutional view he has taken. For, otherwise, the Judges would be reduced to puppets and would always be at the mercy of political parties. For preserving the independence of the Bench, free expression of judicial opinion, however unjust, should not be interfered with by the Executive. The proper authority for censuring such observations is the Appellate Court. If Mr. Sankar Nair appeals, it remains to be seen what the Court of Appeal would say with regard to Mr. Justice McCardie's most extraordinary charge to the jury. Mr. Ramsay MacDonald was, however, quite justified in expressing the opinion, which is shared by lawyers and laymen alike, that "the judiciary should guard itself against pronouncements upon issues involving great political consequences which themselves were not being tried." This practically amounts to a censure on Mr. Justice McCardie and the judiciary will do well to bear this always in mind.

—

The following is a telegraphic summary of Mr. Lansbury's motion and the Prime Minister's reply :—

In the House of Commons Mr. Lansbury asked if the Government would grant time for discussion of his motion asking for the removal of Justice McCardie from the bench in connection with his summing up in the O'Dwyer case.

Mr. MacDonald said that the Government had come to the conclusion that discussion on this subject would only add to the harm done to India by the words complained of.

As regards Justice McCardie it ought in fairness to be borne in mind that the objectionable passage did not occur in the considered written judgment but in the oral charge to the jury delivered at the conclusion of a lengthy and somewhat heated trial and the very form, in which it was couched, showed that the judge was not informed regarding what took place. He affirmed that the Government completely associated itself, with the decision of the Government and not merely of the Secretary of State for India of the day.

He added that, however unfortunate his words might have been, they clearly did not constitute any kind of fault amounting to moral delinquency, which constitutionally would justify Government's action. The Government would always uphold the rights of the judiciary to pass judgment even on the executive if it thought fit It was therefore all the more necessary that the judiciary should guard itself against pronouncements upon issues involving grave political consequences which themselves were not being tried

Mr. Lansbury expressed that he was perfectly satisfied with Mr MacDonald's statement.

Criminal responsibility and Insanity.

Insanity is often put forward as a defence in murder trials. What degree of dementia would excuse one from the criminal responsibility has been a debatable question of very long standing and has quite recently formed the subject-matter of both academic and legal

discussion. The Atkin Committee which was appointed by Lord Birkenhead, when he was Lord Chancellor, has given a quasi-legal recognition to "irresistible impulse." But at the same time this Committee, which was composed of eminent lawyers, unanimously reported in favour of the rule in *M'Naghten's* case which was recently re-affirmed in *Rex* v. *True* (16 Cr. App. R. 164). A Bill was, however, framed by Lord Darling, called the Criminal Responsibility (Trials) Bill, for giving legal recognition to the doctrines of "irresistible impulse." This Bill was introduced in the House of Lords and was debated upon during the third week of May and rejected without a division.

Lord Birkenhead who could not take part in the debate in the House of Lords owing to ill health has addressed a letter to the *Times* on "irresistible impulse," which advances very weighty arguments as to why it cannot be accepted always as a successful plea against criminal responsibility. He asks:—

"In what manner is the defence of irresistible impulse to be shown to the satisfaction of jury? Sane persons from time to time suffer impulses to do wrong. They, as a rule, resist these impulses. If they do not, and if the wrong which they are thus led to do is one forbidden by the criminal law and they are detected in its commission, they are rightly indicted and rightly convicted. It is precisely the same with the insane. They like sane persons, perhaps to a greater degree, are the subjects of impulses to do wrong. Sometimes they give way to them If they give way to them under the influence of delusion, or not knowing right from wrong, or not understanding the nature of the act which they are committing, they are amply protected under the express words of the M'Naghten rules. But insane persons, like sane persons, give way to impulses sometimes with which their impulses have no connection, and knowing well what they are doing, and that it is wrong. In such cases who is to say whether the impulse was resistible or irresistible? Everyone who has any experience of Criminal Courts can well foresee what will happen. Evidence will be tendered to show that in the family of the accused there is some taint of insanity, that the accused conducted himself at times in a manner unusual among persons of his status and education. The absence of motive will be pointed out. It will be urged that the law recognises that a person, though not wholly deluded, not ignorant of right or wrong, not ignorant of the nature and quality of his acts, may be subject to irresistible impulses, and that, if he is so subject, he is excused criminal responsibility. I have the greatest faith in the institution of jury trial. But it seems to me that such a state of the law and such an argument must place a jury, in whose hands for the time being lies the decision of the issue of life and death, in an impossible position."

The Gopinath Shaha case which was tried in the Calcutta High Court Sessions not very long ago would furnish an object lesson as to the contingencies contemplated above by Lord Birkenhead.

Mr. Justice Horridge, addressing the Grand Jury at the Birkshire Assizes on the 26th of May last, said in the same connection, that certain scientific medical persons had lately started a theory that a man should not be held responsible for actions if actuated by an "irresistible impulse." It is, His Lordship said, impossible to put that into working practice. How was a jury to determine whether a man was actuated by an irresistible impulse arising from mental disorder when he snatched an attractive bag from a lady's hand. His Lordship expressed satisfaction that Lord Darling's Bill did not receive any support in the House of Lords. He referred to Lord Birkenhead's letter in appreciative terms and said that "irresistible impulse arising from mental disorder" was seldom advanced except in murder charges, the reason being, he supposed, that imprisonment in a criminal lunatic asylum was often far more serious than any punishment which might be imposed for a less grave crime than that of murder.

PROCEDURE FOR IMPEACHING AWARDS.

This note will be confined to cases arising in connection with the Indian Arbitration Act. The three main classes of cases are when the award is impeached (*i*) on grounds mentioned in sec. 14 of the Indian Arbitration Act, *viz.*, that the arbitrator or umpire has misconducted himself or that the arbitration or award has been improperly procured, (these grounds will be referred to hereinafter as "misconduct"), (*ii*) on the ground of want of jurisdiction, and (*iii*) mixed grounds of misconduct and want of jurisdiction. Questions of procedure are mainly:—(*a*) When the aggrieved party takes the offensive, whether he can do so by the summary procedure of petition under the Indian Arbitration Act or by a regular suit? (*b*) In what cases can objections to award be pleaded as a defence?

I.—Misconduct.

(1) If the *award has not been filed* in Court.

(*a*) Does a *petition* lie to set aside the award?

According to an Allahabad decision of Walsh and Ryves, JJ., in *Ramkissendass Brijmohan* v. *Sushil Chandra Dass* (All-India Reporter, 1923, Allahabad 31) such an application is not maintainable. The Allahabad view receives indirect support from a Lahore deci-

sion in the case of *Hiranand Murlidhar* v. *Fleming Shaw & Co.*, 4 Lah. L. J. 12, in which Rossignol and Campbell, JJ., say that "sec. 14 details the causes open to the Court after an award has been filed in Court."

(b) A *suit* is maintainable in such a case for a declaration that the award is not binding. Such a suit lies under sec. 42 of the Specific Relief Act. It was so held in the above case of *Hiranand Murlidhar* v. *Fleming Shaw & Co.* Mookerjee and Chotzner, JJ., held in the case of *Baidyanath Chattopadhyaya* v. *Sm. Panchanani Dassi*, 28 C. W. N. 140 : s. c. 37 C. L. J. 542, that "it cannot be contended that an award was not valid because the party in whose favour it was had never applied to have it filed in Court. . . . If the award is valid, it is operative even though neither party has sought to enforce it by a regular suit or by the summary procedure." See also *Bhajahari* v. *Behary Lal*, I. L. R. 33 Cal. 881. Therefore if the award is challenged, and an application is not maintainable for the purpose, a suit must lie.

(2) When the *award has been filed in* Court :—

(a) A *petition is the proper procedure* for impeaching it when the grounds are all covered by sec. 14 of the Indian Arbitration Act. Their Lordships of the Privy Council in *E. D. Sassoon & Co.* v. *Ramdutt Ramkissendass*, L. R. 49 I. A. 366 at 373 : s. c. 27 C. W. N. 660, expressed the following opinion · "Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award." Compare the case of *Oppenheim & Co.* v. *Mohamud Haneef*, L. R. 49 I. A. 174 : s. c. 27 C. W. N. 612 ; [1922] 1 A. C. 482, although this case deals with the corresponding English law. See Form No. 67 given in Russell on Arbitration and Award, 11th Edition, p. 666.

(b) Is a *suit* maintainable in such a case? If not, is it a question merely of costs or must the suit be dismissed?

Whether an application is the exclusive remedy in such cases was expressly left open by Mookerjee and Fletcher, JJ., in *Radha Kissen Khettry* v. *Lachmi Chand Jhawer*, 24 C. W. N. 454 : s. c. 31 C. L. J. 283. In this respect the head-note to the report in 31 C. L. J. is inaccurate.

The point came up for decision before Greaves, J., in Suit No. 3428 of 1922, *Uday Chand Pannalall* v. *P. E. Guzdar & Co.*, and the learned Judge observed: "I think the contention is correct that this application could, under the circumstances, have been made by motion and not by suit. . . . But I am not prepared to say that the suit is incompetent because the application could have been by a motion and not by suit : and in my reading of the decision of the Judicial Committee" in 27 C. W. N. 642 "this has not been so decided. I can well understand that questions as to costs may arise if the more costly procedure is adopted but I am not prepared to say that the suit is incompetent because the procedure by motion might have been adopted . I hold that the suit is maintainable."

On the 14th of January 1924 the same point was dealt with by C. C. Ghose, J., in Suit No. 2463 of 1921, *Balmukund Rina* v. *Overseas Export and Import, Ltd.*, which was an undefended case. The learned Judge did not treat the question as one merely of costs but dismissed the suit.

On the 29th of January 1924 the aforesaid judgment of Greaves, J., came up on appeal before Sanderson, C. J. and Richardson, J., in Appeal No 61 of 1923, *P. E. Guzdar & Co.* v *Uday Chand Pannalal*. The above judgment of C. C. Ghose, J., was also referred to during argument. In the judgment delivered on the 30th January 1924 the learned Chief Justice observed: "I do not think it necessary to express further opinion upon the question of whether the proceedings by way of suits would lie. I agree with the argument which was submitted by the learned Counsel for the Appellants that the proper proceedings was by way of a petition and motion as is laid down by the rules of the Court. But there is really no substance in that point in this case because, as I have already said, the learned Judge treated the matter as a motion and directed the costs to be taxed on that basis." The appeal was allowed on the merits and the Plaintiff's suit was dismissed with costs on Scale No. II (and not merely costs as of an application).

In such a case ordinarily the Plaintiff can get only the costs as of an application if he succeeds and must pay the costs as of a suit if he fails. This is because the Plaintiff adopted a wrong procedure and must suffer the consequences appropriate to the result. Should the suit be dismissed on the ground that the proper procedure is by way of application, then, of course, the Plaintiff would be

entitled to proceed *de novo* by way of application if within time. It may be observed in passing that the period of limitation for such applications is not ten days as prescribed by Art. 158 of the Indian Limitation Act for applications under the Code of Civil Procedure, 1908, to set aside an award.

(3) After *the award has been filed and enforced by execution* can the aggrieved party move by petition to set aside the award? This point was left open in 49 I. A. 366 at 373. But in many cases on the Original Side of the Calcutta High Court execution has been levied almost immediately after the filing of the award, and applications for setting aside the awards have been entertained after such execution.

(4) Can the grounds under sec. 14 of the Indian Arbitration Act be taken by way of *defence to an action on the award?* On this point in the Madras High Court there has been difference of opinion, which has been referred to in the judgment delivered in 49 I. A. 174, but their Lordships expressed no opinion on the question whether if the arbitration had taken place in India the defence on the ground of irregularity could have been pleaded. Their Lordships held that it could not have been pleaded in answer to an action on an award governed by the corresponding English law. In the circumstances it would be advisable to take active steps to set aside the award and not stand on the defensive.

II.—JURISDICTION.

When a duly appointed arbitrator exceeds his jurisdiction, the case comes under sec. 14 of the Indian Arbitration Act and the question is regarded as one of misconduct. In the case of awards, the main questions of jurisdiction, briefly put, are: (*i*) no submission, (*ii*) void submission, and (*iii*) no qualification, *e.g.*, when an Asiatic is appointed as arbitrator whereas the arbitration clause requires an European.

When an award is challenged on the ground of want of *jurisdiction*:—

(*a*) Does a *suit* lie to set aside the award?

This matter was at one time the subject-matter of controversy. Rankin, J. maintained that under the Indian Arbitration Act all applications to set aside an award which has been filed should be made by petition, *whatever be the ground.* See for instance 31 C. L. J. 283 at p. 291. On appeal Mookerjee and Fletcher, JJ., were not prepared to accept this as correct exposition of the law. And it was held that "where the ground of attack goes to the root of the matter and arises as it were before the constitution of the domestic forum, a suit is maintainable for the investigation and determination of the controversy according to the procedure prescribed by the law." See 24 C. W. N. 464. The Privy Council has set the matter at rest by laying down that "where (as here) it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose.

(*b*) The fact that the award has been *enforced by execution* under sec. 15 of the Indian Arbitration Act is not a bar to a suit to have it declared void and for consequential relief; see 49 I. A. 366 at p. 373.

(*c*) Does an *application* lie to set aside an award alleged to have been made without jurisdiction? The matter has not been put beyond all controversy. In the case of *Matulal Dalmia* v. *Ram Kissen Das*, I. L. R. 47 Cal. 806, it was contended that there was an interpolation in the contract and an application was made to have the award set aside and taken off the file on the ground that there was no contract between the parties and consequently there was no submission. Greaves, J., tried the matter on affidavits and set aside the award. On appeal Mookerjee and Fletcher, JJ., delivered a very short judgment, the material portion of which is as follows:— "We are of opinion that the question which arises in this matter should be decided in a regular suit. We therefore allow this appeal, set aside the order of the Court below and dismiss the application." Comment has at times been made that the above judgment does not lay down a general rule but dealt with the special nature of the case. But on the other hand this case has discouraged the making of applications for setting aside awards on the ground of want of jurisdiction.

(*d*) Can an objection on the ground of jurisdiction be raised by way of *defence to an action on the award?* With regard to the corresponding English law the Judicial Committee of the Privy Council in 49 I. A. 174 at p. 180, expressed that "no doubt any defence going to the root of the award—for instance, that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit."

III.—MIXED GROUNDS.

Where an award is attacked on mixed questions of jurisdiction and misconduct:—

(a) A *suit* is, of course, maintainable. See 49 I. A. 366 and 24 C. W. N. 454.

(b) Is an *application* maintainable in such a case? But if Mookerjee and Fletcher, JJ., laid down a general rule in I. L. R. 47 Cal. 806, C. C. Ghose, J., however not only treated an application to be not maintainable where a question of jurisdiction is raised, but dismissed such an application even when the matter was not to be tried on affidavits. This happened in application No. 67 of 1919 *re arbitration*, *Ram Kissen Das Joydayal* v. *Hulasiram Ramdayal.*' In this matter on the 9th April 1919, agreed issues were filed before Rankin, J., and an order was made for affidavits of documents and inspection and thereafter for the placing of the matter on the prospective list of suits. In course of time the matter came up for hearing for all practical purposes as a suit before C. C. Ghose, J., on 6th May 1920. Then a preliminary objection was taken that the application was not maintainable. On the 26th May 1920 the preliminary objection was held to be fatal and the application was dismissed.

Apart from the defensive and confining attention to active steps for setting aside awards, it will appear from the above that the law has become highly technical. It is easy for the litigant to get into the wrong boat: but there is this consolation to him that in most cases all is not lost: he pays costs and then has a chance to go right. He would hardly make a mistake in the second choice.

K. P. Khaitan,
Bar-at-Law.

Correspondence.

PROCESS-SERVERS, IF PUBLIC OFFICERS.

To

The Editor, "Calcutta Weekly Notes."

Sir,

I beg to draw your attention to the following lines and shall be much obliged, if you or any of your numerous readers will kindly give them the consideration they may deserve.

I had recently had occasion to file the certified copy of the report and affidavit of the process-serving peon to prove that symbolical possession was delivered to the decree-holder of a piece of land in execution of a rent-decree under sec. 52 of Act VIII of 1869.

My contention was that the peon's report is a public document and that, therefore, the certified copy thereof should go in without producing the peon and his original report and proving the latter through him.

Under sec. 74, sub-sec. 1, cl. (iii) of the Evidence Act, records of the acts of a "public officer" is a public document, of which a certified copy is admissible without formal proof.

Under sec. 2, sub-sec. 17, cls. (d) and (h) of the Civil Procedure Code, a peon, attached to a Munsif's Court, is a "public officer." Therefore, the certified copy of the peon's report was admissible without proof.

The Court, however, refused to admit it, on the ground that a "public officer" under the Civil Procedure Code was not so under the Evidence Act. Moreover, he doubted, if a peon was at all a "public officer" even under the said provisions of the Civil Procedure Code.

I submit that the Court's opinion is erroneous.

The General Clauses Act does not define a "public officer." So, a "public officer" under the Civil Procedure Code, or a "public servant" under the Criminal Procedure Code, must be a "public officer" for the purposes of the Evidence Act as well. Every person, whose duty it is to execute a judicial process, and every person especially authorised to do so as well as every person in the pay of service of Government, is a "public officer."

Is the peon a "public officer" for some purposes only, while he is not so for other purposes? (I. L. R. 22 Cal. 759).

My question is whether a peon, attached to a Munsif's Court, is a "public officer" under sec. 74 (1) (iii) of the Evidence Act read together with sec. 2 (17) (d) and (h) of the Civil Procedure Code, so that his report and affidavit about the service of process in his official capacity is a "public document" and a certified copy thereof is admissible in evidence without production of the original report of the peon and peon's deposition in its support.

Much unnecessary waste of time and money would be saved if my contentions hold good. It may also happen that the peon is dead, or is not available for production at the hearing of a suit or proceeding and the original record may have been destroyed long ago, it causing great difficulties to the ———

I think the peon's report should be declared

a "public document" by legislation, in order to make it admissible without proof and necessarily also the certified copy thereof, if it is not already such.

Yours faithfully,
MAHANANDA CHAUDHURI,
Pleader, Habiganj (Sylhet).

24-6-1924.

VALUATION OF REDEMPTION SUITS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

In your Editorial Notes at p. 145 you have discussed at length the case of *Saroda Sundari Bosu* v. *Akramanessa*, 28 C. W. N. 710 and pointed out the anomalous results that may follow if the jurisdiction for the trial of redemption suits is to depend upon the sum that may ultimately be found due. You have suggested that the valuation for the purpose of jurisdiction should be based either upon the principal money stated in the bond, or upon the same with interest calculated up-to-date without regard to pleas available in reduction of the amount. The first alternative, I may be permitted to say, is open to the objection pointed out in the judgment that the sum ultimately due which may be recoverable by the sale of the land may exceed the limited pecuniary jurisdiction of the Court. The second alternative is not open to the same objection, but it may unduly raise the value of the suit so as to drive the Plaintiff to a higher, and a more distant, and a more expensive tribunal.

I would venture to make a third suggestion, namely, that the market value of the property sought to be redeemed may be taken as the value of the suit for the purpose of jurisdiction. This class of suits is described in sec. 7, cl. (*ix*) of the Court Fees Act as a "suit for the recovery of the mortgaged property," and in the usual course of things its valuation should be the value of that property. Such a valuation would not, to my mind, lead to any anomalous results. If the value of the property is less than the pecuniary limit of the Munsif's jurisdiction, but the sum found due exceeds that limit, it will be against the interest of the Plaintiff to redeem the mortgage, and ordinarily he would not choose to do so. In such a case the Defendant (mortgagee) may however get a decree for foreclosure or sale. Whether the final decree is for redemption in favour of the Plaintiff, or for foreclosure in favour of the Defendant, it concerns the property only, the value of which is within the Court's jurisdiction, and it is therefore competent to pass such a decree. If, on the other hand, it is a decree for sale, it may be proper to assume that the price fetched at the sale would not exceed the sum at which the property was valued in the plaint, if the valuation was at all accurate. Thus the sale-proceeds which the Court would award to the Defendant would remain within the limits of its jurisdiction. There is no provision in Or. XXXIV of the Civil Procedure Code for passing a decree in such a suit in favour of the mortgagee for the balance of his dues, if the sale proceeds be insufficient to satisfy them fully. R. 6 of that order which is the only rule on the point, deals with a sale taking place under a decree in a suit brought by the mortgagee under r. 4 for the sale of the mortgaged property, and it has no application to a suit for redemption brought under r. 7. Thus the Court will not be called upon to realise, and pay to the Defendant, a sum exceeding its pecuniary jurisdiction.

It may be useful to compare redemption suits with suits for pre-emption coming under sec. 7, cl. (*vi*) of the Court Fees Act. In both these classes of suits the Plaintiff prays for possession of immoveable property on payment of what may be found due from him. In a pre-emption suit the valuation for jurisdiction is the value of the land, as implied in sec. 3 (*1*) of the Suits Valuation Act. I think on this analogy also the value of redemption suits may be taken at the value of the property sought to be redeemed.

Yours truly,
S. C. BASU,
Subordinate Judge.

Suri,
14-6-24.

Review.

HINDU LAW. *By Golap Chandra Sarkar, Sastri. Fifth Edition. By Rishindra Nath Sarkar, M.A., B.L., Vakil, Calcutta High Court. Eastern Law House, Calcutta, 1924.*

This well-known work has grown from a students' hand-book to that of a well-known treatise on Hindu law. The present Editor, the son of its eminent author, has done well in making no material alteration in the text of the work. He has only added notes of decisions that have been given by the Judicial Committee and the Indian High Courts since 1910, when the previous edition was published. While case-law has thus been incorporated, we find that the changes in the law effected by the more recent statutes have not been so embodied in the present edition. This is undoubtedly due to the fact that as they were passed during the progress of the work through the press, the editor has not had the opportunity of incorporating them in the body of the work. For instance, we find him making mention of the recent amendment to the Civil Marriage Act of 1872, but as Dr. Gour's Bill after passing through the Assembly in the early part of 1923 passed through the Council of State towards the end of that year and received assent of the Governor-General later on, the editor could not possibly embody its provisions in the present edition. The same may be the reason for not making any mention of Mr. Sheshagiri Ayer's amendments regarding exclusion from inheritance by reason of certain disabilities under Hindu law, but it would have been better if the legislative measure in this connection had been noticed. The editor may issue supplementary slips in this connection, because it will be some years before a new edition of this valuable work may be expected to be issued. We hope the editor will accept these suggestions which are made from our desire to see the work of his learned father quite up-to-date in all respects. The special merit of the late Prof. Sastri is that being a non-Brahmin, he was able to review the law with regard to some dubious questions of Hindu law and custom from an unbiassed point of view. For instance, he has had the boldness of stating that there is hardly any justification for saying that *pratiloma* marriage is absolutely prohibited under Hindu law. The recent amendment of the Civil Marriage Act will, we expect, put an end to the controversy on this debateable question. Another question with regard to which we find ourselves in perfect agreement with him is his view in respect of the doctrine of spiritual benefit and the fictitious importance that has been attached to it by certain judicial decisions in connection with questions of inheritance. We have always attempted to purge Hindu law of this legal fiction and Prof. Sastri has demolished it by an able analysis of the authoritative Sanskrit texts bearing on the question. Prof. Sastri's work is not merely a compilation of the rules of Hindu law but he brings to bear on them the light of his research and learning to present some original views, which may not generally be accepted in all cases but will certainly contribute to the better appreciation of some vexed questions of Hindu Law. The get up of the book is excellent and it is also very ably edited.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before NEWBOULD AND B. B. GHOSH, JJ. APPEAL FROM ORIGINAL DECREE No. 179 OF 1922. DEBENDRA NATH ACHARJYA and another, Plaintiffs-Appellants *v.* TRAILOKHYA NATH ACHARJYA, Defendant-Respondent. The 25th March 1924.

Indian Lunacy Act (IV of 1912)—Application to declare a person to be a lunatic and to be appointed manager to the estate, refusal of, by District Court—Appeal to High Court—Alleged lunatic, if a necessary party to the appeal.

The facts material to this report are as follows :—

The Appellants made an application before the District Judge of Khulna under the Indian Lunacy Act for a declaration that their father Purna Chandra Acharjya was of unsound mind and incapable of managing his affairs, and for their appointment as managers to the estate of their father. The application was opposed by the Respondent, one of the co-sharers of the alleged lunatic. In ac-

cordance with the provisions of the Lunacy Act the District Judge held an inquisition and came to the finding that the alleged lunatic was capable of managing his own affairs and dismissed the application on this ground. Against this order the Appellants preferred this appeal to the High Court. The alleged lunatic Purna was not made a party to this appeal. A preliminary objection was taken on behalf of the Respondent to the competency of the appeal, and it was urged that Purna was a necessary party and in his absence the appeal was incompetent:

Held—That the omission to make the alleged lunatic a party to the appeal was a fatal defect, and the appeal was held to be incompetent.

After a person has been held capable of managing his own affairs it is absurd to imagine that a Court would pass an order in his absence and deprive him of that right without giving him an opportunity to be heard.

Babu Satindranath Roy Chowdhury for the Appellants.

Rai Surendra Chandra Sen Bahadur and *Babu Hemendra Chandra Sen* for the Respondent.

H. C. S.

CIVIL APPELLATE JURISDICTION. Before NEWBOULD AND B. B. GHOSH, JJ. APPEAL FROM ORIGINAL ORDER NO. 327 OF 1921. CHANDRA KUMAR BOSE, (Defendant), Appellant *v.* SATIS CHANDRA CHUCKRAVARTY, (Plaintiff), Respondent. The 2nd April 1924.

Civil Procedure Code (Act V of 1908), Or. 40, r. 1 (a)—Or. 43, r. 1 (s)—Receiver, appointment of, order for, when appealable.

Plaintiff applied for the appointment of a Receiver under the provisions of Or. 40, r. 1 (a) of the Code of Civil Procedure for better management of the mortgaged properties during the pendency of his suit for the enforcement of a mortgage bond. The learned Subordinate Judge of Faridpore passed an order on 21st November 1921 in these terms: "This is a fit case where Receiver should be appointed for better management of the properties. The case be adjourned to 20th December 1921 for further order after the applications are received for appointment of Receiver." This appeal was filed on 9th December 1921 against the said order of 21st November 1921. It appears that two persons were ordered to be appointed, one was named and required to furnish security to the satisfaction of Court and the other was to be appointed after advertisement.

The Respondent's vakil contended that the appeal was premature and not maintainable on the authority of *Upendra Nath* v. *Bhupendra Nath*, [1910] 13 C. L. J. 157 and *Srinivas Prosad* v. *Kesho Prosad*, [1911] 14 C. L. J. 489, until the order for appointment became final and operative by actual appointment after the security was furnished.

The Appellant urged—This was an operative order, there was an appointment and that the appeal was therefore competent:

Held—That the appointment of Receiver not having been complete and effective within the meaning of Or. 40, r. 1 (a) until security was furnished as directed by the order of appointment, the appeal was premature and not maintainable under Or. 43, r. 1 (s).

Srinivas Prosad v. *Kesho Prosad*, [1911] 14 C. L. J. 489 at 490, followed.

Babu Brojo Lal Chuckerbutty for the Appellant.

Babu Prokash Chandra Majumdar for the Respondent.

H. D. C.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, JULY 7, 1924. [No. 33.

Contents.

NOTES

Trial by Newspapers.

In England some newspapers which carry on a traffic in sensations for purposes of profit are being brought to book by the Law Courts for publishing opinions and also results of independent inquiries with regard to sensational crimes. It is common sense that such independent inquiries are based on statements, which are worse than hearsay, since they are not made on oath, and the persons making them run no risk of being prosecuted for making false or malicious statements. The publication of such statements or results of non-judicial investigations also result in the mischief that the person accused is prejudiced in his trial. The High Court of England has therefore recently imposed the heavy fine of £1000 on an evening newspaper and also pretty heavy fines on some other journals, which prematurely discussed the details of the "Bunglow" murder case. The Lord Chief Justice took occasion to observe that if the growing evil of trial by newspapers did not cease, the judges would not hesitate to visit the offenders with imprisonment.

Judicial Committee and its power to interpret constitutional questions.

Various questions of constitutional importance have from time to time come up from Canada for interpretation by the Judicial Committee of the Privy Council. We learn from our legal contemporary of the *Law Times* that the Government in England has decided to refer an interesting question in connection with the Irish Boundaries Commission to the Judicial Committee for opinion. Our contemporary says: "Owing to the refusal of the Government of Northern Ireland to appoint a representative to the Boundary Commission to be set up under Art. 12 of the Treaty, questions might arise as to whether the Commission could make a valid award, and whether such Commission was legally constituted. The Government have, therefore, wisely decided to ask the Judicial Committee of the Privy Council to advise them on these points, availing themselves of the power conferred by sec 4 of the Judicial Committee Act of 1833 which provides that 'it shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such or other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.' It is stated that distinguished judges from the Dominions are to be asked to sit on the Committee, the Chief Justice of Australia has consented to act and it is hoped that a member of the Canadian Bench will also sit. The scope of sec. 4 of the Act of 1833 is very wide, and matters have been considered under its provisions, which are not strictly appealable grievances." The jurisdiction of the Judicial Committee is much wider than that of any other Court in the British Empire including that of the Judicial Committee of the House of Lords. This is because its judicial functions arose out of the executive functions it once exercised as His Majesty the King's Executive Council. Even now its judgments are delivered as opinions advising His Majesty. It is by pr[illegible] and convention that they have come regarded as judgments of the highest C[illegible] Appeal so far as the Colonies and Dependencies are concerned.

Reports of process-servers, how may be made admissible in evidence.

There is much to be said in favour of Mr Mahananda Chaudhuri's suggestion that the reports of process-servers should be made admissible in evidence, for what they are worth, without further proof, in proceedings other than those in which they are made. (*Vide* 28 C. W. N. clxi). But we do not agree that this object will be attained by simply declaring peons' reports to be "public documents," for, unless and until it is established that the contents of a public document are relevant under some other provision of the Evidence Act, they cannot be proved by the production of the document itself, and sec. 77 of the Act will not be available to let in the certified copy when the original is not admissible. The content of the peons' report would not be relevant under sec. 35 of the Act, even if it was declared to be a public document. The change desired cannot be obtained without expanding the scope of sec. 35. Statements recorded in the course of business, official or otherwise, whenever they refer to matters into which the Court has to enquire may very well be made relevant on the analogy of the provisions of secs. 34, 35, 36 and 37 of the Act. This coupled with a suitable amendment of sec. 74 which will make it clear that records of acts of ministerial officers duly incorporated in the records of public officers, legislative, judicial and executive, are also public documents, will, we think, go a long way towards removing the difficulties alluded to in Mr. Chaudhuri's letter and effect material saving of time and money in judicial proceedings. The suggestion is well worth the consideration of the Civil Justice Committee, who, if we remember aright, did invite suggestions for changes in the law of evidence directed to this end.

PART II.

THE FICTION OF SURRENDER AND THE EVIDENTIARY VALUE OF CONSENT.

BY D. R. VAIDYA, SUB-JUDGE, 2ND CLASS, KHANDWA, C. P.

Mr. Justice Das in *R. B. Mansing* v. *Nawalakhbati* (I. L. R. 2 Pat. 607) said : "It is well to remember that, although actual transfers by Hindu widows have, in many cases, been supported by reference to the theory of the relinquishment of the widow's entire interest, there is relinquishment in the true sense of the term, when there is disclaimer by the widow at the time of the death of her husband, or the renunciation of the world by her afterwards, or some act by her which might, in the eye of law, justify the inference that the widow is civilly dead. It is only when the widow is dead, either actually or civilly, that the law steps in and gives the estate of her husband to the next reversioner. But there are cases in the books which are called cases of relinquishment but which are in fact not cases of relinquishment at all, where alienations by Hindu widows have been upheld by arguing from analogy. But analogy denotes only a partial similarity and it does not follow that, because where a widow renounces the world the next reversioner takes the estate by operation of law, there is also a succession by operation of law where, as a result of a transaction not amounting to a relinquishment, properly so called, but capable of being supported by reference to the theory of relinquishment, the estate comes to the next reversioner. But where the widow sells the estate for valuable consideration to the heir or to a stranger with the consent of the heir or enters into an engagement with the heir which has the effect of carrying the estate to the heir or a stranger with the consent of the heir, in other words, whenever the transaction is one not of relinquishment but one capable of being supported by reference to the theory of relinquishment, the title of the heir arises, not by operation of law, but by the act of the transfer on the part of the widow."

When a widow transfers for consideration her husband's estate to the next reversioner or with his consent to a stranger, or makes a gift of it to a stranger with the consent of the next reversioner, we can scarcely say that there is relinquishment by her. In the case of transfers for consideration, we can well say that she has merely converted her estate into cash. It is only in cases of gifts to the next heir that we can say that there is relinquishment. The reason for allowing such transfers to stand on the basis of a relinquishment was well stated by Sir Richard Garth in *Nobokishore* v. *Harinath* (I. L. R. 10 Cal. 1102 F. B.), where he said : "It is thus the impossibility of preventing such alienations which supports them." He observed : "If it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent

any alienation which the widow and the next heir may thus agree to make."

If it were once held that no alienations by widows to the next heir or with his consent to strangers would stand, the people would take care to obtain surrenders by widows, so far as appearances went, and effect transfers all the same. What is the use of following the strict sense of the law? There is, indeed, no logic in calling what is not relinquishment a relinquishment, but strong common sense will dictate that it will be the same thing over again under different names. Every day non-transferable tenant rights are transferred by first surrendering them to the landlord and the landlord reletting it again to the intended transferee. As the landlord cannot be relied upon and prevented from being a colluding party, so the next heir also cannot be prevented from being in the conspiracy. It is, indeed, not strict logic but it is strong common sense to support these alienations on the ground of relinquishment. Fine logic is of no use in the hard matter-of-fact world. What the law will not allow to be done directly, people will effect indirectly and law will have to condone it, and logical consistency will be pedantic only and of no practical effect.

(*To be continued.*)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

May 12th, 13th, 15th and 16th. *Maharaja of Darbhanga* v. *Hitendra Singh*. These were two consolidated appeals. The Appellant, a decree-holder, sought to have a Receiver discharged. The Receiver had been appointed by consent and had been retained in office under the terms of a consent order. There is a further question of *res judicata*. Judgment was reserved.

Messrs. DeGruyther, K. C. and *A. Majid* for the Appellant.

Sir G. Lowndes, K. C. and *Mr. B. Dubé* for the Respondents.

May 19th, 20th, 22nd, 23rd and 26th. In the Board Room before LORDS DUNEDIN, CARSON and MR. AMEER ALI. *Nayak Vajesingji* v. *Secretary of State* (Bombay).

The suits out of which these appeals arose were brought by the Appellants against Government for declarations that they held the lands claimed as proprietors and not as Government tenants.

The Appellants claim that they and their ancestors have held the lands as proprietors for two centuries first under the Maharatta and then under British rule. Judgment was reserved.

Messrs. Dunne, K. C. and *Parikh* for the Appellants.

Sir G. Lowndes, K. C. and *Mr. Kenworthy Brown* for the Respondents.

May 27th. *Manzur Hasan* v. *Md. Zaman* (Allahabad).

This appeal was argued before LORDS DUNEDIN, CARSON and DARLING.

The Appellants are members of the Shia Community of Aurangabad and claim the right to use a street which runs at the back of a Sunni mosque for the Moharram procession and to perform the "matam" in a circle close to the mosque. The Board have reserved judgment.

Messrs. DeGruyther, K. C., Wallach and *Fateh Singh* representing the Appellants.

Sir G. Lowndes, K. C. and *Mr. A Majid* for the Respondents.

May 27th. Before LORDS SHAW, BLANESBURGH, SIR J. EDGE and MR. AMEER ALI.

Sant Bakhsh Singh v. *Mahadeo B. Singh* (Oudh).

This litigation is concerned with the under-proprietary rights in the estate of Harha. The Appellants claimed to be put into joint possession of certain villages, but the Court of the Judicial Commissioner reversing the decree of the Subordinate Judge denied possession but granted a money decree. The appeal was dismissed.

Messrs. A. M. Dunne, K. C. and *Dubé* for the Appellants.

Mr. Kenworthy Brown for the Respondent.

May 27th. *Sircar Barnard & Co.* v. *Sm. Barkunarain* (Patna).

The High Court whose judgment was upheld by the Board decided against the due attestation of a mortgage deed. The appeal was dismissed.

Messrs. Dunne, K. C. and *Hyam* for the Appellants.

May 27th and 28th. *Ma San Ban* v. *Ma Da Tire* (Lower Burma).

Properties had been conveyed to the first Respondent with a provision for reconveyance. The first Respondent conveyed to the second Respondent under a similar arrangement, and

the Appellants claimed the return of their property. The Respondents contended that the Appellants were not entitled to a reconveyance as they had failed under their original agreement to give possession. Judgment has been reserved.

Mr. E. B. Raikes for the Appellants.

Messrs. A. M. Dunne, K. C. and *Pennell* for the Respondents.

May 29th and 30th. The hearing was commenced of an appeal from Lower Burma, *Kirkwood* v. *Maung Sin*, which raises important questions of succession under the Burmese Buddhist Law. The Appellant is the wife of Col. Kirkwood who some years ago was injured in a railway accident on the East Indian Railway and fought his claim right up to the Privy Council where he was finally unsuccessful.

The argument for the Appellant was opened by *Messrs. DeGruyther, K. C.* and *The Hon. Geoffrey Lawrence*.

Messrs. Dunne, K. C. and *E. B. Raikes* represent the Respondents. The Court then adjourned until the 19th June.

June 3rd. The Birthday Honours List, published this morning, contains the name of Sir Charles Neish, the Registrar of the Privy Council, who has been made a Knight Commander of the British Empire. This recognition of his services will be welcomed by all who have come in contact with the Registrar, whose unfailing courtesy and tact have smoothed away many a difficulty for solicitors and counsel alike.

G. D. M.

3-6-24.

Review.

THE CALCUTTA RENT ACT, 1920 (as amended by the Acts of 1923 and 1924). *By Mr. M. N. Kanjilal, M.A., LL.B. (Cantab), Bar-at-Law, Advocate, High Court, Calcutta. The Art Press, Calcutta. Price Rs. 9.*

The revised edition of Mr. Kanjilal's Calcutta Rent Act is a great improvement on its predecessor in every respect. It is very neatly got-up and ably edited.

As might have been expected the book brings the law on the subject absolutely up to date and is a perfect vade mecum for the practising lawyer. One interesting feature of the book is that it is a compendium of all cases decided in the Courts of Record in England and in this country. This feature will be most appreciated by the busy practitioner.

The lay readers will also find the book not only interesting but also very useful whether he happens to be a landlord or a tenant.

The book is provided with a carefully prepared index.

The texts of the Bombay, Rangoon and English Acts are also given.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before GREAVES AND GRAHAM, JJ. S. A. No. 933 of 1922, KEDAR NATH BASAK, Plaintiff-Appellant *v.* AMAR CHANDRA CHAKERVERTY and others, Defendants-Respondents. The 26th June 1924.

Suit for ejectment—Notice of ejectment—Lease created before the Transfer of Property Act.

The Plaintiff brought a suit in ejectment against Defendant No. 1 and his sub-lessees on the ground of forfeiture incurred by him for his denial of relationship of landlord and tenant in a previous rent suit. The Defendants pleaded that the tenancy was a permanent one and that there had been no forfeiture, and forfeiture, if any, had been waived by notice to quit which treated the tenancy as subsisting. The learned Munsif dismissed the suit holding that the suit land being within the town of Pabna it was admitted by both the parties that the case was governed by Transfer of Property Act, that there has been no forfeiture and that the tenancy was permanent. The lower Appellate Court found the tenancy to be permanent and that there had been forfeiture, but that the forfeiture was waived by the notice to quit which treated the tenancy as subsisting:

Held—That the forfeiture was waived by the notice to quit which treated the tenancy as subsisting. *Doe* v. *Miller*, 2 Carrington and Payne 348.

Babu Krishna Kamal Maitra for the Appellant.

Babus Broja Lal Chakravarty and *Dinesh Ch. Roy* for the Respondents.

S. C. C.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, JULY 14, 1924. [No. 34.

Contents.

NOTES

Injunction on the President of the Bengal Council.

Two applications of an extraordinary character were decided by Mr. Justice C. C. Ghose in the course of last week. One of them was for a mandamus, and the other for an injunction, but, in effect, the object of both was to prevent the Supplementary Demand for the Ministers' salaries from being put forward before the Council. The application for mandamus was refused on the ground that the applicant did not satisfy the conditions laid down in proviso (a) to sec. 45 of the Specific Relief Act. The application for injunction has been granted pending the disposal of the suit. In making the order, Mr. Justice Ghose has held that the Plaintiffs are competent to maintain the suit and that the motion for Supplementary Demand for the Ministers' salaries is clearly in derogation of r. 94 of the Council Rules. In these circumstances, His Excellency the Governor has prorogued the Council *sine die*.

An appeal has been preferred against Mr. Justice Ghose's order for injunction and we believe it will be disposed of in the course of this week. It will not be, therefore, proper for us to make any comment on the learned Judge's order or judgment. It may be pointed out, however, that an injunction, such as has been issued in the present case, is perhaps unique in the history of judicial administration. Courts of law in India and the United States have often pronounced particular measures passed by legislative bodies as *ultra vires*, and has refused to give effect to them. But so far as we know they have not until the present case interfered with the proceedings of the latter. Such an interference is unquestionably of very serious consequence to the legislature and we shall await further enlightenment from the Court of Appeal before giving expression to our opinion with regard to the matter. Quite apart from the question whether we agree with his interpretation of the law or not, we must say that the learned Judge has the courage of his convictions and has shown judicial independence of a very high order, such as is associated with the best traditions of the High Court of Calcutta.

Dominion Government and its meaning.

A telegram sent by Mr. Bruce, the Prime Minister of Australia, on the Empire Day has put our contemporary of the *Law Times* into pains to offer a plausible explanation. Our contemporary says:—

Mr S M Bruce, the Prime Minister of Australia, sent to Sir Joseph Cook, the High Commissioner for Australia, a cabled message on Empire Day, which contains the following passage, constituting in itself a concise and graphic description of the relations to the Mother Country and to each other, of the members of the Community of Nations which form the British Commonwealth of Nations "The British race," said Mr Bruce, "nurtured to liberty, governs by consent No constitution binds us, no force enthrals us, no fear subdues us We are self-governing partners of a commonwealth of nations" Mr. Bruce's words are a striking illustration of the fact that, side by side with the legal Constitution of the British Empire. an unwritten or a conventional constitution has developed The contrast between the legal position of the Dominions as mere dependencies of Great Britain to be administered not for their own benefit, but for the convenience of the Mother Country, and their actual position in accordance with the conventions of the Constitution of the British Empire as free nations co equal

members with Great Britain of the British Commonwealth of Nations, is of the very highest import and furnishes a complete explanation of Mr Bruce's statement, savouring of paradox, in relation to the status of the Dominions. "No Constitution binds us." This apparent inconsistency, but latent harmony, has been elucidated in anticipation by Mr. Lloyd George, speaking in the House of Commons, as Prime Minister, on the 14th December 1921: "What," he asked, "does Dominion status mean? It is difficult and dangerous to give a definition. When I made a statement at the request of the Imperial Conference to this House as to what passed at our gathering, I pointed out the anxiety of all the Dominion delegates not to have any rigid definitions [in Mr. Bruce's words the Dominions do not desire any Constitution to bind them]. That is not the way of the British Constitution. We realise the danger of rigidity, and the danger of limiting our Constitution by too many formalities. Many of the Premiers (of the Dominions and Colonies) during the course of that conference, delivered notable speeches, emphasising the importance of not defining too precisely what the relations of the Dominions were to ourselves. It is something which has never been defined by an Act of Parliament even in this country, and yet it works perfectly. . In practice it means complete control over their own internal affairs without any interference from any other part of the Empire. They are rulers of their own hearths and finance, administration, legislation, as far as their domestic affairs are concerned, and the representatives of the Sovereign will act on the advice of the Dominion Ministers. I now come to the question of external affairs. The position of the Dominions, in reference to external affairs, has been completely revolutionised in the course of the last four years. Since the War the Dominions have been given equal rights with Great Britain in the control of the foreign policy of the Empire. That was won by the aid they gave us in the War. They claim a voice in determining the lines of our policy. At the last Imperial Conference they were there discussing our policy in Germany, in Egypt, in America, our policy all over the world, and we are now acting upon the mature decisions arrived at with the common consent of the whole Empire. The sole control of Britain over foreign policy is now vested in the Empire as a whole. That is a new fact." Mr. Bruce's statement that the Dominions have no constitution cannot be accepted without explanation.

THE FICTION OF SURRENDER AND THE EVIDENTIARY VALUE OF CONSENT.

By D. R. Vaidya, Sub-Judge, 2nd Class, Khandwa, C. P.

(Continued from p. clxvii.)

The learned Judges of the Madras High Court, in *E. Ram Lakshmi* v. *Doda Nagratnam* (1923 Mad. 335, All-India Reporter) have held that there is no relinquishment when the instrument of transfer exhibits a different intention. Logically this is true, but the result of such decisions will be to drive underground what otherwise has come out to the surface. As Batten and Hallifax, A. J. Cs, in *Mt. Kushibai* v. *Mahru Khan* (1923 Nagpur 265, All-India Reporter) said very wisely: "In *Nobo Kishore's* case it was held that a sale by a widow with the consent of the only presumptive reversioner was valid after the death of the widow, for the reason that it could be regarded as a relinquishment of the estate in favour of the next reversioner and as a sale by him after the estate had vested in him. This was approved by their Lordships of the Privy Council in the case of *Rangaswami Gounden*." This is the most practical way to look at these transactions. Macleod, C. J., in *Rama Nana* v *Dhondi* (1923 Bom. 432, All-India Reporter) said: "If a widow by deed conveys her life-estate to the next reversioner, is there any necessity of making use of a legal fiction in order to make the next reversioner the full owner? As pointed out by Benman, J., in *Moti Raiji* v. *Laldas Jebhai* (I. L. R. 41 Bom. 93), the true doctrine of acceleration is no more than the English doctrine of merger subjected to the peculiar conditions and requirements of the law of the joint Hindu family. If then the widow does not convey her life-estate to the next reversioner for which she is competent, but purports to convey the fee for which she is not competent, the real result of the authorities is that the conveyance is split up into its component parts and effect is given to that part which is valid. When treated in this way, it may be said that no question arises with regard to the attempted alienation of the fee, which would be as a matter of fact unnecessary for bringing about the merger." These views are sound common sense, if not so sound logic.

Mr. Justice Das would not allow widows whose estate was taken up under the management of the Court of Wards to alienate or accelerate the succession. In this way a minor widow would not be allowed to surrender her husband's estate. For renouncing the world or turning a Bairagi, there is no restriction of age. Child widows are competent to do that. No law can prevent them from doing that. It is no use putting one restriction and not the others. If we say that widows must be guarded against their own indiscretions, there is no end to our tutelage, we shall have to revert

to old Hindu law which makes women destitute of any sense and keeps them under perpetual tutelage. If once we allow some sense in widows, we must take the necessary evil of relinquishment.

The alienation by the widow for consideration to the next heir or with his consent to a stranger must thus be allowed on the fiction that there is relinquishment. So also in alienation by the widow by way of gift to a stranger with the assent of the next heir must be allowed on the theory of that fiction. It is making a virtue of necessity. We must frankly be persuaded that such things are impossible to prevent. The gift to the next heir is of course, nothing else than a genuine relinquishment. Looked at from this point we cannot differentiate the case of consent of a female reversioner and that of consent of the male reversioner. If at all we insist on that, the parties will not be averse to procuring the consent of the reversioners until they reach the remote male reversioner somewhere.

The next thing to see is whether the alienation is of the whole interest in the whole of the husband's estate. If the widow does not [illegible] for the whole of the estate we cannot find support in the theory of relinquishment. We must allow these transactions to stand on the theory of relinquishment so far as it is impossible to prevent such transfers. The widow cannot effect a partial relinquishment and hence a transfer cannot stand except on the [illegible] of partial surrender we can forbid it. [illegible] this way we prevent practically preventible transfers and shut the door against devices to [illegible] the estate.

Macleod C. J. in *Adiveppa v. Toulappa* [illegible] L. R. 44 Bom. 2[illegible] said "Any consideration is sufficient to change acceleration into alienation otherwise door would be opened to all sorts of discussion as to the quantum of consideration." In this case the gift was burdened with the maintenance of the widow. In *Rama Nana v. Dhondi Marari* (192[illegible] Bom. 1[illegible] All India Reporter) the same learned Judge repeated the warning in the following terms: "It offers a temptation to next reversioners to induce young widows to surrender their life estate in return for maintenance and it will be difficult to draw the line between a promise to pay maintenance and an arrangement which is a device to divide the estate between the reversioner and the widow. If the real test is the complete surrender by the widow of the right to hold the property the loss of the right acting as a deterrent against a too frequent use by widows of the power of surrender so as to favour the next reversioner to the detriment of the more remote who still have a chance of being the nearest when the reversion falls in, it seems to me that if the widow is able to secure her maintenance the forces operating on her mind to prevent her from exercising her power of surrender have been rendered extremely small. The life estate owners hold the estate as it were in trust for the likely reversioners who will acquire absolute ownership."

It must be remarked that when a Hindu widow renounces the world or turns Bairagi, under strict Hindu law a person who adopts this order of life must divest himself of all earthly belongings and depend for his livelihood upon the gifts of nature or charitable fellow men. Rights of any property in such persons are impossible and incompatible with the very theory of it. But the strict letter of the law would be too much for ordinary men to follow and provided the [illegible] reserves only a minimum compatible with their maintenance for the remainder of their life there is no harm. It will indeed take painful enquiry into the quantum of this necessary [illegible] portion. In fact in the case of *M[illegible] v. Naulakhbati* what was allowed by the Court of Wards as fair maintenance was not considered fair by the parties who stipulated [illegible]. But troublesome is the enquiry [illegible] is no impossible to arrive at a figure which may represent fair maintenance and not a device to divide the estate. The question whether the maintenance allowance ought to permit the minimum to keep body and soul together or to allow living on the standard the parties [illegible] accustomed to is of importance. Strict Hindu law would at most permit the former; modern sense of justice would allow the latter and rightly. Short of a device to divide the estate proper maintenance allowance ought to be allowable.

This proposition has been established in the following cases:

(*Sureshwari Misser v. Maheshrani Misrain* I. L. R. 18 Cal. 100 P. C.; *Bhagwat Koer v. Dhanuk Dhari Prasad* 47 M. L. J. 51[illegible] P. C.; *Annamalai Chetti v. Varatharajulu Chettu* I. L. R. 42 Mad. 8[illegible]; I. B. Mt *Supah v. Marutee* [1922] Nagpur 187 All India Reporter; *Vadlamudi Gopal Krishnaiya v. Vallamudi Gangaaya* 52 I. C. 749 Mad.,

Karuppa Gounden v. *Mudali Gounden* 13 M. L. J. 36.)

If the widow reserves out of her husband's estate just so much as is sufficient for her maintenance or inadvertently omits to include small items of her husband's property or keeps only moveables which under Mithila law she owns absolutely, we can hold that there is surrender of her entire estate. If the widow transfers her husband's estate not absolutely but by mortgage or lease we cannot invoke the fiction of relinquishment because the widow retains the lessor's interest or the mortgagor's interest. It is only in out and out transfers such as sale or gift that we can invoke the aid of that fiction (*Hari Kishen* v. *Raj Rang Sahai Sing* 15 C. W. N. 544). The widow must divest herself of all her right in the whole of her husband's estate so as to attract the doctrine of relinquishment by her of her husband's estate. The exception allowed is of just so much as is sufficient to maintain her. Otherwise there shall be a widow partly dead and partly alive.

(To be continued.)

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before NEWBOULD AND CHAKRAVARTI, JJ. CRIMINAL REVISION No. 39 OF 1924. SURATH NATH GHOSH v. JOGENDRA NATH BAIDYA. The 26th May, 1924.

Criminal case—Witness, examination of, on commission—Purdanashin lady of Satgope caste, whether entitled to be so examined.

In this case the Petitioner who belongs to the *Satgope* caste applied to the District Magistrate of Howrah for examination on commission of his wife aged 16 who was a witness on his behalf in a case brought by his father-in-law for trespass etc. in the Court of a Magistrate of 1st class at Howrah. The trying Magistrate passed an order to the effect that from what he (the Magistrate) had seen of the father and the husband of the girl he did not think she belonged to [illegible] status of society [illegible] entitle her to claim examination on commission and remarked that if she [illegible] be heard in open Court he (the Magistrate) would be glad to examine the girl in camera. The District Magistrate thereupon rejected the Petitioner's prayer for examination of his wife on commission. The Petitioner thereupon moved the Hon'ble High Court to set aside the order of the District Magistrate on the ground that the Petitioner was likely to be excommunicated if his wife appeared in open Court and that the Petitioner was a man of position and that the order of the District Magistrate being based on no evidence was liable to be set aside. Their Lordships issued a rule calling on the District Magistrate to show cause why the order complained of should not be set aside. The trying Magistrate submitted in explanation (1) that there was no chance of the Petitioner being excommunicated if his wife appeared before him in camera, (2) that the order was not opposed by the father of the girl, (3) that the girl might not speak the whole truth if she were examined on commission at her husband's place as she would then be under the influence of her husband.

Babu Probodh Kumar Das and *Babu Kanti Lal Pal* for *Babu Khitis Ch. Chuckerbutty* urged that in view of the ruling laid down in *Bhuvaneswari Debi* v. *Kishori Mohan Banerji* I. L. R. 12 Cal. at p. 19 and in view of the status of the Petitioner his wife should be examined on commission and further that the trying Magistrate's order being based upon no evidence but upon mere surmise was liable to be set aside.

Their Lordships NEWBOULD and CHAKRAVARTY, JJ. delivered the following judgment:—

We are not satisfied that the trying Magistrate was justified in holding that the girl in question does not belong to such a grade in society as cannot appear in Court. There is evidence before us to the contrary in the Petitioner's affidavit and that is unrebutted. In any case having regard to the nature of the case we do not think that it is necessary that the girl should be compelled to appear. We accordingly make the rule absolute and direct the District Magistrate to issue a commission for the examination of the witness.

K. P. *Rule made absolute.*

THE
Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, JULY 21, 1924. [No 35.

Contents.

NOTES

The Injunction on the President of the Bengal Council And After.

The High Court of Calcutta has been a centre of extraordinary controversy since the injunction was issued on 7th July restraining the Hon'ble Mr. Cotton from putting before the Council the motion for demand for the ministers' salaries On receipt of the injunction the President announced in the Council that His Excellency had "prorogued" the Council till "this day week" i.e., till the 14th instant Then appeared a notification in the *Calcutta Gazette* that the Council had been prorogued On this, the Plaintiffs in the injunction suit, alleging that the order on the President was operative during the session commencing on 7th July and that it had been rendered infructuous by the prorogation order, applied on 15th July to Mr. Justice Ghose praying that "it may be recorded that the suit is withdrawn." Before any order was made in this application, one Niranjan Chatterjee applied in the suit to be added as a party Plaintiff. Mr. Justice Ghose considering that the suit was of a representative character has allowed Niranjan to be added as a party and has allowed the original Plaintiffs to withdraw from the suit.

The appeal which has been preferred by the President against the injunction has been fixed for to-day. But two other appeals have been preferred by the original Plaintiffs against Mr Justice Ghose's orders (1) allowing the Plaintiffs to withdraw from the suit and (2) substituting Niranjan in their place Plaintiff and they maintain that these are to be disposed of first. There is also pending before Mr. Justice Ghose an inquiry into the question whether Niranjan has any interest and if he is not colluding with the Defendants as also an application by Mr. Dhirendra Nath Roy, a Zemindar and a Member of the Bengal Council, to be added as a Plaintiff in the suit. It is not for us to speculate as to the motives which lie behind these legal manœuvres. Enough to say that the parties concerned are not sparing themselves to gain an advantage over the other by whatever means law and procedure have placed at their disposal. Those who have no taste for witnessing a mere display of legal wit and subtlety in a Court of law are getting tired of the proceedings and think that His Excellency the Governor was not well advised in proroguing the Council. If the Council had been adjourned, that would have given time for the appeal to be heard, and at the same time left no room for the various applications that have made the matter more complex

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Mr. Justice McCardie and Sir Sankaran Nair libel case.

One English contemporary of the *Law Journal* thus recorded a mild protest against the extraordinary procedure adopted by Mr. Justice McCardie in the libel suit of Sir Michael O'Dwyer against Sir Sankaran Nair :—

"With the political aspects of the action brought by Sir Michael O'Dwyer formerly Lieutenant Governor of the Punjab against Sir Sankaran Nair, once a member of the Council of India, we have no concern in these columns. It is permissible, however to express a regret that a libel

case should have been treated as an opportunity of retrying the issues that were before the Hunter's Commission and that the proceedings should have been permitted to assume the importance and length of a State trial No fewer than 26 days—more than half the Sittings—were occupied by Mr. Justice McCardie in presiding over a long drawn out trial

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In a subsequent issue of the *Law Journal*, our contemporary expresses the opinion that the indiscretion perpetrated by Mr Justice McCardie did not amount to anything more than an error of judgment and as such did not call for the exercise of the extraordinary power of Parliament for his removal from the Bench This is what our contemporary says in this connection —

The Prime Minister will be acting wisely and constitutionally if he declines to give facilities for Mr Lansbury's motion for the presentation of an Address for the removal of Mr Justice McCardie from the Bench because of certain observations he made in his summing up in the Indian libel case Whether these observations were relevant and well advised is a question on which we have already indicated our opinion Nobody however with a sense of the fitness of things can fail to dismiss as exaggerated the notion that a mere error of judgment is sufficient to justify such a motion as that which Mr Lansbury is seeking to submit to the House of Commons When some eighteen years ago the conduct of Mr Justice Grantham at the trial of the Yarmouth election petition was impugned by Mr Swift MacNeill the Attorney General of the day—Sir J Lawson Walton—made it perfectly clear that something much more than an otherwise unfortunate utterance was necessary to constitute a ground for censuring a judge He referred to the only two occasions in modern times on which the conduct of a judge has been made the subject of serious attack in the House of Commons When, in 1844, the conduct of Baron Smith an Irish Judge was criticised by the friends of Daniel O'Connell Sir Robert Peel laid down that to warrant a motion of this kind it must be shown that there must be corruption partisanship or moral delinquency and when some years later the conduct of Lord Abinger was attacked by Mr Thomas Duncombe as being unconstitutional and oppressive on the Bench a like attitude was taken by Parliament in deference to Sir Robert Peel's

THE FICTION OF SURRENDER AND THE EVIDENTIARY VALUE OF CONSENT

By D R VAIDYA SUB-JUDGE, 2ND CLASS, KHANDWA, C P

Continued from p clxxii

The alienation by the widow to the next heir either for consideration or without it provided it is of the whole estate must be allowed, because it is impossible to prevent it An alienation by the widow for consideration or without it, to a stranger with the assent of the next all heir or to one of the next heirs with the assent of the others must also be allowed for the same reason But there is one important flaw in the latter case The consenting reversioner is thus allowed to traffic in chances by his giving of consent There must be some interval of time when the next heir is free and his own master If the widow surrenders the entire estate in favour of the next heir and when this surrender is complete, the next heir deals with the estate which has become his, and then it is not open to the objection that it is a traffic in chances People will say what is there in this farce But it must be borne in mind that the element of time is of utmost importance in these cases The next heir becomes free when the estate once vests in him, his consent must be after this vesting of estate It must not be obtained as a part of the same transaction which vests in him the estate Once the estate vests in him, the next heir is free to fulfil his promise or not to fulfil it The "yes" or "no" is the answer of a free man Law does not protect free men even from their indiscretions This attitude of law is seen in its treatment of mortgagors If the mortgagor, as a part of the transaction of mortgage, enters into any agreement imperilling his right of redemption law does not allow it, saying that it is a clog on the equity of redemption But the same mortgagor any time after the mortgage is complete, is allowed not only to bargain away his right but to sell it out and out At the time of the mortgage he is a necessitous man any time after it he is considered free He is therefore, not allowed to clog his equity of redemption as part of the transaction of mortgage Likewise the next heir should not be allowed to bargain away his rights as a part of the transaction of surrender but any time after it he may be so allowed, because then he is free to do or not to do as agreed

Whenever the next heir joins in the deed of transfer by the widow, the consent of the next heir is open to the objection that it is of a necessitous or reckless man So also of his consent before surrender His consent will be valid only when he first takes the surrender has an interval, however short, of freedom, and then retransfers it to the intended transferee The surrender and the transfer to and by the next heir respectively must be distinct transactions separated by some interval of time, so that the ultimate transfer may stand as valid

In *Nara Hari* v *Tri Kom Devji* [1923] Bom 191, All-India Reporter, the widow con-

veyed the whole estate as a gift to her daughter in March 1911, and the daughter on 11th December 1912, conveyed it back to the mother and Shah and Crump JJ. held that the widow got the absolute estate of the daughter, and they refused to consider the two transactions as part of the same transaction. Here was, indeed, a fair interval of freedom for the daughter to consider her position and her free choice was open to no objection. This freedom is the crucial test and it should be insisted upon.

When the next heir is a female who, under the Bombay law, acquires an absolute estate, the surrender to her and the subsequent transfer by her is open to no objection. But if the female next heir does not under law acquire full ownership, the surrender to her will give her only a life estate and the transfer by her will be only of the life estate. In order to reach a next heir, who can become full owner there will have to be a series of surrenders and transfers until they reach a transfer by that full owner.

When looked at from this point of view, the question of representation by immediate reversioners of remote actual reversioners in such cases will not arise at all.

Now remains the last question as to how far the consent of the next heir is evidence of justifying cause for the alienation by the widow. It is said that the consent is presumptive evidence of necessity for the alienation if it is for valuable consideration but that it is not so when the alienation is without consideration such as by gift. Batten and Hallifax A. J. C. in *Mt. Kushibai* v. *Mania Khan* [1923] Nagpur 265 All India Reporter, said: "The argument rests mainly on the assertion that legal necessity for a gift is impossible. But justifying cause for such a gift even of the whole estate, is however quite conceivable and can be proved by evidence just as such cause for a transfer for consideration whether of the kind that is called legal necessity or some other kind, can be proved and the consent of the people interested in quarrelling with an alienation would be equally strong proof of its being justifiable whether it was a gift, or a sale or a mortgage. In the case of *Rangasami Gounden* (I. L. R. 42 Mad. 523 P. C.), it was held under what their Lordships called the second head of the subject the consent of the next reversioner must be looked on, in their Lordships own words in the earlier case of *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (I. L. R. 41 Cal. 793 P. C.) as affording presumptive evidence that the alienation was 'under circumstances which rendered it lawful' and valid without any specification of these circumstances. The consent of reversioners who would not be more than life owners if they ever did inherit could not be treated in the same way as presumptive evidence of an unspecified cause which would justify and validate an alienation beyond their own lives. But it is presumptive evidence of circumstances not requiring to be specified which would render it lawful and valid during their lives and there is no reason why it should not be treated as evidence for what it may be worth of specific causes justifying an alienation which created an absolute title."

This is very instructive. The consent of persons interested in quarrelling with the alienation by the widow can always be looked upon as presumptive evidence of justifying circumstances for the said alienations. But care should be taken that this consent is considered only as a piece of evidence and nothing more. It only shifts the burden of proof. The consent should not be construed as an estoppel which is altogether a different matter. So far as it is evidence it is legitimate, so far as it is used to shut out contrary evidence it is [illegible]. As a piece of evidence it is always a valuable piece.

(To be Concluded.)

LONDON NOTES

FROM OUR CORRESPONDENT.

[illegible] Appellants claim a preferential [illegible] on the ground that [illegible] of his father. The [illegible] contend *inter alia* that where [illegible] daughter [illegible]. The appeal is from a Full Bench decision of the Burma Court. Judgment was reserved.

Messrs. *DeGruyther* K. C. and *Hon. G. Lawrence* for the Appellants.

Messrs. *Dunne* K. C. and *E. B. Raikes* for the Respondents.

June 20th. *Lachmi Narain Marwari* v. *Balmakund*, an appeal from Patna, was heard by LORDS SHAW and PHILLIMORE, SIR J. EDGE and MR. AMEER ALI and raised a question of procedure under the Civil Procedure Code. In a partition suit before the Appellate Court certain terms were agreed to and the record was sent back to the trial Court for certain inquiries to be made. Upon the day fixed for the hearing the Plaintiffs failed to appear and the suit was dismissed for non-prosecution. The 1st Respondent did not apply to have this order set aside but eventually applied for a review which was refused. On appeal the High Court held that the dismissal of the suit for want of prosecution was *ultra vires* and ordered it to be restored. Judgment was reserved.

Mr. E. B. Raikes for the Appellants.

Mr. B. Dubé for the Respondents.

In *Mitra Sen* v. *Janki Kuer* (Oudh), the Respondent claims an estate by estoppel alleging that the Appellants have recognised her under-proprietary right to property and have accepted rent from her. Judgment was reserved.

Messrs. DeGruyther, K. C. and *E. B. Raikes* for the Appellant.

Mr. Dubé for the Respondent.

The following judgments have been delivered :—

Raja Nayasingerji Gynagerji v. *Raja Panaganti Parthasaradhi* (Madras). The appeal was dismissed, the decree of High Court being varied.

Vaidyanatha Ayyar v. *Swaminatha Ayyar* (Madras). The appeal was dismissed.

Kenchana Kom Sanyallappa v. *Girimallappa Channappa* (Bombay). The appeal was dismissed.

G. D. M.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before GREAVES AND GRAHAM, JJ. CIVIL RULE NO. 330 OF 1924. BHAGABAN CHANDRA ROY CHOWDHURY, Petitioner *v.* AMIN ALI and others, Opposite Party. The 27th June 1924.

Civil Procedure Code, sec. 115—High Court's power of interference in revision.

A decree was passed by the Additional District Judge of Noakhali upon a compromise petition filed by some of the Defendants in an original suit which was transferred to the said Court from the file of the Subordinate Judge where the suit was originally instituted. There was a variance between the judgment of the Additional District Judge and the decree as drawn up, inasmuch as the Opposite Parties who were no parties to the compromise were made liable for costs and mesne profits though the judgment did not provide for such order. The Opposite Parties filed an application for amendment of the decree to the District Judge as at the date of the application there was no Additional District Judge of Noakhali. The District Judge held upon that application that he had no jurisdiction to entertain the application, and the application should be made to the Subordinate Judge who upon a fresh application presented to him amended the decree. The rule was granted on the ground that the Subordinate Judge had no jurisdiction to amend the decree passed by the Additional District Judge :

Held—Upon review of the several sections of the Bengal Civil Courts Act, XII of 1887, that though there may be a technical defect in the lower Court's order, the High Court should not interfere in revision where substantial justice has been done.

Babu Pramod Chandra Ghosh for the Petitioner.

Babu Jitendra Kumar Sen Gupta for the Opposite Party.

S. C. C. *Rule discharged.*

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, JULY 28, 1924. [No. 36.

Contents.

Judicial interference with Legislative proceedings.

It is with a sense of relief that we are able to record this week that the proceedings in the High Court of Calcutta for restraining the President of Bengal Council from bringing the Government motion for the grant of Rs. 1,71,000 for the salary of ministers and to declare that the inclusion of the motion in the agenda paper of the Council was illegal and *ultra vires*, have come to a termination; but we regret very much that the Secretary of State and the Government of India should have thought it necessary to amend the rules regarding the presentation of supplementary estimates to the Legislative Assembly and the local Legislatures in India. Although Mr. Justice Ghose issued a temporary injunction on the President of the Bengal Council in the suit of Mr. Kumar Sankar Roy Chaudhuri and another he had refused an application by Mr. J. M. Sen Gupta for a mandamus for imposing a like restriction on the President. We have not been able to reconcile the almost contradictory findings in the two judgments over what seemed to us to be almost identical issues. We are sure that the Appellate Court would have experienced similar difficulty and would have surely come to the conclusion that the learned Judge's interpretation of the law in Mr. J. M. Sen Gupta's application was the correct view to take. This is all the more so, because, the learned Judge gave his reasons for his judicial findings in Mr. J. M. Sen Gupta's case, whereas his findings to the contrary in the suit of Mr. Kumar Sankar Roy Chaudhuri are unsupported by any reasoning and are mostly in the nature of *obiter dicta*.

We do not at present wish to deal with the judgments in any detail but we may say that we are in general agreement with the law as interpreted by the learned Judge in Mr. Sen Gupta's application and we shall give our reasons below which may not be quite identical with those given by the learned Judge. The reasons which we would advance would apply equally in support of the order of refusal of mandamus as also against the grant of injunction. According to the Judicial Committee of the Privy Council the same principle applies to an injunction in a suit if the injunction is of the nature of a writ of mandamus or a writ of prohibition. See 12 C. W. N. 525 at pp. 531. We have said before in these columns that the Courts in India and the United States have been known to declare Acts and measures passed by the Legislature as *ultra vires*. But we have not yet come across any instance of the Court in any country interfering with the proceedings of the Legislature. The British Parliament is a sovereign body and the Courts have no jurisdiction to interfere with its proceedings. But the Indian Legislatures are statutory bodies and it may be said that the High Courts in India have jurisdiction to interfere when proceedings are held in contravention of the statutory provisions which include the rules framed under statutory authority. Let us now see whether the Government motion put down in the agenda paper for the meeting of the Bengal Legislative Council proposed to have been held on the 7th of July last contravened any of these provisions or rules. R. 21 of the Bengal Legislative Council says "(1) A list of business for the day shall be prepared by the Secretary (of the Bengal Council) and shall be circulated to all members. (2) No business not included in the list of business for the day shall be transacted at any meeting without the leave of the President." It is clear from this rule that it is competent for

the Secretary to include any item of business in the agenda paper. He can do so without the leave of the President; it is only in respect of business not so entered that leave of the President has got to be asked.

Under r. 15 all questions of admissibility of a motion is left with the President. If an item of business has been improperly inserted in the agenda paper the proper procedure is for a member of the Council to rise on a point of order and object to it at the meeting of the Council at which it is brought forward. R. 15, cl. (2) says: "Any member may at any time submit a point of order for the decision of the President, but in doing so shall confine himself to stating the point." R. 15, cl. (1) says: "The President shall decide all points of order which may arise, and his decision shall be final." The word "final" here must be taken to exclude the jurisdiction of even the highest Court of Justice, for if this were not so every member of the Council would be at liberty to apply to the Court for upsetting the ruling of the President and it would be impossible for him to regulate the proceedings of the Council. It is for these reasons that the President of a Legislature is invested with the supreme authority with regard to questions of order that may be raised in the Council.

It must not be supposed however that if a Bill, motion or resolution is improperly admitted by the President, the Council is without remedy. They may reject it by the majority of vote. Assume that instead of doing so the Council passes it. It is then and then only that the Court can go into the question and decide upon its validity upon a properly constituted suit and may also issue a mandamus or injunction for preventing any injury or violation of any rights in the perpetration of any illegality [illegible] under. The learned Judge in Mr. J. M. Sen Gupta's case correctly states the law that [illegible] mandamus [illegible] we presume an injunction also may only be granted in the absence of any other [illegible] remedy. We have shown above that if the motion for ministers' [illegible] was improperly included in the agenda paper for the meeting [illegible] of July last, two other specific legal remedies were open to the member of the Legislative Council, viz. (1) to object to it on a point of order under r. 15, (2) to reject the motion by a vote of the majority. It follows therefore that before resorting to both of these specific legal remedies no one could come before the Court for the exercise of those extraordinary remedies and no Court ought to entertain any application or suit or grant any mandamus or injunction.

In dealing with Mr. Sen Gupta's application the learned Judge held relying on Mr. Justice Chaudhuri's judgment in *In re Rasul* (I. L. R. 44 Cal. 548) that the applicant could not claim this extraordinary relief unless he could show that some *personal* right of his was about to be irreparably injured and not for any infringement of any right *in rem* which he shared in common with other people. Mr. Justice Ghose asks in his judgment "has the applicant here shown that his property or franchise or personal right would be injured?" And answers that "the applicant pays Government revenue ... but he pays it along with thousands of other people ... this by itself cannot constitute such injury to applicant's property as the proviso contemplates." With regard to the plaintiff's "franchise" the learned Judge finds that the right to vote in Council does not come within that category. Further that even if it did His Lordship could not see how Mr. Cotton's putting the item of business objected to before the Council would result in any interference with the applicant's right to vote in any way he liked.

With regard to the threatened injury to applicant's personal rights His Lordship concluded in the following terms:

[illegible] of the [illegible] will be any injury to the applicant's personal right. What is the personal right? He says [illegible] that the business of the [illegible] Council [illegible] conducted in accordance with the provisions of [illegible]. The right the applicant enjoys [illegible] 139 members of the Legislative Council the [illegible] of the Council [illegible] that the applicant [illegible] satisfaction [illegible] without [illegible] of the [illegible] *In re P* [illegible] I. L. R. 44 Cal. 548 [illegible] that the [illegible] injury threatened to the present applicant [illegible] applicant asks for a direction on Mr. Cotton to disallow [illegible] from the agenda item No. 6 or to take it from the [illegible] the Council. Suppose Mr. Cotton is not so [illegible]. What follows? How would the applicant [illegible] except that it would hurt the applicant's notions of what is right or illegal under the Rules and Standing Orders, except that it will offend against his views that the motion ought to [illegible] others, I cannot see what injury will be

caused to the applicant's property, franchise and personal right within the meaning of the section

The conclusion therefore I come to on an examination of the applicant's contention under the head proviso (a) is that the applicant has failed to satisfy the requirements of the Statute

We fail to follow on what ground, His Lordship arrived at the contrary conclusion upon the identical questions in Mr Kumar Sankar Roy Chaudhuri's case when according to the Privy Council decision in 12 C. W. N. 825 already cited the same principle should govern injunction in the nature of a writ of mandamus or a writ of prohibition. Since His Lordship did not give any reasons for his findings to the contrary or distinguish the Privy Council ruling we would accept his interpretation of the law in Mr Sen Gupta's as correct.

Restoration of rejected grants and supplementary demands.

We agree with the learned Judge that the Rules and Standing Orders framed under the Government of India Act for the regulation of business of the Indian or Provincial Legislature have been framed generally in accordance with the Parliamentary procedure and we should follow with scrupulousness the English Parliamentary practice. One of such rules is r. 39 of the Bengal Council which says "a motion must not raise a question substantially identical with one on which the Council has given a decision *in the same session*." It is a matter of common knowledge that a Demand for grant in the Legislative Assembly or the Bengal Council is brought in by a Government member (Crown) by way of motion or resolution which is either ... modified or rejected by the Council. The above rule only says that when a motion has been disposed of during any session it is not permissible to bring in another motion which is substantially the same during the same session. Applying this rule to the demand for grant of salary for three ministers and their peons and travelling charges etc. put down at Rs. ... under the head 22A in the Budget estimate for 1924-25 it was rejected by the Council on the 24th of March 1924 and if the Government had brought in the same motion in another but substantially the same form during the same session they could not do so under r. 39. But we are not sure that if Government had altered the demand as they did in item No 6 in the list of business for 7th July since the demand was for Rs 1,70,000 for salary and establishment of two ministers only, and brought it before the Council during the *same session*, it would have been barred under r. 39. Of course the members could have objected to it, but it might have been argued on the Government side consistently with Parliamentary practice, that it was a different motion as it was for two ministers only and for a much smaller grant. We would not anticipate what would have been the ruling of the President with regard to such a question if it at all arose but regarding it purely from a constitutional point of view and quite apart from the question whether the ministers should have resigned or should have been dismissed on the previous adverse vote we are of opinion that there was no legal bar to the Government bringing in such a demand for grant in the subsequent session. In support of our view we may refer to Chap. XI of Erskine May's Parliamentary Practice where at the outset he sets out the Parliamentary Rule which is identical with r. 39 of the Bengal Council which bars repetition of the same motion in the same session. In the next paragraph (p. 267) he explains how a vote on a measure passed may be rescinded. Then he says that "the rescinding of a negative vote (or of a motion or measure rejected) is a proceeding of greater difficulty" and he goes on to say that "the only means by which a negative vote can be revoked is by proposing another question similar in general purport to that which has been rejected but with sufficient variance to constitute a new *question* ... the House can determine whether they ... substantially the same question or not." It ... that he says this with regard to ... of a motion rejected in the *same session* and ... cannot be regarded as a bar ... it forward during any subsequent session. It is also to be observed that ... motion is brought in the same session ... to but with sufficient variation ... it is to the House to do ... whether it is substantially the same question ... words the Chairman ... out of order or ruling ... the House can ... it or reject it. ... it follows that even assuming that the High Courts in India ... jurisdiction to interfere in such matters, ... reasons already given ... such matters till the President has ... his ruling and the Council has exercised ... of vote which are the obvious

statutory remedies. The Legislature would also be abrogating its functions and surrendering its claim to autonomy, by prematurely resorting to a Court of law without exercising their own legitimate right.

We have already said that there is a bar to the same motion being repeated in an identical form during the same session but we are unable to find any authority for maintaining that it may not be brought forward for restoration or revision during the following session. At page 118 Erskine May says that supplementary grants and revised and additional estimates are presented in Parliament every session. Of course it is open to any member to object to or to oppose it whether a rejected grant is brought back in a substantially identical form or in a different form and for a different amount. But there is no absolute bar to its being brought forward. With regard to this, reference may be made to Redlich's Procedure of the House of Commons, Vol III, p. 36; Todd's Parliamentary Practice, Vol I, pp. 190-191. We need not go abroad but may cite an instance of quite recent occurrence from the proceedings of the Bengal Legislative Council itself and it may be within the recollection of our readers that when a demand for grant for the paper-book department of the High Court was rejected by the Council during the Budget discussion in March 1922 it was brought forward for restoration on the 11th of July 1922 by Sir Abdur Rahim. Babu Rishindra Nath Sarkar took objection at the very outset that it could not be brought in as a supplementary demand. Babu Surendra Nath Ray, the Deputy President, then presiding, ruled that the motion was in order. It is interesting to note that the present minister, the Hon'ble Mr. Fazlul Haq, opposed the motion and so did the ex-minister Babu Surendra Nath Mallik, but the question was debated upon and eventually the rejected grant was restored by a majority of votes in the Council (see Proceedings of Bengal Council, 11th July 1922, pp. 170 to 181). We may mention also in this connection that in March 1922, the Legislative Assembly reduced demand for grants to the extent of 95 lacs 72 thousand and amongst them customs establishment was curtailed by over 4 lacs. In September 1922 a supplementary demand was made, among other things, to restore this grant. The then Finance Member, Sir Malcolm Hailey, explained that he had more than carried out the wishes of the Assembly for retrenchment for which the Assembly had made a total cut of 95 lakhs and 72 thousand; he had "been able to effect retrenchments to the extent of one crore and ten lacs." He had done this by effecting economy in other directions but he asked the members to restore the cut made in the customs establishment, as reduction of customs establishment would result in a reduced realization of the customs revenue. Objection was taken to the restoration but eventually it was waived in view of the circumstances explained. Instances of the restoration of rejected grants by Parliament have also been referred to. We shall now conclude by reproducing r. 225 of the House of Commons which is identical with r. 94 of the Bengal Council. We take this Rule from the Manual of Procedure of the House of Commons published by His Majesty's Stationary Office, 1919. R. 225 is in the following terms:—

> 225. An estimate must be presented for a supplementary or additional grant when—
>
> (1) the amount named in the ordinary estimates for a particular service is found to be insufficient for the purposes of the current year; or
>
> (2) a need arises during the current year for expenditure upon some new service not contemplated in the ordinary estimates for that year.

We are sorry that owing to the ill-advised and hasty legal proceedings, the Government has thought it fit to amend this Parliamentary Rule so far as the Indian and Provincial Legislatures are concerned. It is to be seen whether the effect of it will not be retrograde.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, AUGUST 4, 1924. [No. 37.

Contents.

NOTES

Mr. Justice Page and the Calcutta Bar.

It is with a sense of pain that we publish from the reports in the public press an account of a very regrettable incident that took place in the Court of Mr. Justice Page, on the Original Side of the High Court, of Calcutta, on Wednesday the 23rd of July last. The report will speak for itself. As regards the facts we need only say that the account of the incident that we have received from the members of the Bar, who were present in Court, agrees substantially with the accounts published in the newspaper press, amongst which also there is no material discrepancy. We must say that this is the first time that we have heard of a Judge of the Calcutta High Court asking a Counsel to leave the Court. We have heard of an occasional breeze in Court between the Bench and Bar but these things are not taken seriously by either party. But the incident we refer to was of a more serious character.

A Judge may refuse to hear Counsel if he is irrelevant or repeats his argument. He may ask him to resume his seat but to do so in the style of a schoolmaster is hardly consistent with the dignity of the Court and respectful to the profession. We doubt also whether Counsel can be ordered out of Court except for persistence in boisterous conduct. During our experience extending over nearly thirty years, we have never known a Judge of the High Court asking any Counsel to leave the Court. The unfortunate part of it is that there is no legal remedy against any such insult offered to a member of the Bar. The learned Judge said that he might have taken proceedings for contempt. We wish he had. That would have been certainly more dignified and appropriate on the part of the learned Judge and fair to the Counsel also. If the Judge had done that, the proceedings would have been, in due course, brought before the Bench of the Hon'ble the Chief Justice by way of appeal. We are sure in that case the aggrieved Counsel would have got justice and his honour would have been vindicated.

We are informed that a representation was proposed to be presented by the members of the Bar to His Lordship the Chief Justice, but that it was not actually presented as His Lordship said that he could not take any judicial notice of it in open Court. The Chief Justice and his brother Judges have a disciplinary jurisdiction over the members of the legal profession but they have none over any offending member of the Bench. His Lordship the Chief Justice might, as one gentleman to another, have spoken to his colleague and asked him to make up and restore the cordial relationship that has always existed between the Bench and the Bar in the Calcutta High Court. But if Mr. Justice Page had disregarded such advice, nothing more could be done. We wish that the learned Judge would only emulate the example of judicial dignity and courtesy for which His Lordship the Chief Justice is noted and is held in high regard by all.

We must congratulate the Advocate-General on having espoused the cause of the Bar. For, any gratuitous insult offered to any individual member of the Bar is an insult not merely to him personally but to the whole Bar. We are sorry that Mr. Justice Page so far forgot himself that he hardly treated the Advocate-General with the courtesy that is due to the leader of the Bar. He forgot that it was the duty of the Advocate-General to bring the grievances of the Bar before the

Bench and curtly told him that he would not be dictated to by anybody. The learned Judge also forgot that when a Judge gets into temper, refuses arbitrarily to hear Counsel and is unable to maintain judicial equanimity on the Bench, he acts contrary to the trust and responsibility that have been entrusted to him by His Majesty the King-Emperor.

It is a pity that His Lordship acted in the manner he did and did not draw up contempt proceedings against the aggrieved Counsel. The Bar and Bench may with profit refer in this connection to *In re Pollard*, L. R. 2 P. C. A. (1867-69), pp. 106-121, which was a case of contempt proceedings against a barrister in the Supreme Court of Hongkong the facts of which are somewhat similar to what transpired in Mr. Justice Page's Court. In this case the proceedings were quashed by the Privy Council, and in the later case of *MacLeod*, [L. R. A. C. (1899), pp. 549-562: s. c. 3 C. W. N. cccxlvi] the Judicial Committee awarded costs against the Judge for improperly proceeding in contempt against a barrister.

We said recently in connection with the questionable conduct of Mr. Justice McCardie in England that the Judges in India seldom perpetrate such indiscretions. We regret therefore all the more that we have to notice a case of indiscretion so soon after. But we must not forget that Mr. Justice Page is quite new to his office and is a new-comer to this country and that he has yet to adapt himself to the traditions of courtesy and good behaviour that have come down to the cultured classes in India from time immemorial. We dare say a little longer experience of his surroundings will sober him down and will enable him to adapt himself to his environment.

Autocracy in the garb of liberty.

Mr. Whiteley, the Speaker of the House of Commons, who cannot make any speeches or express any political opinion in the House but has only to regulate the business and decide points of order, had occasion to make a speech on the Celebration Day of the Magna Charta at Runnymede. Freed from the bondage of office he spoke like a free man and gave expression to his views with regard to the marked tendency of modern political movements. We know how some people in the name of popular liberty and freedom often resort to the worst form of autocracy and despotism. In no country public and personal liberty and individual freedom of action are held more sacred than in Britain Still Mr. Whiteley sounded a note of warning to those who were proud of their political liberty and regarded the *Magna Charta* as the corner-stone of their constitution. He said: "Our heritage is not unchallenged. In these days it is not from a monarch that our challenge comes. We have learnt to love a monarch who understands and values our constitutional system. It is from a very different quarter that we hear questionings of our hard-won prize of consultative Government. Dictatorship, with queer names, triumvirates with unlimited power but much limited responsibilities—these are offered as substitutes for our liberty. Charles I is not dead, but he does not live in Windsor. More likely you will find him in Kensington or Kennington. He is just the same and still dislikes hearing any voice but his own. He goes to public meetings to prevent free speech, and he would suppress all organs of opinion other than his own. Even on the green benches of House of Commons now and then in a new Parliament I thought I saw his ghost, ready of speech but impatient of hearing."

If we turn to Russia or to Italy or look for the evil spirit of Charles I elsewhere, we would find autocrats masquerading in the garb of advocates of popular rights, both far and near. Public freedom is merely a pretext with them for gaining power and once they get it, they take to crushing public liberty and individual freedom quite ruthlessly. So the note of warning of the Speaker of the Mother of Parliaments has not been sounded a day too soon.

Bench and Bar, Calcutta High Court.

A MEMBER OF THE BAR ORDERED OUT OF COURT BY MR JUSTICE PAGE.

An unusual occurrence took place in the High Court, Calcutta, on Wednesday the 23rd of July last, Mr. S C Bose, a member of the Calcutta Bar, being ordered out of Court by Mr. Justice Page The incident arose in course of a reference to the suit, Sashimukhi Debi *v.* Keshablal Mukherji, and was followed by a protest by the Advocate-General, Mr. S. R. Das, on behalf of the Bar.

The case in question was mentioned early in the afternoon before Mr. Justice Page for certain

directions regarding the terms of the judgment and the order which His Lordship had passed in the morning.

Mr. H. D. Bose (with Mr S K. Chuckerbutty) appeared for the Plaintiffs, and stated that though his Lordship had made it clear in the morning that the said order was not by consent of the parties, this did not appear in the Court minutes. In the minutes it appeared that the order was by consent of the parties.

His Lordship: I made no order. I made that clear. I expressed my opinion on the question of maintenance.

Mr S C. Bose, who appeared for the Defendant, submitted that the words "by consent of the parties" should be deleted from the minutes.

His Lordship: It was at the suggestion of the parties and that will appear.

Mr. S. C. Bose said that it was no doubt at the suggestion of the Plaintiffs, but not at the suggestion of the Defendant.

His Lordship: It was at the suggestion of the parties. You made your suggestions on behalf of your clients.

COURT JURISDICTION.

Mr S. C. Bose: I made my suggestions at the direction of the Court, but your Lordship will remember and my learned friends will remember that I stated clearly that the suggestions which I was making regarding the question of maintenance were without prejudice to my contentions as to the jurisdiction of the Court

His Lordship: Has the Court no jurisdiction to make suggestions?

Mr. S. C. Bose: I submit not in a case where the Court has no jurisdiction in respect of that matter

His Lordship: Then you had better learn it.

Mr. S. C. Bose: I have learnt it in this case. But I submit if the words "suggestions of the parties" are to appear in the judgment or order, it ought also to appear that I made the suggestion without prejudice to my contentions regarding the question of jurisdiction

His Lordship: I have made my order Sit down, Sir. Resume your seat

Mr. S C Bose: I must protest against your Lordship addressing me in that manner

His Lordship: Sit down Are you going to obey the order of the Court?

Mr. S C. Bose thereupon resumed his seat but after a few minutes got up again and said: "I sat down in obedience to the order of the Court but I rise again and I ask your leave to make my submissions."

His Lordship: Sit down, sit down.

Mr. S. C. Bose resumed his seat.

His Lordship: Leave the Court at once. Leave the Court.

Mr. S. C. Bose got up and said: "I leave the Court but I do so under protest"

Mr. Bose then walked out

ADVOCATE-GENERAL'S PROTEST.

By four o'clock the members of the Bar as well as other branches of the profession assembled in the Court room of Mr. Justice Page.

When his Lordship Mr. Justice Page was about to rise at 4-30 p.m., the Advocate-General addressing his Lordship said:

My Lord, before your Lordship rises I have a very unpleasant matter to mention before you.

Mr. Justice Page: I am very glad to see you Mr. Advocate-General.

The Advocate-General: Thank my Lord. As the head of the Bar it has been represented to me that your Lordship asked--directed- a member of the Bar to go out of the Court and I am here to protest against that remark. But I submit very respectfully to your Lordship that a member of the Bar and your Lordship is a member of the Bar yourself—is entitled to courtesy from the Bench And I am here to tell your Lordship as your Lordship is a member of the Bar yourself, you must realise how difficult it is for the members of the Bar to appear before your Lordship and assist you if they cannot count upon the courtesy which your Lordship has up to now always extended to the members of the Bar

Mr Justice Page: I regret very much now that you have come and have elected to speak. You are untutored in this matter. You know me well enough as you have been good enough to say, you know, that I have always shown respect to the Bar and I shall always continue to do so; but it is for the Judge to decide as to whether proceedings before him are conducted according to the rules of the Court, and in this instance, I regret to say, for the first time since I have sat in this place, that a member of the Bar has flagrantly refused to obey the order which I made For that there is no excuse. It is for the Court alone to decide as to whether respect and courtesy is extended to it. And when a member of the profession, which you and I hold so dear, in the heat of the moment, or in the exuberance of spirit, travels beyond the attitude of respect which he is bound to tender to the Court, then one expects a member of the Bar to tender his apology to me the Court, the representative of His Majesty the King Emperor who sits in this place, for the disrespect which he has shown, and the Court will invariably extend to him every opportunity to express his regret and will be most lenient towards any action which is taken. But for a member of the Bar to refuse to obey—or rather not to obey the order of the Court is a gross contempt of Court, far more gross in this case because he stands there as one of those whose sole interest should be the administration of justice. I yield to nobody in my determination to uphold all the traditions and privileges of the Bar (you know that well), but there is a paramount duty which I owe to this Court and to the King-Emperor whom I represent that nobody, however great or however small, shall dare to show disrespect with impunity to persons holding the great office which has been entrusted to me by the King-Emperor I think and I hope that on a little reflection the member of the Bar who has permitted himself, no doubt in the heat of the moment, to adopt the attitude that is inconsistent with that which it is incumbent upon him to adopt towards this Court that

he will do what is right in the matter and come to express his regret, and he will receive from me every consideration But I must protest against anybody dictating to me as to what my duty is in this respect.

The Advocate General: I have not the slightest desire to dictate to your Lordship what your duty is That is not my duty. But I submit to your Lordship very respectfully, while expressing regret that any member of the Bar should have shown discourtesy to the Court—I do submit with respect that if he has been guilty of contempt of Court there is a procedure open to your Lordship to take, and that it does not follow because a member of the Bar has lost his sense so far as to be guilty of contempt of Court that you should direct him to go out of Court in the same way as your Lordship would do to your servant

Mr Justice Page I think on reflection, it is my last observation and then I rise, you will see that I am extremely moderate in taking the course I did rather than applying much more rigid requirements of law which is open to me under the circumstances

His Lordship then left the Court

MENTION OF THE MATTER BEFORE THE HON'BLE CHIEF JUSTICE BY THE ADVOCATE GENERAL

Wednesday's incident between Mr Justice Page and Mr S C Bose, was mentioned on Thursday afternoon before the Chief Justice by the Advocate General

The Chief Justice I have read the copy of the petition which you desire to present, Mr Advocate-General It is quite impossible for me to allow this to be presented or discussed in open Court If you, as the leader of the Bar, desire to make a representation to me on any matter connected with the administration of the Court, it should be done in the usual way and it will receive my consideration

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before GREAVES AND GRAHAM, JJ. CIVIL REVISION NO. 498 OF 1924. MAHARAJ KUMAR MAHIMA NIRANJAN CHAKRAVARTY, Plaintiff, Petitioner v. MAHA BISHNU CHONGDAR, Defendant, Opposite Party The 18th June 1924.

Service on Defendant, failure of, through want of identifier—Suit, if may be dismissed.

The facts of the case were that the Plaintiff brought a suit for rent in the Court of the Subordinate Judge at Suri against the Defendant. The suit was instituted on 12th February 1924. The order of the Court on that date was that process-fee should be filed within a week and the case be fixed for hearing on 20th March 1924. The process-fee was duly paid and notices were issued to the Defendant. The identifier who was sent by the Plaintiff to identify the Defendant fell ill and could not on that account identify the Defendant. The notices were returned unserved on the ground that there was no identifier present. On 20th March the Plaintiff made an application for fresh service on the Defendant and deposited the process-fees The learned Subordinate Judge, however, made an order calling upon the Plaintiff to show cause by 24th March why his suit should not be dismissed on the ground that he failed to supply an identifier. The Plaintiff filed an affidavit setting forth the reasons as to why the identifier was not present and prayed for fresh service of notice The learned Subordinate Judge on 24th March dismissed the Plaintiff's suit on that date on the ground that the Plaintiff failed to supply an identifier at the time of the service of notice

On these facts, the Plaintiff obtained the aforesaid Rule in the High Court and the said Rule came up for final hearing before Greaves and Graham, JJ., on 18th June 1924.

Babu Sitaram Banerji for the Petitioner submitted that the learned Subordinate Judge had no jurisdiction to dismiss the Plaintiff's suit The Judge apparently purported to act either under Or. 9, r 5 or r. 6 of the Code of Civil Procedure In either case the Court had no jurisdiction to dismiss the Plaintiff's suit. The only course open to him was to order fresh service. The Subordinate Judge's order was most arbitrary and could not be supported by any provision of law.

The order of the Court was to the effect "We make the Rule absolute and direct that fresh processes shall issue."

S. B.

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, AUGUST 11, 1924. [No. 38.

Contents.

NOTES

Mr. Justice Greaves' appointment as Vice Chancellor of the Calcutta University.

We welcome the appointment of Mr. Justice Greaves as the Vice-Chancellor of the Calcutta University. Sir Lewis Greaves has been noted for his courtesy and devotion to duty not only on the High Court Bench but in connection with many extra-judicial public functions. He has always taken a keen interest in sports and many other public functions and bodies which have for their object social, physical, intellectual or moral well-being of the community. Amongst his extra-judicial duties his services and report in connection with the Committee of Enquiry appointed in Bengal for the separation of Executive and Judicial Functions, met with much public appreciation. He has for many years now been a member of the Senate of the Calcutta University, of its Law Faculty as also of the governing body of the University Law College. Besides his past connection with the University and his long experience in the discharge of presidential duties of many public bodies make his selection as the Vice-Chancellor of the Calcutta University a very appropriate one. We have every confidence that he will be able to put back the administrative and the financial position of the University which has of late got somewhat out of gear, on a sound business-like basis.

Confused Condition of Records of Indian Appeals before the Privy Council.

We publish below a circular letter recently issued by the Registrar of the Privy Council drawing the attention of the profession to their Lordships' observation regarding the confused condition of the records of some Indian Appeal.

The Registrar of the Privy Council with reference to his circular letter of October 1922 as to the re-arrangement of records desires to call the attention of practitioners to the following observations recently made by their Lordships in giving judgment dismissing an Indian Appeal.

Their Lordships feel bound to draw attention to the state of the record. In the teeth of directions issued from the office no trouble whatsoever had been taken with the arrangement of the record and it came before their Lordships in a disgraceful state of confusion. Had the Appellants been successful their Lordships would not have hesitated to disallow in toto the solicitors' fee for perusing the record.

The above observations were made by Lord Dunedin in giving judgment dismissing an Indian Appeal before the Judicial Committee of the Privy Council on the 26th of June last.

Re-arrangement of Records of Indian Appeals before the Privy Council.

The Circular letter of October 1922 referred to above has also been forwarded to us for publication and is in the following terms:—

The Registrar of the Privy Council desires to call the attention of practitioners in Indian Appeals to the fact that the Indian Courts are now adopting the system of printing the exhibits either at the end of the record or in a separate volume, each exhibit being printed separately and paged at the foot of each page. The object of this system is to allow Counsel and Solicitors in

London to prepare a proper record for the use of the Board by

(1) omitting unnecessary documents; and

(2) re-arranging the exhibits, if necessary, and the Registrar has to request Solicitors carefully to consider this matter when perusing the record.

The parties should omit any documents they agree are unnecessary, and mark in the index against the omitted documents the words "omitted by consent". Where one party objects to the retention of a document as unnecessary and the other party insists on its being included, the record should contain a note as provided by r. 18 of the Judicial Committee Rules, 1908, with a view to the subsequent adjustment of the costs.

The exhibits should be arranged as far as suitable in chronological order, mixing Plaintiff's and Defendant's documents together when necessary. Each document should show its exhibit mark and whether it is a Plaintiff's or Defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as,

(a) a series of correspondence, or

(b) proceedings in a suit other than the one under appeal,

should be kept together. It will be seen that the order in the record of the exhibits will probably be different from the order in the index (which should be in the order of the exhibit mark), and when the part containing the exhibits has been settled, it must be re-paged at the top of each page and the new page numbers substituted for the old page numbers in the index.

When no alteration is made in the arrangement of the exhibits, the pages in the record numbered at the foot of the page must be numbered again at the top of the page

October, 1922.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

July 17th. The Canadian List has almost entirely monopolised the attention of the Privy Council during this term, but a warning note from the Registrar proclaimed the hearing of Indian appeals on Friday last, the 11th instant.

VISCOUNT CAVE presided over a Board consisting of LORD CARSON, SIR JOHN EDGE and MR. JUSTICE DUFF.

The first appeal to be heard was from Madras, *Sri Ambalavana D. P. Sannadhi Avergal* v *Lakshmana Pillai*. In this appeal there were allegations of mismanagement against the trustee of a charitable endowment. The Indian Courts having found the charges proved, dismissed the trustee, and the High Court formulated a scheme for the management of the trust thereby ousting the prerogative of the Adhinam to nominate new trustees.

Sir G. Lowndes, *K. C.* and *Mr. B. Dubé* for the Appellant contended that the Adhinam should not have been deprived of their right of nomination and also that the decree of dismissal did not operate as against the trustee who was at present administering the trust, the trustee against whom the decree was made having died.

Messrs. DeGruyther, K. C. and *Parikh* for the Respondents.

The appeal was dismissed.

Mr. B. Dubé appeared "*ex parte*" in an appeal from Lahore—*Sat Narain* v. *Behari Lal*—from a Full Bench decision of the High Court reported in I. L. R. 3 Lah. 329. The question for decision arose in a pre-emption suit. A Hindu father became insolvent and the Full Bench held that under the Mitakshara the son's as well as the father's interest vested in the Official Assignee. Judgment was reserved.

G. D. M.

Correspondence.

PEON'S REPORTS IF SHOULD BE EVIDENCE BY THEMSELVES.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

A letter has appeared in Part 32, Vol. XXVIII, of the *Calcutta Weekly Notes* over the signature of Babu Mahananda Choudhury, Pleader, Habiganj (Sylhet), regarding the admissibility of peon's reports, etc., in evidence without formal proof. I whole-heartedly endorse the suggestion made by that learned gentleman. Peon's reports, etc. should as a rule be made admissible in evidence without formal proof of those documents, as that would save a good deal of time in the disposal of Miscellaneous (Judicial) cases, especially those coming under Or. 21, r. 90 of the Civil Procedure Code. As is well known, quite a lot of processes have got to be proved in cases under Or. 21, r. 90, and it would be a great relief to all concerned if the reports and affidavits submitted by the peons could be made provable either by producing the original documents or by producing certified copies of them. Peons are absolutely formal witnesses

for the party by whom they are called. The other party also gain very little by cross-examining them, as they invariably answer "I have no independent recollection." In this state of things, presence of the serving peons at the trial for the purpose of proving their reports, etc., is absolutely unnecessary and should be dispensed with. Sec 74 of the Indian Evidence Act appears to cover such reports, etc., and if it is so, they can very well be proved by producing merely certified copies of them, much to the convenience of the litigants concerned. As regards peons' reports regarding delivery of possession there is also authority for holding that they are public documents copies whereof are admissible in evidence without proof. (*Satnarain Dubé* v. *Narain Bargah*, 13 A. L. J. 935 : s. c. 30 I. C. 830; *Mahammad Nasir* v. *Ram Karan Singh*, 25 I. C. 529).

I would now request that you will be pleased to publish the above in your much esteemed journal.

I have the honour to be,
Sir,
Your most obedient Servant,
ROMESH CHANDRA BHATTACHARYYA,
Pleader, Judge's Court, Mymensingh.

18-7-24.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

Referring to your Editorial Note in Part 33 of 28 C. W. N. on the letter of Mr. Mahananda Choudhury which appeared in the previous issue regarding the above subject, may I take the liberty of pointing out the following :—

(1) I regret to find that neither your nor your correspondent's attention was drawn to the decision of the Madras High Court in the case of *Abdul* v. *Ayyar*, reported in 35 Mad. 670 (1911) in which exactly the same point arose Sundara Ayyar, J., observed in that case "in my opinion, the returns are admissible under sec. 35 of the Evidence Act as evidence of the facts reported by the process-servers."

(2) The Madras decision referred to above goes against your view that "the content of the peon's report would not be relevant under sec. 35 of the (Evidence) Act, even if it was declared to be a public document."

(3) That decision shews that the peon is a "public servant" and his report or return is an "entry in any public record" made by him "in the discharge of his official duty" under sec. 35, and is a "public document" within the meaning of sec. 74 (i), (iii) of the same Act.

(4) Whether you agree with the view taken by Sundara Ayyar, J., or not is a different matter.

Yours faithfully,
RADHAROMON MUKERJEE,
Vakil.

Berhampore,
13th July 1924.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before SUHRAWARDY AND DUVAL, JJ. M. A. No. 77 OF 1923. CHANDRA KUMAR DE, Decree-holder, Appellant *v.* KUSUM KUMARI ROY, Judgment-debtor, Respondent. The 2nd July 1924.

Commissioner's fee, order allowing, execution of—Objection by party—Appeal—C. P. C., secs. 36, 47.

The Appellant was appointed as pleader Commissioner who was by the order of the Subordinate Judge declared entitled to Rs 643-13-6 pies from the Plaintiff as his remuneration for his work in a partition suit dismissed for default. He applied for execution of the order for costs but his application was disallowed on the objection of the Plaintiff, judgment-debtor. He preferred an appeal to this Court. It was contended by the Respondent, (1) that no appeal lay (2) that the order is not a decree and there is no provision for the execution of the said order. In support of his contention he cited 10 C. W. N. 231

Held—That under sec. 36, C. P. C., the order had the effect of a decree and sec. 47 applied to the case and hence an appeal lay. It was further held that the decision in 10 C. W. N. 231 was passed when the old C. P. C. was in force and there was then no corresponding section similar to sec. 36 of the new Code.

Dr Jadu Nath Kanjilal (with him *Babu Krista Kishore Bysack*) for the Appellant

Babu Rajendra Ch Guha for the Respondent

S C C *Appeal allowed with costs*

CIVIL APPELLATE JURISDICTION Before SUHRAWARDY AND CHAKRAVARTI JJ S A No 866 of 1922 KARTICK CHANDRA DAS and others Defendants, Appellants *v* JITENDRA NATH ROY Plaintiff Respondent The 17th June 1924

Bengal Tenancy Act (VIII of 1885) sec 105 Decree for enhancement of rent in sec 105 proceeding against tenants one of whom was dead before institution of the proceeding if a nullity—Rent suit for enhanced rent as determined in sec 105 proceeding only against tenants who were parties to that proceeding if maintainable Landlord if entitled to a money decree

The facts of the case material to this report are as follows —

Plaintiff applied under sec 105 of the Bengal Tenancy Act against the Appellants and one Kali Charan Das for settlement of fair and equitable rent claiming also enhanced rent for rise of prices of staple foodcrops. The application was contested Plaintiff obtained a decree for enhanced rent in the said proceeding Plaintiff now instituted the present rent suit for 1325 to 1326 B S against all the said Defendants at the enhanced rate as determined in the aforesaid sec 105 proceeding The Munsif of Khulna who tried the present suit found as a fact that the said tenant Kali Charan Das one of the Defendants in this suit and who was one of the Defendants in the sec 105 proceeding died before the institution of that proceeding Plaintiff brought the present suit against him as a living person but substituted his widow Defendant No 11 as his heir later on Subsequently Plaintiff got her name expunged from the record during the trial of the suit and wanted decree against the remaining Defendants The Munsif held that the Plaintiff was entitled to get a decree for his claim for a money decree against the other Defendants, as the arrears did not accrue due in Kali Charan's life-time The Munsif awarded a money decree for the Plaintiff's claim On appeal by the Defendants, the Additional Subordinate Judge of Khulna affirmed the decision of the Munsif and relied on the cases in 36 I C 243 and 23 C W N 27 (notes) He held that evidently the contesting Defendants practically opposed the sec 105 application on behalf of all the co-sharers and did not then bring to the notice of the Court the fact as to Kali Charan's death The Additional Subordinate Judge dismissed the appeal Against this decision the Defendants preferred this second appeal

Their Lordships affirmed the decision of the Courts below and dismissed the appeal

The following portion of their judgment will be found material

The tenants have appealed on the ground that Kali Charan Das having died previous to the institution of the suit under sec 105 of the Bengal Tenancy Act the decree obtained by the Plaintiff for enhancement of rent was inoperative and ineffectual and that the present suit at the enhanced rate was not maintainable The objection is that the decree in the suit under sec 105 of the Bengal Tenancy Act having been obtained against a dead person or against some of the tenants must be treated as a nullity We are unable to give effect to this contention The Appellants were aware at the time of the suit under sec 105 that Kali Charan was dead No objection was taken on that ground The suit was contested on several grounds In the present suit it does not lie in the mouth of the Appellants to say that the decree is inoperative when they contested the suit on all grounds available but failed The only person who could say that it was not binding on her is the heir of Kali Charan and the suit, it appears has been dismissed against his widow

Babu Shib Chandra Palit and *Dr Jadu Nath Kanjilal* for the Appellants

Rai Surendra Chandra Sen Bahadur and *Babu Hemendra Chandra Sen* for the Respondent

H C S

THE
Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, AUGUST 18, 1924. [No. 39.

Contents.

High Court Rules and Admission of Advocates.

The High Court of Calcutta has anticipated legislative interference by drawing up rules under sec. 10 of the Letters Patent by giving effect to the main recommendations of the Bar Committee. The rules have been circulated among the various branches of the profession to elicit their opinions and suggestions and, after the same have been considered, will be sent up to the Government for sanction. We have no desire to revive an old controversy by discussing the rules on their merits. But we hope they will be worked by those whom they are intended to benefit in the spirit in which they have been made. It cannot be gainsaid that the rules as they now stand will hit the Bar, particularly its junior members. To alleviate their difficulties, they should be allowed to act if they choose to do so. In framing the rules the Judges do not appear to have borne in mind the recommendations of the Bar Committee to this effect.

R. 5 provides that any person who has passed the B. A. or B. Sc. Examination of the University of Calcutta, Dacca, Allahabad, Patna, the Punjab or Bombay or the B. A. Examination of the University of Madras may be admitted as an Advocate on production of a certificate that he has passed in certain branches of law. The list of subjects specified in the rule is quite a long one and a graduate who passes them may be taken to have acquired a good mastery of law. He will have, besides, before admission to read for a period of twelve months in an Advocate's chambers. The provisions contained in this rule we believe constitute a move in the right direction. In course of time the University of Calcutta will not have to provide instruction for those who intend to join the legal profession, and will be in a position exclusively to devote its resources to the study of the higher arts and sciences.

R. 3 provides: From and after the date on which these rules come into force Advocates will take precedence on the Original Side and in the Court for hearing of appeals from the Original Side according to the dates on which they were called to the Bar or were admitted originally as Vakils or Attorneys of the Court. The rule admits of two interpretations in the case of Advocates who were originally Vakils or Attorneys and have been subsequently called to the Bar. Do they take precedence according to the date on which they were admitted originally as Vakils or Attorneys, or according to the date on which they were called to the Bar? The ambiguity should be removed before the rules are sent up for sanction.

American Lawyers' visit to England.

The visit of nearly 1200 American and 250 Canadian lawyers to England as guests of the lawyers of England is regarded as a historic event and is believed to have the effect of strengthening the bond of brotherhood between the English-speaking people in the world. The English *Law Journal* on behalf of the Bench and Bar in England, in according welcome to their brethren across the "pond," says: America the half-brother of the

world! The *Law Times* notices this unique event in more sober terms and says.—

Next week will be a memorable one in the history of the Profession. Nearly twelve hundred members of the American Bar Association will be here as the guests of the lawyers of England and about two hundred and fifty of the Canadian Bar Association will assist in their entertainment. This great gathering of lawyers speaking a common tongue should prove of the highest value, both from a professional point of view and otherwise. It is all to the good that the lawyers of the United States of America, of the Dominion of Canada, and of this country should meet in social intercourse and exchange ideas. A legal conference in its strict sense was an impossibility but an assembly of those who practice the law even for the period of one short week, should do much to encourage cordial relations between the nations. In all countries it has been the fashion to decry the lawyer but it is to the lawyer that the layman turns when advice and assistance are sought and both directly and indirectly the lawyer wields enormous power in moulding public opinion. It is for these reasons that the coming meeting may truly be described as a great event.

Correspondence.

NEW EDITION OF SHASTRI GOLAP CHANDRA SARKAR'S HINDU LAW

To

THE EDITOR, CALCUTTA WEEKLY NOTES.

SIR,

I have read the comment which appeared in your Journal 28 C. W. N. clxiii in which you have pointed out my omission to notice certain changes alleged to have been made in the Hindu law by recent statutes in the 5th edition of the Hindu law by Babu Golap Chandra Sarkar Shastri edited by me. I beg to add that Mr. Sheshagiri Ayer's Bill regarding exclusion from inheritance by reason of certain disabilities under Hindu law (Hindu Inheritance Removal of Disabilities Act 19) has not yet been passed into law. I am informed by the Secretary to the Legislative Assembly that the Bill referred to above has only been passed by the Assembly and is still pending before the Council of State.

I thank you for your valuable suggestion but I do not think any useful purpose will be served by issuing supplementary slips noting a proposed change in the law. The other Bill which has subsequently been passed into law has already been referred to in the book.

I hope you will kindly publish this letter in the next issue of your esteemed Journal so that there may not be any misapprehension about any change having been effected in the Hindu law of inheritance which has not been noticed in the book.

Yours truly,
RISHINDRA NATH SARKAR

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before GREAVES AND PANTON, JJ. Cr. Rev. No. 990 of 1923. RAGHUBAR DAYAL, Petitioner *v.* NALINAKHYA BHATTACHARYA, Opposite Party. The 4th March 1924.

Stay of criminal proceedings pending the disposal of civil suit between the parties, propriety of.

The above Rule was obtained by the complainant in a criminal proceeding against an order of the Second Presidency Magistrate directing the criminal case to be filed until the disposal of a civil suit instituted by the accused. The complainant's story was that he was induced to part with two sums of money to the accused on false and fraudulent representations. The complaint was instituted early in July 1923 shortly after the receipt of a letter from the attorney of the accused asking for their partnership accounts. The accused urged that the matter raised by the complainant in his complaint would be in effect decided in the partnership suit, which the accused had instituted.

Held: We do not think that is so. The partnership accounts no doubt, if the suit is proceeded with, will be directed to be gone into and no doubt when the matter comes before the officer taking the partnership accounts, the complainant will allege the payment of the two sums alleged in the criminal proceedings and the accused will give his version of what happened with regard to these two sums. But I am certain of one thing, that the question of fraudulent representations raised by the complainant in his complaint will never be decided or gone into in the partnership proceedings and it seems to me that having regard to the time that has already elapsed since the institution of the suit and having regard to the manner in which the matter is proceeding several years will elapse before the partnership matter and the taking of accounts are finally disposed of. Under the circumstances it seems to us that in effect the order of the learned Magistrate is to bring the criminal proceedings to an end and thinking as we do that in effect what is raised by the

complaint of the complainant will not be decided in the civil suit, although the liability for the payment of the two sums will be decided, we think that the order of Second Magistrate is wrong and he should not have filed the complaint as he has done."

Babus Narendra Kumar Basu and *Probodh Chandra Chatterjee* for the Petitioner.

Mr. Bagram and *Babu Pannalal Chatterjee* for the Opposite Party.

J. N. R. *Rule made absolute.*

CRIMINAL REVISIONAL JURISDICTION. Before C. C. GHOSE AND CUMING, JJ. Cr. Rev. No. 361 of 1923. BHAGWAN DAS SAHA, Petitioner, v. SRILAL KHEJRIWALA, Opposite Party. The 22nd May 1923.

Stay of criminal proceedings pending disposal of civil suit, how far justifiable—Quashing of criminal proceedings, grounds of.

A complaint was lodged by the Opposite Party Srilal in the Police Court, Calcutta, charging Bhagwan Das Saha, Petitioner, with embezzlement of certain moneys realised by him from a certain constituent of the Opposite Party and not credited in the books of the Opposite Party. Two civil suits were then pending in the Original Side of the High Court between the parties, one of them being instituted by the Opposite Party for judgment for a sum of Rs. 6,000 said to have been paid by the Petitioner to one Madan Lal but which the latter denied having received, and the other suit being instituted by the Petitioner alleging that he was a partner of the Opposite Party and was entitled to a certain share in the profit of the business carried on by the Opposite Party. The Petitioner got the present Rule on the Opposite Party to show cause why the proceedings in the criminal case instituted by the Opposite Party should not be stayed pending the disposal of the aforesaid two suits.

Held: That on the facts there are no grounds for quashing the proceedings and so far as the question of the stay of the criminal proceedings pending the disposal of the civil suit instituted by the Opposite Party is concerned, no sufficient grounds exist for the stay of the criminal proceedings pending the disposal of that suit. The matters involved in the suit are entirely different from the matters which form the subject matters of the criminal proceedings. No sufficient grounds exist for the stay of the criminal proceedings pending the disposal of the second civil suit either. The issues involved in the second civil suit are not the same as the issues involved in the case in the Criminal Court. In the circumstances, the order made by the learned Magistrate should not be disturbed and the criminal proceedings should not be stayed.

Babus Manmatha Nath Mukerji and *Panna Lal Chatterjee* for the Petitioner.

Babus Dasarathi Sanyal and *Probodh Chandra Chatterjee* for the Opposite Party.

J. N. R. *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before SUHRAWARDY AND DUVAL, JJ. S. A. No. 911 of 1922. CHANDRA MOHAN GOPE, Defendant No. 2, Appellant, v. GANJAR ALI and others, Plaintiff and other Defendants, Respondents. The 11th July 1924.

Benami—*Onus—Presumption—Abatement of suit on the death of a Defendant.*

The appeal arose out of a suit for declaration of title and recovery of possession. Defendants Nos. 2 and 3 filed a joint written statement stating *inter alia* that Defendant No. 3 purchased plots Nos. 2 and 3 and Defendant No. 2 purchased plots Nos. 1 and 5 from Defendant No. 1. The Munsif dismissed the suit holding that the Plaintiff had no title. The Plaintiff appealed and during the pendency of the appeal before the Subordinate Judge Defendant Respondent No. 3 died and the appeal was ordered to abate so far as Defendant No. 3 was concerned. At the time of the hearing of the appeal before the lower Appellate Court the Defendants urged that the appeal should abate in its entirety. But the Subordinate Judge held that as Defendant No. 3 was the wife of Defendant No. 2, it should be held that she is the *benamdar* for Defendant No. 2. The Subordinate Judge found title in favour of the Plaintiff and decreed the whole suit. Thereupon Defendant No. 2 appealed to the High Court.

Held: Onus of proving *benami* was on the Plaintiff. As the question of *benami* did not arise in the Court of first instance and no evidence was gone into, the case should go back for determination of that point. No presumption arises because the parties were husband and wife. The suit should not fail in its entirety as Defendants No. 3 and 2 were purchasers of different plots.

Babu Jatindra Nath Sanyal for the Appellant.

Babu Rupendra Kumar Mitter for the Respondents.

Appeal allowed in part. Case remanded so far as plots Nos. 2 and 3 are concerned.

S. C. C.

Extract.

THE LEGAL REVOLUTION IN THE IRISH FREE STATE.

(BY A MEMBER OF THE IRISH BAR.)

'All lawful authority comes from God to the people,' says the preamble to the Irish Constitution, and so reiterated the Chief Justice of the Free State (Mr. Hugh Kennedy) at the opening of the new Courts in Dublin a few days ago. Although it is more than eighteen months since the Irish Free State was instituted, the Courts of the defunct British *régime* had continued to exercise their old jurisdiction pending the changes contemplated by the Free State Executive under Art. 61 of the Constitution. But now National Courts have been established, new judges have been appointed, and many important alterations have been made in the Law and in its administration —in fact, a veritable revolution has been accomplished in the legal system of the country.

The Keynote of the new movement in Ireland is republicanism—not, perhaps, as a genuine political belief, for the majority are loyal to the Free State and the Empire, but as an outward expression of distaste for the monarchist principles of England and the Law in Ireland has decided to take the lead in interpreting the popular ideal. There was no majesty and not much dignity about the procession of judges in Dublin Castle, where the Free State Courts have been established, except for the bodyguard of hundreds of soldiers and stalwart Metropolitan policemen, for the Irish judges have discarded their robes as relics of English influence, and now appear on the Bench and even in State processions in morning coat or lounge suit according to individual fancy.

It is difficult to understand the popular dislike in Ireland of the name of English Law, and the satisfaction with which the Free State Attorney-General, in his first official speech, claimed that 'the opening of these Courts constitutes a culminating factor in the inauguration of a new order in Ireland,' and the Chief Justice described the ceremony as 'a precious moment—the moment when the silence of the Gael in Courts of Law is broken.' For, in point of fact, the Irish Courts have for many generations been presided over exclusively by Irishmen, and the Law administered therein has been adapted to the peculiar needs of the country, while the people, being a litigious race, have thronged the Courts and fought their cases with vigour, so that 'the silence of the Gael in Courts of Law' has never been remarked on before.

But the present judges derive their authority entirely from God and the people, and they have lost no time consolidating their position by deleting the King's name from all legal proceedings. For example, a prisoner in the Free State is now to be prosecuted, in the name of the Attorney-General, before a judge who has declared no allegiance to His Majesty, for an offence against 'the peace and dignity of the Irish Free State.'

In the matter of language, too, there must be an appeal to the popular imagination. Art. 4 of the Constitution enacts that 'the national language of the Irish Free State is the Irish language, but the English language shall be equally recognised as an official language,' and consequently all statutes of the Irish Parliament are printed in Irish, although the judges themselves cannot read them, and Writs of Summons may be and are now printed entirely in Irish, leaving the unfortunate Defendant, if he is not an Irish scholar, in utter ignorance of the cause of action against him.

But this democratic influence in the Law is not all sham nor mere political propaganda. A real effort has been made to cope with two great evils from the litigant's point of view, legal Delay and Expense. By enlarging the County Court jurisdiction sixfold, from 50*l.* to 300*l.*, the Irish Government hopes to bring the Law to the poor man's door, and to save him the costly adventure of bringing up his witnesses and solicitor for a High Court action in Dublin, and by making the assent of nine jurymen out of twelve sufficient to secure a verdict in civil cases it hopes to eliminate the delay and trouble caused by re-trials of the same action many times over before a verdict is obtained. These are only two of the many changes effected by what is known as the Courts of Justice Act, the whole principle of which is decentralisation of the law. It is likely to reduce the prestige in which Irish judges and Irish law have hitherto been held, and to lower the social and intellectual position of the Irish Bar; but if the result is to bring the law in closer touch with the people, to make it more popular and more accessible to them without impairing its efficiency, the legal revolution in Ireland may serve as a model to reformers in other countries who would like to see their own legal systems keeping pace with the times.—*The Law Journal.*

THE

Calcutta Weekly Notes.

Vol. XXVIII.] MONDAY, AUGUST 25, 1924. [No. 40.

Contents.

NOTES.

Visit of American lawyers to England.

The visit of the members of the American Bar Association as guests of the legal profession and the Judges of England is an event of unprecedented character in the history of the legal profession in any country. The party of American lawyers numbering 2,100 of whom 1,350 were men and the remaining ladies and the Canadians numbering 210 lawyers and fifty lady companions, arrived by two steamships in England on the 19th of July last. On nearing the English coast the Americans, though republicans, sent a wireless message of greetings to their Majesties the King and Queen to which their Majesties sent a graceful reply. Their visit was then celebrated by a round of festivities of which the notable ones were the Bar Dinner in the Four Inns of Court and by the solicitors in the Law Society's Hall, the Corporation banquet in the historic Guildhall of the City, the Royal reception at the Buckingham Palace, the Lord Chancellor's reception at the Palace of Westminster. There were, besides many other social functions. The day after their arrival that is on Sunday the 20th July last many of the American guests attended the morning service in the Westminster Abbey where special accomodation was provided for them and a larger congregation attended service [illegible] the much more capacious St. Paul's Cathedral.

But the most impressive ceremony of all was the reception given to the American lawyers and Judges on Monday the 21st July last by the Judges of England and the members of the English and the Canadian legal profession (who also joined their English brethren) as hosts in the historic Westminster Hall. The hosts and guests numbered quite three thousand and filled the Hall to its utmost capacity, right up to the broad steps leading to the Parliament House, from which in the olden days justice was dispensed. The Lord Chancellor, the Judges of England and the members of the English Bar were attired in their distinctive and imposing robes but the American lawyers, who had discarded such robes, were in plain clothes. The Attorney-General (Sir Patrick Hastings, K.C.) representing the Bar, the President of the Law Society, Mr. Dibdin, (representing the solicitors) Sir James Aikins, K.C., LL.D. (President of the Canadian Bar Association and Lieutenant-Governor of Manitoba) representing the Canadian Bar, and the Lord Chancellor of England (Viscount Haldane) representing the Judges, delivered welcome addresses to their distinguished guests.

The Hon'ble Mr. Charles F. Hughes, Secretary of State and President of the American Bar Association, in replying gave a very eloquent and instructive address. We cannot do justice to his speech within the limited space at our command and can but refer to some of its salient features to give our readers an idea of its quality and character.

"We have no political ends to serve," said he, "no differences to compose, no policies to advance except the highest of all—the policy of understanding and good will." He then referred to America as an object lesson to the world where in spite of diversity a spirit of unity for the common weal of all had grown up and he appealed to the world at large for a better understanding and reasonableness without which justice is unattainable. He said, "We come in the spirit of frater-

nity which has triumphed over the diversities of the forty-eight commonwealths in our Union, because it is in truth the spirit of the larger fellowship represented here to-day in which differences of particular interest and environment cannot avail to obscure the community of tradition of those who have been trained according to the standards and the methods of the Common Law. We come even with a larger aim than the enjoyment of fraternal association in order that by these agreeable interchanges and a more intimate knowledge of each other we may promote a clearer appreciation of our privileges and responsibility as ministers of justice in a world which needs justice and the reasonableness which makes justice possible."

The following passage makes his meaning clearer. We in common with him regard the rule of law as the greatest security that citizens can have. King's justice and King's laws in England under enlightened public opinion of a liberty loving people became the common law or the people's law and all people became equal before the eyes of the law. A strange reaction is observable in countries which were subject to autocratic rule. They are still being ruled and oppressed by autocrats in the name of democracy or even socialism. The people there are not free men like those who are under the rule of law but are mere slaves of the State. There is little to choose between democratic autocracy and the bureaucracy and to our mind the best form of Government is the one where the rule of law is supreme. In this view we commend the following observations of Mr. Secretary Hughes:

It may be, as has been pointed out by your distinguished historians of English law, that it was possible for men to worship the words of Magna Charta because it was possible to misunderstand it, but they are careful to observe that analysis does not destroy our reverence for it as a sacred text. For it means that no one is or shall be above the law. As they put it "The law of the great man has become the law for all men, because the law of the King's Court has become the common law." The spirit of the common law is opposed to those insidious encroachments upon liberty which take the form of an uncontrolled administrative authority—the modern guise of an ancient tyranny, not the more welcome to intelligent free men because it may bear the label of democracy. It is doubtless impossible to cope with the evils incident to the complexities of our modern life and to check the multiform assaults of organised cupidity by the means which were adapted to the simpler practices of an earlier day, but we have an instinctive feeling that there is no panacea for modern ills of bureaucracy. There is still the need to recognise the ancient right and it is the most precious right of democracy, the right to be governed by law and not by officials, the right to reasonable, definite and proclaimed standards, which the citizen can invoke against both malevolence and caprice. We of the common law respect the authority of the legal order. We respect those who, in station high or humble, execute the law, because it is our law. We esteem them only as they esteem and keep within the law.

The following homage is paid to the system of jury trial which is such an important feature of English Common Law as an institution which has not only served to protect the liberty of the subject more than any other charter of liberty but also on account of its educative value on the people. Mr. Hughes said:—

With the common law we took its distinctive feature of trial by jury, at once a bulwark of freedom and an effective method of applying to infinitely varied states of fact within ordinary experience the common sense of the community. But in obtaining the practical advantages of this method we have found what is especially for us a most important by-product, the advantage of which in the maintenance of free institutions is rarely mentioned. I refer to its advantage as a means of instruction. Throughout our land, in the more than 3000 counties in our States, our citizens are constantly sitting in grand juries and petty juries in criminal cases and as trial jurors in civil cases, so that the qualified portion which is very large of our population is constantly passing in rotation through our courts, receiving directions, obtaining schooling in our laws and acting as responsible critics and valuers of assertion, testimony, and argument, a priceless discipline in democracy.

The importance of the judicial authority over the legislature is thus explained and justified by the distinguished speaker: It must be remembered that where there are local legislatures it may not be out of place to confer jurisdiction on the Supreme Court to interpret the constitution in case of conflict between the local and federal legislature and between the latter and the written constitution.

The relation of the State and Federal power which gives the national authority we need for national concerns, without interfering with the desirable autonomy of the State in purely local concerns, could not be maintained except by the judicial power authoritatively expounding the Constitution. Otherwise Federal power

would be at the mercy of State Legislatures, or State Legislative power would be subject to the control of the Federal Congress. In either case the legislative will would still be the supreme law despite constitutional restrictions, and instead of a systematic development of constitutional law we should have the fluctuations of a control dictated by political expediency. It was realised at the beginning that the courts of justice were organised with peculiar advantages to exempt them from the baleful influence of faction. We have given, as was well said by Mr Evarts, a new exaltation to the power of the Judiciary. We have lifted up the principle of the common law, we have exalted it to the point that judicial reason, and in the forum of forensic discussion, shall be the final arbiter of the rights of the people against their Congress, against the magistrates, and between the States and the nation that all shall obey. This delicate and difficult duty has been well discharged, and, notwithstanding repeated efforts to undermine this jurisdiction, the Supreme Court of the United States is the final authority in the interpretation of the Constitution. It retains its hold upon the confidence of the people. I believe that the attacks upon it once more renewed will fail.

The members of the American Bar presented to the members of the English Bar a statue of Blackstone, which was placed at the central hall of the Royal Court of Justice and unveiled by the Hon George W Wickersham, one of the leading members of the American Bar. What America owes to Blackstone may be gathered from his eloquent and interesting speech. The Americans got in fact their ideas of free citizenship from the classical exposition of the English Common Law by this Tory English Judge. It may not be commonly known, as Lord Haldane said that the commentaries had their origin in a series of lectures delivered by this eminent Judge at Oxford and it was from that time that the teaching of law was introduced into that University. Blackstone though a Tory was a great champion of the freedom and liberty of an Englishman. But true to the insular traditions of a conservative Englishman he would deny the Colonies which were in those days merely dependencies of England the privileges of an Englishman. The following extract from the speech of Mr Wickersham at the unveiling of Blackstone's statue will show how much America was indebted to him.

When Sir William Blackstone delivered his lectures on English law, people in America were thinking much of the rights of Englishmen. There was but little agreement as to what those rights were, and when, in 1765, there appeared the first volume of the Commentaries on the laws of England, followed within the next four years by three additional volumes, they were greedily sought by the colonists, who read there for the first time in logical form a statement of the inalienable rights of man and of their birth. They read in Blackstone a formulation of those rights which were inherent in free born Englishmen. It is true the commentator denied us the possession of any of those inherent rights of Englishmen which he ascribed to the dwellers in England. The colonists accepted Blackstone's definition of the rights but they rejected his classification which would put them beyond the pale of rights of American colonists, as historically inaccurate and obviously unsound.

Soon after the publication of the first edition of Blackstone in England, a cheaper edition of it was published in America and even the common people purchased and studied it and it is no wonder that they have been able to found a system of Government which is today the admiration of the world. The following will give an idea of the class of people in America who purchased Blackstone and read it with avidity in their desire to acquire the rights of a free born Englishman and which resulted in the Declaration of American Independence.

Nor was the list confined to lawyers. It included military men, tavern keepers, cabinet makers, farmers, merchants and people of every station. It is a tribute to the understanding of the men of that day to look at the list of those who subscribed to that first edition and to realise how wide an audience was waiting for its formal pronouncements of the rights of Englishmen as prepared by a great Tory judge and was ready for the acceptance of a great democratic people. The Declaration of Independence has largely been ascribed to the influence that the Commentaries of Blackstone exerted on the minds of the framers of the Constitution. In that great document was a statement of the rights and liberties which the colonists of America claimed as their own. We find these principles in clear and distinct language embedded in that Constitution.

THE HIGH COURT AND THE PROVINCIAL LEGISLATURE

A SUIT FOR INJUNCTION.

Two questions of grave constitutional importance arose in the appeal of *[illegible] v. Kumar Sankar Ray Chaudhuri* which unfortunately could not be decided. But as they are of public importance it might be of interest to the public to know what these questions were and the law bearing on these questions.

In the last sessions of the Legislative Council the annual estimates of expenditure and revenue of the Province for the whole of the financial year 1924-25 was on the 18th March placed before the Council and, in accordance with sec 72D of

the Government of India Act, proposals of the Local Government for the appropriation of provincial revenues for the year were made in the form of demands for grants.

One of these demands for grants was "that a sum of Rs. 96,80,000 be granted for expenditure under the Head 22--General Administration." The estimates presented showed that this Head 22 was made up of several sub heads, one of which was 22E -Ministers, Rs 2,20,000. This sum of Rs. 2,20,000 included the estimated pay of 3 Ministers as also certain other expenses connected with the Ministers.

On the 24th March, this item under 22E-- Ministers --was refused by the Council, thereby refusing to grant the estimated expenditure for the salaries not only of the two Ministers who had already been appointed, but also of the third Minister whose office was then vacant.

The Council was subsequently prorogued and later on the members were summoned to a new Session to be held on the 7th July.

On the 30th June, an agenda of business proposed to be brought forward at the new Session was issued to the members of the Council by the Secretary of the Council and one of the items in this agenda was item No. 6, which ran as follows:—

"Supplementary Demands for grants.

"22—General Administration (transferred)

"The Hon'ble Mr. Donald to move that a sum of Rs. 1,71,000 be granted for expenditure under the Head 22- General Administration (transferred) on account of the salaries of Ministers".

Thereupon, Mr J. M. Sen Gupta, a Member of the Legislative Council, applied to Mr. Justice Ghose under sec 45 of the Specific Relief Act for a rule on the President of the Council to show cause why he should not decide on the admissibility of the motion being item No. 6 in the said agenda and disallow the same and or forbear putting the same at the Session of the Legislative Council to commence on the 7th July. This application was, after argument, dismissed by Mr. Justice Ghose.

Thereupon a suit was instituted by Mr. Kumar Sankar Roy Chowdhury and Mr. Kiran Sankar Roy Chowdhury on behalf of themselves and all other persons residing within the Presidency of Bengal and paying revenue and or taxes allocated under the Government of India Act to the Government of Bengal as sources of provincial revenue" This was what is known as a representative suit, and was instituted against Mr Cotton, the President of the Council and the two Ministers and prayed, amongst other things,

(a) for a declaration that Mr Donald's motion, set out above, was incompetent and illegal and *ultra vires* and (b) for an injunction restraining the President from putting the motion before the Council.

The Plaintiffs applied to Mr Justice Ghose for an injunction restraining the President from putting the motion before the Council and the appeal by Mr. Cotton was from Mr Justice Ghose's order issuing the injunction as prayed

Two very important questions arose for decision in this appeal.

(1) Does a suit of this nature lie and if so, has the High Court jurisdiction to interfere with the proceedings of the Legislative Council in the manner prayed for?

(2) Is the motion to which objection was taken incompetent, illegal and *ultra vires*?

It is obvious that if the first is decided in the affirmative it seriously affects the independence of the President and no Legislative Assembly can carry on its business under such circumstances, while if the second is also answered in the affirmative, the Legislative Council would have been, but for the new Rule just passed, without one of the most valued rights of all Legislative bodies, that of reconsidering its own decision after due deliberation. As Mr. Asquith, then Prime Minister, said on a famous occasion during the discussion of the Government of Ireland Bill in 1912: "To say that this House is not able, if it is so minded, to rescind a resolution which upon reconsideration it thinks ought not to have been passed is to deny to the House the first quality of a really deliberative Assembly." If once a mistake was committed however serious that mistake might have been, the Council would have been powerless to remedy it until the next annual budget when it might have been too late That the joint Parliamentary Committee who framed the Legislative Council Rules thought that ample power was contained in Rules for the Council to reconsider its decision is clear from para. 11 of their Report which runs as follows:

"In cases where the Council alter the provision for a transferred subject, the Committee consider that the Governor would be justified, if so advised by his Ministers, in re-submitting the provision to the Council for a review of their former decision; *but they do not apprehend that any statutory prescription to that effect is required.*"

We propose to discuss the questions which arise under these different headings. -

(1) Are the Plaintiffs entitled to maintain this suit?

(2) Is the jurisdiction of the High Court to issue the injunction barred either expressly or by implication?

(3) Is the motion to which objection has been taken incompetent, illegal and *ultra vires*?

The authorities to which we shall presently refer show that in order to be able to maintain a suit of this nature, they must show (1) that there is some specific legal right of their own, different and apart from their rights as members of the public, which is threatened with injury and (2) that there is imminent danger of that right being infringed.

Or. 39, r. 2, of the Civil Procedure Code provides for application for a temporary injuction to restrain a Defendant "from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right." It is clear that the injury sought to be avoided must be injury to some property or legal right. That right must be th

Plaintiff's for obviously no one can restrain a person from committing injury to the property or right of another person

Sec. 45 of the Specific Relief Act which deals with writs of mandamus and writs of prohibition, provides that an application for an order requiring any specific act to be done or forborne, must be an application by some person whose property, franchise or personal right would be injured by the forbearing or doing of that specific act. In the case of *Bank of Bombay* v. *Suleman Somji* reported in 12 C. W. N. p. 825, the Privy Council held that the principles which govern the issue of a writ of mandamus, *i.e.*, an injunction under sec. 45 of the Specific Relief Act, apply to injunctions which require specific acts to be done or forborne and laid down three propositions:—

(1) applicant must show clearly that he has the specific legal right to enforce which he asks for the interference of the Court.

(2) that he has claimed to exercise that right and none other and that his claim has been refused

(3) that he has a special interest in the matter complained of, an interest other than and different from that of others of the body to which he belongs and that he had a definite right or object of his own to serve or aid

The first two propositions are embodied in sec. 46 of the Specific Relief Act, which provides that "every application must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof" and the third proposition really follows from the first two.

It is clear, therefore, that the right which, the Plaintiffs allege, is threatened with injury must be some right peculiar to themselves, that is peculiar to those who pay Government Revenue or taxes and not a right which is shared by, say, every member of the public whether he pays Government Revenue or not.

Let us now examine what is the right which the Plaintiffs say is threatened with injury. After stating that they pay Government Revenue and taxes, in paras 10 and 11 of the plaint they say that the conduct of the President in declining to disallow the said motion has seriously injured the rights of the Plaintiffs and that they will suffer irreparable loss and damage if the motion is put before the Legislative Council. In para. 12 of the plaint they merely repeat that their rights have been infringed and then they go on to say that if the Defendants, that is, Mr. Cotton and the two Ministers, are not restrained by an injunction, the Ministers will receive monies which they are not legally entitled to and monies available for legitimate purposes will be diverted for making improper payments.

It is clear, therefore, that the right which they allege will be injured, if the President and the Ministers are not restrained, is a right to see that public money is not diverted for improper payments.

In paras. 4 and 5 of their petition they suggest that they also have right to see that the law and procedure with regard to the right of the members to vote is not set at naught or in other words, the right to see that the provisions of the Statute and Rules made thereunder are strictly complied with.

Mr. Justice Ghose has held that inasmuch as the Plaintiffs contributed to the Provincial Revenue they have a right (1) to see that improper payments are not made out of Revenue and (2) that there is no infraction of the Rules and Orders regarding the provisions as to voting of supplies. It is, however, curious to note that the same learned Judge in dealing with this latter right of the Plaintiffs says, "The right to vote supplies is perhaps the greatest privilege accorded to a Legislative body and any infraction of the Rules and Regulations guarding the provisions as to the voting of supplies is an injury which the Plaintiffs in a representative suit are entitled to be protected from," but when dealing with the same right as asserted by Mr. Sen Gupta, who also pays Government Revenue, he made the following observations: "It seems to me clear, therefore, that there is no injury threatened to the present applicant. The application seeks for a direction on Mr. Cotton to disallow or delete from the agenda item No 6 or to forbear from putting the same before the Council. Suppose Mr. Cotton is not so directed. What follows? How would the applicant be hurt? Except that it will hurt the applicant's notions of what is legal or illegal under the Rules and Standing Orders, except that it will offend against his view that the motion in question is *ultra vires* I cannot see what injury will be caused to the applicant's property, franchise and personal right within the meaning of the section."

S. R. D.

(*To be continued.*)

High Court Rules.

DRAFT RULES.

The following Rules have been framed by the High Court under sec 10 of the Letters Patent. 1865.

CHAPTER 1A

1. Persons who are not entitled to be admitted as Advocates under the provisions of r. 1, Chap. I, may be admitted as Advocates of the High Court under the following Rules appearing in this Chapter.

2 From and after the and until the expiration of seven years therefrom, or such further period as the Court may determine, a Vakil or Attorney of this Court, of not less than ten years' standing, on application by petition verified by an affidavit stating that he desires to be admitted as an Advocate of this Court and that his name is borne on the Roll of Vakils or Attorneys of this Court, as the case may be, and that his application, if any, for admission as an Advocate has or has not been refused by any other Court in India, may be admitted as an Advocate of this

Court. Such application shall be supported by the certificate of one of the Registrars of this Court to the effect that the applicant's name is borne on the Roll of Vakils or Attorneys of this Court, as the case may be, and such certificate shall also state the date of his enrolment.

3. From and after the and until the expiration of seven years therefrom, or of such further period as the Court may determine, a Vakil of this Court of less than ten years standing, on application by petition verified by an affidavit and containing the statements mentioned in the last preceding Rule and supported by a certificate of the Registrar of this Court, in its Appellate Jurisdiction, to the effect that his name is borne on the Roll of Vakils of this Court and mentioning the date of his enrolment, may be admitted as an Advocate of this Court, provided that he produces the certificates hereinafter mentioned, *viz.* :—

(a) A certificate signed by the Secretary of the Board of Examiners, mentioned in r 19, that he has satisfactorily passed an examination in the following subjects, *viz.* :—

(1) The Charter of the High Court

(2) The Letters Patent, including any modifications thereof

(3) The Rules of the High Court on the Original Side.

(4) Principles of the law and procedure in the High Court as to Guardian and Wards, Arbitration and Lunacy

(5) Principles of the law and procedure in the Testamentary and Intestate, Matrimonial and Admiralty Jurisdictions of the High Court.

(6) Company Law and the Rules made under the Indian Companies Act

(7) Insolvency Law and the Rules made under the Presidency Towns Insolvency Act

(8) Commercial Law, including the law relating to Mercantile Persons, Mercantile Property, Mercantile Contracts and Mercantile Remedies.

(b) A certificate from a practising Advocate approved by the Court, as provided in r 17, stating that he has read for a period of 12 months in the said Advocate's Chambers in Calcutta.

4. From and after the and until the expiration of seven years therefrom, or such further period as the Court may determine, an Attorney of this Court, of less than ten years' standing, on application by petition verified by an affidavit and containing the statements mentioned in r. 2 and supported by a certificate of the Registrar of this Court, in its Original Jurisdiction, to the effect that his name is borne on the Roll of Attorneys of this Court and mentioning the date of his enrolment, may be admitted as an Advocate of this Court, provided that he produces the certificates hereinafter mentioned, *viz.* :

(a) A certificate from a practising Advocate, approved by the Court, as provided in r 17 stating that he has read for a period of 12 months in the said Advocate's Chambers in Calcutta.

(b) A certificate that he has passed under these Rules an examination in Commercial Law, with special reference to the Law relating to Negotiable Instruments, Charter Parties, Bills of Lading, Sale of Goods and Marine, Fire and Life Insurance, signed by the Secretary of the Board of Examiners mentioned in r. 19

5. Any person who has passed the B.A. or B. Sc. Examination of the University of Calcutta, Dacca, Allahabad, Patna, the Punjab, or Bombay, or the B.A. Examination of the University of Madras, may, on application by petition verified by an affidavit and on proof of the University degree which he has obtained, be admitted as an Advocate, on production of the following certificates :

(a) A certificate signed as stated in r. 3, that he has passed an examination in the following subjects :

(1) Roman Law and the Principles of Legislation.

(2) Jurisprudence and English Constitutional Law and Legal History.

(3) International Law and the Conflict of Laws (otherwise Private International Law)

(4) Hindu Law.

(5) Muhammadan Law and the Law relating to Persons

(6) The Law relating to property, including the Law of Transfer *inter vivos*

(7) Principles of the English Law of Real Property

(8) Elements of Practical Conveyancing

(9) The Law of Intestate and Testamentary Succession, and the procedure therein

(10) Law of Contracts and Torts.

(11) The Law relating to Negotiable Instruments, Charter Parties and Bills of Lading, Sale of Goods, Marine, Life and Fire Insurance.

(12) The Law relating to Property, including the Law of Land Tenures, Land Revenue and Preemption

(13) The Principles of Equity, including the Law of Trusts

(14) The Law of Evidence and the general principles of Civil Procedure and Limitation.

(15) Criminal Law and the general principles of Criminal Procedure

(16) The Charter of the High Court, the Letters Patent, including any modifications thereof.

(17) The Rules of the High Court on the Original Side

(18) Principles of the law and procedure in the High Court as to Guardians and Wards, Arbitration, Lunacy and as regards the Matrimonial and Admiralty Jurisdictions of the High Court

(19) Company Law and the rules made under the Indian Companies Act

(20) Insolvency Law and the rules made under the Presidency Towns insolvency Act

Note. No candidate will be allowed to sit at the above examination until the expiration of two years from the date of his passing the B.A. or B. Sc. Examination referred to above.

(b) A certificate from a practising Advocate, approved by the High Court as provided in r. 17, stating the he has read for a period of 12 months in the said Advocate's Chambers in Calcutta after passing the examination hereinbefore prescribed.

(c) Two satisfactory testimonials as to his good character :

Provided that the Court may, in special cases on being satisfied that the applicant has satisfactorily passed any examination in law prescribed by any of the Universities hereinbefore referred to, exempt the applicant from passing the examination in one or more of the subjects specified in this Rule.

The Court may from time to time prescribe the limit of each of the subjects for examination under these Rules and by reference to text-books or legislative enactments and statutes or leading cases.

A candidate may sit for examination in all the above-mentioned subjects at the same examination or he may select not less than ten of the foregoing subjects for the examination at which he desires to appear and on passing in the same, he will be exempted from appearing again for examination in such subjects and in the latter case, he shall mention in the notice he gives to the Registrar under r. 12 the subject or subjects in which he desires to be examined.

6. "The Registrar shall submit the petition to be admitted as an Advocate with the other necessary documents prescribed by the Rules in this chapter to the Chief Justice and Judges."

"Every person, when admitted and enrolled as an Advocate of this Court, shall be entitled on payment of the prescribed fee for admission, to obtain a certificate of admission under the signature of the the Registrar and the Seal of the Court."

"Every person who shall have given notice of his intention to appear at any of the examinations mentioned in this chapter, or to apply for admission as an Advocate, and who shall not have attended to be examined, or not have passed the examination, or not have been admitted, may renew the notice for examination or admission, from time to time, as often as he shall think proper: Provided that every renewed notice shall be given in conformity with the Rules in this chapter, unless the Court shall otherwise order."

"An Advocate of this Court admitted under this chapter may, on the payment of a fee of Rs. 5 in Court fee stamps, obtain a certificate under the signature of the Registrar and the Seal of the Court that his name is borne on the Roll of Advocates of this Court."

7. Persons admitted as Advocates under Rules 2 to 5 shall, in all respects, conform to the practice of, and shall be subject to, the same obligations and rules of professional etiquette as govern Advocates practising on the Original Side of the Court on the date on which these Rules come into force.

8. The Registrar shall have the custody and care of a special Roll of Advocates admitted under these Rules with the dates of their admission.

9. An Advocate admitted under these Rules who desires to have his name struck off the said Roll of Advocates shall apply by petition verified by affidavit containing the particulars and statements mentioned in Rule 10, Chap. I, so far as they may be applicable to the case and shall be entitled to have his name removed from the said Roll of Advocates. A name once removed under this Rule shall not be restored again to the said Roll of Advocates. The procedure laid down in Rules 11 to 13, inclusive of Chap. I, shall be followed in the case of an application under this Rule.

10. The Registrar shall enter in a book to be kept for the purpose the names in alphabetical order of such Advocates who may be approved by the Court as being entitled to take pupils in their Chambers.

11. No Advocate, without the leave of the Court, shall be entitled to take in more than two pupils at one and the same time.

12. An Advocate taking in a pupil under these Rules shall give notice of that fact to the Registrar in the following form, which shall also be signed by the pupil.—

IN THE HIGH COURT, &c.

O. O. C. Jn.

In the matter of A. B., a candidate for admission as an Advocate.

The Registrar, O. S.

Sir,

Please take notice that on the day of 192 . I admitted Mr. of as my pupil to read in my Chambers for a period of 12 months from the said date with a view to qualify himself for admission as an Advocate of this Court.

Sd.

Advocate.

I, hereby give notice that I have joined Mr. an Advocate of this Court, as his pupil to read in his Chambers for a period of 12 months from day of 192 , with a view to qualify myself for admission as an Advocate of this Court

Sd

Pupil.

13. The notice mentioned in the last preceding Rule shall be filed with the Registrar within a month from the date of admission of the pupil.

14. Notices received by the Registrar under r. 12 shall be entered by him in a book to be kept for the purpose and the entries therein shall be indexed in the names of the Advocates concerned.

15. Where, by reason of death or for any other good and sufficient reason of which the Court shall be the sole arbiter, a candidate cannot complete the aforesaid period of 12 months as a pupil in the Chambers of the Advocate with whom he has been reading, he may read for the unexpired period in the Chambers of any other Advocate approved as aforesaid, and in such case a fresh notice as provided in r. 12 shall be given to the Registrar and filed within the time hereinbefore mentioned.

16. No person, who shall be admitted as a pupil for reading in the Chambers of an Advocate, for the purpose of being admitted as an Advocate under these Rules, shall during the said period of 12 months, hold any office or be engaged or concerned in any other employment,

profession, business or trade whatsoever. Every such person shall, during the whole period continue and be really and actually engaged in the Chambers of the Advocate.

17. The certificates mentioned in rr. 3 to 5 shall be in the following form:—

IN THE HIGH COURT, &c.

O. C. Ju.

In the matter of A. B., candidate for admission as an Advocate.

I, a practising Advocate of this Court, approved by the Court, under the provisions of Rule , Chapter IA. relating to the admission of Advocates, do hereby certify that the abovementioned A. B. read in my Chambers for a period of 12 months from the day of 192 During the same period he was diligently and faithfully working in my Chambers and was not engaged or concerned in any other profession, trade, business or employment.

I do hereby further certify that he is a fit and proper person to be admitted as an Advocate of this Court.

18. The Chief Justice may from time to time appoint a Board of Examiners for the purpose of conducting the examinations referred to in rr. 3 to 5, provided a proportion of the examiners so appointed shall always be Advocates of the Court The Chief Justice shall appoint a Judge of the Court as President of the Board of Examiners.

19. Every person intending to appear at either of the said examinations shall give one calendar month's notice in writing to the Registrar, stating his intention, and shall at the same time pay to the Registrar a fee of Rs 300, and the fees so paid shall be placed to the credit of a fund called "the Advocates Examination Fee Fund"

All expenses that may be incurred on account of the examinations to be conducted under these shall be defrayed by the Registrar out of the said Fee Fund. The scale of remuneration of the examiners shall be as follows, provided that no examiner shall receive less than Rs 300:—

	Rs.
For setting a paper ...	80
For examining an answer paper ...	5

The Registrar shall be ex officio the Secretary to the Board of Examiners and the custodian of the "Advocates' Fee Fund."

20. "The Registrar shall reduce all notices of intention to appear at any of the examinations mentioned in this Chapter into an alphabetical table, under convenient heads, and shall, three weeks previous to the examination, affix the same on the Notice Board at the East Gate, and also on the Registrar's Notice Board, to be exhibited daily, and shall forward copies thereof to the President of the Board of Examiners, Secretary, Bar Library, Secretary, Vakils' Library and Secretary, Incorporated Law Society of Calcutta."

"The Registrar shall inform each candidate, who shall have given notice of his intention to appear at any of the said examinations of the days fixed for each examination"

21. The examinations hereinbefore referred to shall be held annually at such time and place as the Chief Justice may appoint Notice of the time so fixed shall be given by the Registrar at least six weeks beforehand by affixing the same on the Registrar's Notice Board and forwarding copies thereof to the Secretaries of the Bar Library, the Vakils' Library and the Incorporated Law Society

22. There shall be a paper on each of the subjects mentioned in rr. 3 to 5, the number of questions in each paper shall be 10 and the aggregate number of marks in each subject shall be 200. To be entitled to pass, a candidate must obtain 62 per cent. of the total marks in each paper set at the examination.

23. From and after the date on which these Rules come into force, Advocates will take precedence on the Original Side and in the Court for hearing appeals from the Original Side according to the dates on which they were called to the Bar or were admitted originally as Vakils or Attorneys of the Court.

24. Subject to what is hereinbefore stated, Advocates admitted under these Rules shall be governed by the Rules in Chap. I of the Rules of the Court on the Original Side.

25. No person who has been guilty of any fraud, dishonesty, or other disgraceful conduct, or who is of doubtful reputation or who is an undischarged insolvent, or who has been convicted by any Criminal Court for any offence showing such moral turpitude as would, in the opinion of the Court, amount to disqualification, shall be admitted as an Advocate of this Court under the foregoing Rules.

26. Any candidate bringing into an examination room any book, document, or printed or written paper whatsoever or communicating in any way with another candidate or copying from another candidate in the examination room or using any unfair means whatsoever or assisting another candidate in so doing, will be liable to be summarily ejected from the examination room and shall not, unless the Court shall otherwise order, be permitted to appear at the same examination or at any subsequent examination